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In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result

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IN THE SUPREME COURT'S SHADOW: LEGITIMACY OF STATE REJECTION OF SUPREME COURT REASONING AND RESULT

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Although the state constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.

Justice Stewart G. Pollock[1]
New Jersey Supreme Court

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This Article is based in part on the author's remarks delivered at the annual meeting of the Conference of Chief Justices, July 1983.

1. Right to Choose v. Byrne, 91 N.J. 287, 300, 450 A.2d 925, 931 (1982).

I. INTRODUCTION

It is now well recognized that state courts may interpret their constitutions to provide different and more extensive rights than those provided by the federal constitution.[2] Although state courts have always possessed this power, the recent, highly visi-

2. *See generally Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982), and materials cited therein [hereinafter cited as *Developments in the Law*]. For more recent articles, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Carson, *"Last Things Last": A Methodological Approach to Legal Arguments in State Courts*, 19 WILLIAMETTE L.J. 641 (1983); Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221 (1982/83); Galie, *The Other Supreme Courts: Judicial Activism Among* State Supreme Courts, 33 SYRACUSE L. REV. 731 (1982) [hereinafter cited as *The Other Supreme Courts*]; Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7 (1982); Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 171-73, 185-95 (1983); Comment, *Rediscovering the Wisconsin Constitution: Presentation of Constitutional Questions in State Courts*, 1983 WIS. L. REV. 483.

For an excellent bibliography on state constitutional law, see Collins, *Special Section*, NAT'L L.J., Mar. 12, 1984 pp. 25-32.

ble independent interpretation cases involving criminal procedure, abortion financing, and freedom of expression have focused attention on state courts as constitutional decisionmakers. This attention has raised questions about the legitimacy[3] of state court decisions rejecting Supreme Court reasoning and result. These legitimacy questions in state cases "evading"[4] Supreme Court precedent are encouraging some state courts to formulate standards or criteria by which to justify their rejection of Supreme Court decisions.[5]

The legitimacy of a state court decision interpreting a state constitutional provision is not questioned in cases dealing with such areas as government structure or separation of powers.[6] Nor does the question of legitimacy arise in cases involving the many state constitutional provisions to which no comparable or analogous federal constitutional provision exists.[7] Arguments about independence do not arise in these situations simply because there is nothing from which the state courts need to assert independence. Also, state courts need not exercise independence

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3. In this Article, "legitimacy" refers to the debated propriety of state courts reaching results under their constitutions which are contrary to prior Supreme Court decisions rendered under similar or identical federal constitutional provisions. As to the ongoing debate over "legitimacy" in federal judicial review, see *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

4. *See* Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 n.2 (1975)(referring to "evasion cases")[hereinafter cited as *More on the New Federalism*]; Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

5. This search is not really new. *See* Gabriella v. Knickerbocker, 12 Cal. 2d 85, 89, 82 P.2d 391, 393 (1938), *appeal dismissed*, 306 U.S. 621 (1939): "Cogent reasons must exist before a state court in construing a provision of the state constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision of the federal constitution." *See also* People v. Disbrow, 16 Cal. 3d 101, 118, 545 P.2d 272, 283-84, 127 Cal. Rptr. 360, 371 (1976)(Richardson, J., dissenting); Zacchini v. Scripps-Howard Broadcasting Co., 54 Ohio St. 2d 286, 288, 376 N.E.2d 582, 583 (1978); State v. Florance, 270 Or. 169, 183, 527 P.2d 1202, 1209 (1974).

6. Justice Holmes once said: "We shall assume that when, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing . . . to hinder so far as the Constitution of the United States is concerned." Prentis v. Atlantic Coast Line R.R., 211 U.S. 210, 255 (1908). *See also* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612-13 (1937). These Supreme Court decisions, however, are not the source of the state's power to structure its government as it wishes; rather, they merely recognize that inherent power. *See infra* note 107 and accompanying text.

7. Williams, *supra* note 2, at 188-89. *See generally* Galie, *The Other Supreme Courts*, *supra* note 2, at 734-53.

when the Supreme Court has previously invalidated a state policy similar to the one currently before the state courts.[8]

The perceived legitimacy problem arises only when the United States Supreme Court has upheld state legislative or executive action under a federal constitutional provision which is similar or identical to a state constitutional provision. The Supreme Court decision casts a shadow over subsequent state litigation on what otherwise would be purely a question of state constitutional interpretation. The shadow seems to create a presumption of correctness, thus requiring a state court clearly to articulate reasons justifying a contrary result. In other words, the Supreme Court decision is sometimes viewed as presumptively applicable to state constitutional interpretation. This presumption is not necessarily based on the persuasiveness of the Supreme Court's reasoning, but rather on its position as the highest court in the land. Under these circumstances, state judges, counsel, and commentators are beginning to formulate criteria by which to justify a state court decision which reaches a result contrary to the Supreme Court's.

The perceived need for such apparently neutral standards of justification is not surprising. Many state judges are not used to rendering controversial constitutional rulings—a role much more closely associated in the public mind with federal judges.[9] Further, the concern that the Supreme Court would one day erode the "adequate and independent state ground doctrine,"[10] which insulates state court[11] interpretations of the state constitution from Supreme Court review,[12] has now been realized.[13]

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8. *See infra* text accompanying note 26.

9. *But see infra* note 237 and accompanying text.

10. *See* Williams, *supra* note 2, at 193-94.

11. Even federal court interpretations of state constitutions may be insulated. *See* City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982), *on remand*, 701 F.2d 524 (5th Cir. 1983).

12. This ever-present possibility has been noted by several commentators. *See, e.g.*, Wilkes, *More on the New Federalism, supra* note 4, at 892-94; Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729, 749-52 (1976); Welsh, *Whose Federalism?—Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. ___ (1983); Collins, *High Court Reasserts Its Authority*, NAT'L L.J. 13 (May 16, 1983):

> During oral arguments last term, for example, counsel for a defendant claiming state and federal constitutional protection addressed the court by asserting flatly: "I think . . . state courts should be more innovative." Characteristic of the increasingly prevalent attitude, the comment elicited a chilly retort:

State courts may fear further erosion if their decisions are viewed as merely evading Supreme Court precedent. Finally, state constitutional decisions are more likely than federal decisions to be "overruled" by constitutional amendment.[14] By justifying their rejection of Supreme Court decisions, state courts may believe they can diffuse such adverse voter reaction to independent state constitutional interpretation.[15]

For these reasons, state judges may be particularly sensitive, and even defensive, to charges that their decisions are result oriented[16] or that their disagreement with the Supreme Court is based purely on ideological differences.[17] These charges are typically leveled by dissenters[18] or by those who merely disagree

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"By innovative, do you mean ignore the opinions of this court?"

See also Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 758-61 (1972).

13. In Michigan v. Long, 103 S. Ct. 3469 (1983), Justice O'Connor, writing for the Court, articulated a new formulation of the adequate and independent state ground doctrine:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 3476. *See generally* Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A.J. 92 (1984); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME LAW. ___ (1984); Welsh, *supra* note 12. *See also* Florida v. Meyers, 104 S. Ct. 1852 (1984).

14. *See infra* notes 134-151 and accompanying text. See also Barrett, *Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739, 749 (1972), where the author argues that the California Supreme Court was "risking . . . its power and prestige" by overturning the death penalty in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 890, 100 Cal. Rptr. 152 (1972).

15. *But see infra* text accompanying note 147.

16. One commentator reported charges that "state courts are evading Supreme Court doctrine and engaging in unprincipled, result-oriented use of their state constitutions." Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977).

17. Galie, *The Other Supreme Courts*, *supra* note 2, at 786.

18. *See, e.g.*, State v. Simpson, 95 Wash. 2d 170, 197-203, 622 P.2d 1199, 1216-17 (1980)(Horowitz, J., dissenting); and cases cited in Note, *supra* note 16, at 297 n.7. Dissenters have leveled such charges even where textual differences between the federal and state constitutions exist, the most compelling justification for independent state consti-

with the state court's substantive result.[19] Nevertheless, these are the kinds of pressures that have forced state courts to develop standards or criteria by which to justify an independent state constitutional interpretation which arguably conflicts with a prior Supreme Court interpretation of a similar or identical federal constitutional provision.[20]

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tutional interpretation. *See, e.g.*, Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 297, 625 P.2d 779, 806, 172 Cal. Rptr. 866, 893 (1981)(Richardson, J., dissenting); State v. Sarmiento, 397 So. 2d 643, 646 (Fla. 1981)(Alderman, J., dissenting); Commonwealth v. Tate, 495 Pa. 158, 176, 432 A.2d 1382, 1391 (1981)(Larsen, J., dissenting); Hansen v. Owens, 619 P.2d 315, 318-20 (Utah 1980)(Stewart, J., dissenting); State v. Fain, 94 Wash. 2d 387, 403-407, 617 P.2d 720, 728-31 (1980)(Rosellini, J., dissenting).

See generally Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275, 276 (1983):

> Judges are accused of illegitimate "activism" when they decide cases which involve highly controversial and politicized issues. These accusations invariably come from individuals who disagree with the outcomes of those cases. Rather than criticize the outcomes directly, they claim that the court overstepped its institutional bounds by deciding issues which should be left to the political process.

See also Galie, *The Other Supreme Courts, supra* note 2, at 262 n.254; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). Of course, even though judges are aware of this, they still search for rationales or justifications to diffuse even ill-founded charges of illegitimate judicial activism.

19. *See, e.g.*, Deukmejian and Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979)(accusing the California Supreme Court of reaching result-oriented decisions). Mr. Deukmejian was the California Attorney General, and Mr. Thompson one of his assistants, during much of the California Supreme Court's independent constitutional interpretation of the 1970s. They represented the losing side of many such cases. Ron Collins and Bob Welsh observed:

> But politics, rather than legal principle, is behind Deukmejian's insistence that the court establish a "principled basis for repudiating federal precedent" before considering reliance on the state Constitution. He himself does not abide by that policy in his own office. For example, in his novel Los Angeles school violence lawsuit, Deukmejian is quick to invoke state constitutional law. The suit is replete with claims that many observers believe are unlikely to be sustained under federal law. Like the state Supreme Court justices he criticizes, Deukmejian is willing to acknowledge the independent status of California's Constitution only when it suits him.

Collins and Welsh, *The California Constitution Turns Into a Political Toy*, Los Angeles Times, July 17, 1980, Part II p.7.

See also Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 605 n.1 (1981): "I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory."

20. A recent study concluded: "[D]issatisfaction with the federal reasoning or result,

This Article examines the phenomenon of state rejection of Supreme Court reasoning and result, provides a case study on the state abortion financing cases rejecting *Harris v. McRae*,[21] and presents a theoretical framework for analyzing this recent phenomenon. It contrasts federal and state judicial review and evaluates the emerging trend of developing criteria to justify diverging state constitutional decisions. Finally, the Article criticizes this movement to formulate criteria as premature, stifling, and ultimately counterproductive.

II. A New Model of American Constitutional Law

Persons not attentive to the distinctions between federal and state constitutional law might view United States Supreme Court decisions as enunciating the final, definitive constitutional law regarding the validity of state policies.[22] Under this view, Supreme Court decisions represent the *end* of the constitutional decisionmaking process.[23] Other persons, recognizing the state

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is often the most significant factor in stimulating elaboration of state constitutional doctrine, although it is also the factor with which courts and commentators seem most uncomfortable." *Developments in the Law, supra* note 2, at 1359 (footnotes omitted). Another commentator concluded that "[t]he largest single group of state cases can be categorized as being based on ideological disagreement." Galie, *The Other Supreme Courts, supra* note 2, at 779.

21. 448 U.S. 297 (1980). For a similar treatment of state court rejection of Supreme Court decisions in the search and seizure context, see Hancock, *State Court Activism and Searches Incident to Arrest*, 68 Va. L. Rev. 1085, 1121-28 (1982). *See also Developments in the Law, supra* note 2, at 1419-1429.

22. "Characteristically, questions of constitutional law and questions of the role of the Supreme Court are generally treated as the same thing." Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227 (1972). *See also id.*, at 251; Martyn, Book Review, 33 J. Leg. Ed. 164, 165 (1983): "Publishing a book about current medical-legal issues always runs the risk of becoming moot should a court decisively rule on a particular topic. That risk materialized when the Supreme Court upheld the constitutionality of the Hyde Amendment in *Harris v. McRae*, rendering most of Kaufman's article irrelevant." (footnotes omitted). *See also id.* at 166-67.

23. In the area of Medicaid funding for abortion, much legislative and judicial activity, beginning prior to the original 1976 Hyde Amendment, preceded the 1980 *Harris v. McRae* decision. *See generally* Butler, *The Right to Abortion Under Medicaid*, 7 Clearinghouse Rev. 713 (1974); Butler, *The Right to Medicaid Payment for Abortion*, 28 Hastings L.J. 931 (1977); Law, *Reproductive Freedom Issues in Legal Services Practice*, 12 Clearinghouse Rev. 389 (1978); Wallace, Goldstein, Gold and Ogelsby, *A Study of Title 19 Coverage of Abortion*, 62 Am. J. Pub. Health 1116 (1972); Note, *Abortion, Medicaid, and the Constitution*, 54 N.Y.U. L. Rev. 120 (1979). *See also* Kaufman, *Abortion: Divisive U.S. Public Policy* in Medical Ethics and the Law: Implications for Public Policy 375, 381-82 (M. Hiller ed. 1981)(indicating that state and hospital policies

court trend of resorting to independent interpretations of their constitutions in the face of contrary Supreme Court holdings, might view the Court's decisions as the *beginning* of the states' independent constitutional decisionmaking process.[24]

This Article's thesis is that Supreme Court federal constitutional interpretations represent the *middle* of an evolving process of constitutional decisionmaking in our federal system. The ongoing legal and political controversy following Supreme Court decisions holding against asserted federal constitutional rights illustrates an emerging new paradigm of judicial review in cases concerning state activities.[25] The process begins with a series of lower court rulings on federal constitutional challenges to state legislative or executive action. These cases eventually lead to a United States Supreme Court ruling on the federal constitu-

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thwarted numerous Medicaid recipients' attempts to obtain abortions even before the Hyde Amendment).

For state legislative activity after the Hyde Amendment, but prior to *Harris v. McRae*, see Nicholson and Stewart, *The Supreme Court, Abortion Policy, and State Response: A Preliminary Analysis*, 8 PUBLIUS 159 (1978)[hereinafter cited as *Preliminary Analysis*]; Stewart and Nicholson, *Abortion Policy in 1978: A Follow-Up Analysis*, 9 PUBLIUS 161 (1979)[hereinafter cited as *Follow-Up Analysis*]; Note, *Limiting Public Funds for Abortions: State Response to Congressional Action*, 13 SUFF. U.L. REV. 923 (1979) [hereinafter cited as *Limiting Public Funds for Abortions*].

Between 1976 and 1980, the period between the adoption of the Hyde Amendment and the Supreme Court's decision in *Harris v. McRae*, many states provided full funding for Medicaid abortions. Mendelson and Domolky, *The Courts and Elective Abortions Under Medicaid*, 54 SOC. SERV. REV. 124 n.1 (1980)(reporting coverage by seventeen states and the District of Columbia); Palley, *Abortion Policy: Ideology, Political Cleavage and the Policy Process*, 7 POL'Y STUD.J. 224, 228 (1978)(reporting, as of March 1978, coverage by sixteen states and the District of Columbia).

24. *See generally Developments in the Law, supra* note 2. This work specifically recognizes the early state abortion financing decisions. *Id.* at 1434, 1442-43. *See also* Williams, *supra* note 2, at 192 n.104; Note, *Abortion Funding Restrictions: State Constitutional Protections Exceed Federal Safeguards*, 39 WASH. & LEE L. REV. 1469 (1982).

25. Until recently, only Oregon adopted Justice Linde's pure "first things first" approach, *see infra* note 55, relying on the state constitution even where the Supreme Court's federal constitutional interpretations would afford the relief requested. *See* Hewitt v. State Accident Ins. Fund, 294 Or. 33, 653 P.2d 970, 974-75 (1982)(criticizing "apparent inconsistency" and the "kaleidoscope of standards and rationales" in Supreme Court sex discrimination cases, and looking instead to state constitution); Comment, *State Constitutional Analysis of Equal Protection and Privileges or Immunities: Gender Discrimination in Oregon*, 19 WILLIAMETTE L.J. 757 (1983). Recently, several other states have followed this approach. *See* People v. Rolfingsmeyer, 101 Ill. 2d 137, 461 N.E.2d 410 (1984)(Simon, J., specially concurring); State v. Cadman, ___ A.2d ___ (Me. 1984); State v. Ball, ___ N.H. ___, 471 A.2d 347 (1983); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982); State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).

tional question.[26] If the Supreme Court upholds the federal challenge (striking down the state policy), the decision establishes a minimum national standard applicable in every state. But if the Court rejects the asserted federal challenge (upholding the state policy), the decision now triggers a series of "second looks" at the question by state-level decisionmakers, including the courts, based on state legal and policy arguments. During this second stage, the Supreme Court decision, while certainly not controlling,[27] continues to play an integral role in the unfolding state legislative, executive, and judicial decisions. Supreme Court dissenting opinions on the question play an equally important role.[28]

Supreme Court decisions rejecting federal constitutional challenges to state policies are being subjected to "second looks" in state courts or legislatures more often than ever before. This trend, and the presumptive validity accompanying Supreme Court decisions, has produced the movement among state judges, counsel, and commentators to develop criteria by which state courts may justify decisions which reach results that are contrary to or different than the Supreme Court's.[29]

It should now be obvious that United States Supreme Court decisions do not represent the final step in the constitutional decisionmaking process surrounding any issue concerning state policy. For example, as a result of state legislative, executive, and judicial decisions, medical assistance programs in states with approximately seventy-five percent of the nation's eligible population still provide state funding for most abortions,[30] de-

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26. For an interesting evaluation of Supreme Court "doctrine," see Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982). *See also* Linde, *supra* note 22, at 245-47 (criticizing "animistic" view of Warren Court).

27. State courts frequently observe that the Supreme Court's federal constitutional interpretations are not binding on state court interpretations of state constitutions. *See infra* note 56 and accompanying text. This view must be contrasted with state courts' "evasion" of far-reaching Supreme Court decisions during the 1950s and 1960s. *See infra* note 43 and accompanying text.

Of course, analogous litigation under state constitutions cannot follow all federal constitutional decisions. For example, interpretations of the treaty clause, or other uniquely federal provisions, cannot be duplicated under state constitutions.

28. *See infra* notes 92-109 and accompanying text.

29. *See supra* note 16-20 and accompanying text.

30. Brozan, *Plan Casts Doubt on Abortion Aid*, N.Y. Times, Feb. 8, 1982, at 2, col. 6. *See also* Cates, *The Hyde Amendment in Action*, 246 J.A.M.A. 1109 (1981); *The Issue That Won't Go Away*, NEWSWEEK, Jan. 31, 1983, p. 31.

spite the United States Supreme Court's 1980 holding in *Harris v. McRae* that termination of this funding did not violate the federal constitution.[31] These state decisions rejecting *Harris* illustrate the newly emerging model of American constitutional law.

A. The Shadow of the Supreme Court Majority, and Justification for State Court Disagreement

After Congress passed the Hyde Amendment as an appropriations rider in 1976,[32] many states passed similar statutes restricting the use of state funds for abortion.[33] The Hyde Amendment prohibited the use of Medicaid funds for abortion except when carrying the fetus to term would endanger the mother's life or when the pregnancy resulted from rape or incest. Litigants soon filed suit in federal courts[34] attacking[35] the Hyde

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31. 448 U.S. 297 (1980).

32. For a discussion of the congressional procedure that permitted adoption of the Hyde Amendment as an appropriations rider—a floor amendment—rather than as a substantive amendment to the Medicaid Act, see Davidson, *Procedures and Politics in Congress*, in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM, 30, 37-46 (G. Steiner ed. 1983); Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 51, 74-77 (1979); Note, *Limiting Public Funds for Abortions*, *supra* note 23, at 938-40.

33. *See generally* Comment, *The Hyde Amendment: An Analysis of its State Progeny*, 5 U. DAYTON L. REV. 313 (1980). Interestingly, many state constitutions arguably prohibit enacting substantive legislation, such as the Hyde Amendment, through the use of appropriation riders. *See generally* Ruud, *"No Law Shall Embrace More than One Subject,"* 42 MINN. L. REV. 389, 413 (1958); Williams, *supra* note 2, at 204 n.154. *See also* Opinion of the Justices, 373 Mass. 911, 370 N.E.2d 1350 (1977)(upholding gubernatorial veto of appropriations rider limiting abortion funding).

34. The choice of forum is, of course, often controlled by litigants. For the general arguments concerning resort to federal courts under these circumstances, compare Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); and Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981), with Bator, *supra* note 19; Fischer, *Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts*, 34 U. MIAMI L. REV. 175 (1980); and Solimine and Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HAST. CONST. L.Q. 213 (1983).

In many circumstances, however, where the state initiates proceedings in state court against a person, federal arguments must be raised in that forum. *See* Bator, *supra* note 19, at 609-10.

35. Some state court litigation was initiated on nonconstitutional state grounds. *See, e.g.*, State Dept. of Health & Rehab. Serv. v. Alice P., 367 So. 2d 1045 (Fla. Dist. Ct. App. 1979) (unsuccessful attempt to require expenditure of appropriated state funds for

Amendment and similar state statutes on federal statutory and constitutional grounds.[36]

In 1977 the United States Supreme Court upheld several earlier state statutes restricting the use of public funds for abortion.[37] Then, in 1980 the Court upheld Congress' termination of almost all Medicaid[38] funds for poor women's abortions in *Harris v. McRae*.[39] By a 5-4 vote, the Court in *Harris* upheld the federal statutory limitations contained in the Hyde Amendment.[40] In a companion case, *Williams v. Zbaraz*,[41] the Court

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full abortion coverage). *See also* People v. Florendo, 95 Ill. 2d 155, 447 N.E.2d 282 (1983)(upholding grand jury subpoena of names of abortion clinic patients); Kindley v. Governor of Maryland, 289 Md. 620, 426 A.2d 908 (1981)(upholding legislature's power to fund elective abortions after Maher v. Roe, 432 U.S. 464 (1977)); Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd in part and rev'd in part*, 302 N.C. 357, 275 S.E.2d 439 (1981)(same).

36. Initially, funding proponents tried to establish a governmental obligation under the federal constitution to provide funding for abortion for poor women even in the absence of Medicaid funding for childbirth. *See* Charles and Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?*, 23 HASTINGS L.J. 147 (1971); Comment, *Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?*, 41 FORDHAM L. REV. 921 (1973). These attempts were abandoned prior to *Harris v. McRae*. Butler, *supra* note 23, at 938-39. *See generally* Carey, *A Constitutional Right to Health Care: An Unlikely Development*, 23 CATH. U.L. REV. 492 (1974).

In the state abortion financing cases, one state justice would have interpreted his state constitution to require this funding. *See* Right to Choose v. Byrne, 91 N.J. 287, 324-333, 450 A.2d 925, 944-49 (1982)(Pashman, J., concurring in part and dissenting in part). *See* Singer, *supra* note 18, at 283.

37. Maher v. Roe, 432 U.S. 464 (1977)(upholding on constitutional grounds the failure to fund "elective" or nontherapeutic abortions); Beal v. Doe, 432 U.S. 438 (1977)(upholding on statutory grounds the failure to fund "elective" or nontherapeutic abortions): Poelker v. Doe, 432 U.S. 519 (1977)(upholding public hospital bar on nontherapeutic abortions). *Compare* Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978)(criticizing the decisions); and Perry, Correspondence, 33 STAN. L. REV. 1190 (1981)(same), *with* Fahy, *The Abortion Funding Cases: A Response to Professor Perry*, 67 GEO. L.J. 1205 (1979)(defending the decisions); Westen, Correspondence, 33 STAN. L. REV. 1187 (1981)(same); and Tushnet, *supra* note 18, at 811-14 (criticizing Perry's "neutral principles" argument). *See also* Friedman, *The Conflict Over Legitimacy* in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM, 13, 25 (G. Steiner ed. 1983); Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 32 BUFF. L. REV. 107, 146-55 (1982), and materials cited therein.

38. For descriptions of the Medicaid program, see Harris v. McRae, 448 U.S. 297, 301-03 (1980); Butler, *supra* note 23, at 301-03.

39. 448 U.S. 297 (1980). *See infra* note 178. A new round of federal constitutional litigation is now aimed at state restrictions on funding for organizations that offer abortion counseling or referrals. *See generally* Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983).

40. For a discussion of the Hyde Amendment in its various versions, see Appleton,

upheld a similar Illinois statutory restriction on Medicaid funds for abortion. The Supreme Court's decisions foreclosed future federal statutory and constitutional attacks. The Supreme Court's interpretation, although severely criticized,[42] binds both federal and state courts on the federal constitutional question.[43] These decisions thus concluded the first stage of the ongoing constitutional decisionmaking process described earlier.

After *McRae* supporters of Medicaid-funded abortions initiated litigation in state courts challenging the state statutes on state constitutional grounds.[44] To date, all state courts which have considered the question of abortion financing have ordered continuation of state funding under medical assistance programs. Thus far, no state court has agreed with either the result or reasoning of the Supreme Court's decision in *Harris v. McRae*. The highest courts in California[45] and Massachusetts,[46] as

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Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis, 81 COLUM. L. REV. 721 n.3 (1981); Butler, *supra* note 23, at 942-43. *See also supra* note 23.

41. 448 U.S. 358 (1980). Both *Harris* and *Williams* were decided by the same 5-4 vote. In this Article, references will be to Harris v. McRae, 448 U.S. 297 (1980), and are intended to include *Williams v. Zbaraz*.

42. *Compare* Appleton, *supra* note 40, *with* Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1128 (1980)("THE COURT'S DECISION IN *McRae* is more than merely wrong. It borders on the shameful."); and Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U.L. REV. 978 (1981).

43. Most studies of state court reactions to Supreme Court decisions focus on state court attempts to avoid or evade "liberal" decisions of the 1950s and 1960s. *See generally* G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS (1977); I. BECKER & M. FEELEY, THE IMPACT OF SUPREME COURT DECISIONS (2d ed. 1973); Tarr, *State Supreme Courts and the U.S. Supreme Court: The Problem of Compliance*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 155 (1982); Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC. REV. 109 (1973); Kramer and Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, 8 PUBLIUS 75 (1978); Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1018 (1954). *But see* Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L & CRIMINOLOGY 886 (1981).

44. The litigation culminating in Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982), was initiated well before the Supreme Court's decision in *Harris v. McRae* and was based on both federal and state grounds. For its procedural history, see Right to Choose v. Byrne, 91 N.J. at 293-99, 450 A.2d at 928-31.

45. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981). *See* Note, Committee to Defend Reproductive Rights v. Myers: *Abortion Funding Restrictions as an Unconstitutional Condition* 70 CALIF. L. REV. 978 (1982); Note, Committee to Defend Reproductive Rights v. Myers: *Medi-Cal*

well as a trial court in Connecticut,[47] have invalidated abortion funding restrictions on state substantive due process grounds. The New Jersey Supreme Court struck down the funding restriction as a denial of state equal protection,[48] while intermediate appeals courts in Pennsylvania[49] and Oregon[50] have relied on several grounds to reach similar results.

Theoretically, a state court may interpret its constitution without reference to analogous federal constitutional doctrine.

Funding of Abortion, 8 GOLDEN GATE L. REV. 361 (1978-79); Comment, *Committee to Defend Reproductive Rights v. Myers: The Constitutionality of Conditions on Public Benefits in California*, 33 HASTINGS L.J. 1475 (1982); Case Note, 20 J. FAM. L. 345 (1981-82).

California Medicaid recipients have experienced difficulty enforcing *Myers* because the California legislature continues to insert restrictive language in each year's Budget Act. This necessitates annual litigation of the issue. *See, e.g.*, Committee to Defend Reproductive Rights v. Cory, 125 Cal. App. 3d 341, 178 Cal. Rptr. 62 (Cal. Ct. App. 1981), *on remand*, 132 Cal. App. 3d 852, 183 Cal. Rptr. 475 (Cal. Ct. App. 1982).

46. Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981).

47. Doe v. Maher, 8 FAM. L. REP. (BNA) 2006; Conn. L. Trib., (abridged opinion), May 3, 1982, at 7, Col. 1 (Conn. Super. Ct. Oct. 9, 1981). *See* Berdon, *Protecting Liberty and Property Under the Connecticut and Federal Constitutions: The Due Process Clauses*, 15 CONN L. REV. 41, 46-50 (1982). Judge Robert I. Berdon rendered the decision in *Doe v. Maher*. *See also* Berdon, *Protecting Individual Liberties Under the State Constitution*, 56 CONN. B.J. 236 (1982). Lower court opinions are not officially reported in Connecticut.

Lower courts, as well as the highest state courts, often contribute to independent state constitutional interpretation. *See, e.g.*, People v. Goodwin, 69 Mich. App. 471, 245 N.W.2d 96 (1976). *But see Developments in the Law, supra* note 2, at 1331 n.3. (considering only states' highest courts); Comment, *supra* note 2, at 506-10 (criticizing state supreme courts' limitations on trial court declarations of unconstitutionality).

48. Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982). *See* Collins, *The Move to Free State Courts From the 'Patomac's Ebb & Flow,'* NAT'L L.J. Sept. 20, 1982 p. 28, Comment, 14 RUTGERS L.J. 217 (1982); Comment, 13 SETON HALL L. REV. 779 (1983).

49. A single judge of the Pennsylvania Commonwealth Court issued a preliminary injunction. The Pennsylvania Supreme Court affirmed this injunction without reaching the merits in Fischer v. Department of Pub. Welfare, 497 Pa. 267, 439 A.2d 1172 (1982). Then, the Commonwealth Court, sitting *en banc*, heard and denied the state's motion to dismiss (called "preliminary objections" in Pennsylvania) by a 3-3 vote. Fischer v. Department of Pub. Welfare, 66 Pa. Commw. 70, 444 A.2d 774 (1982). The case was tried in February 1984 and the court entered a permanent innunction against the funding restrictions.

50. The Oregon case, Planned Parenthood Assoc. v. Department of Human Resources, 63 Or. App. 41, 663 P.2d 1247 (1983), was an original proceeding challenging an administrative rule limiting abortion funding. The case is now pending on appeal in the Oregon Supreme Court. Litigation was recently initiated in Vermont. Doc v. O'Rourke, Docket No. 581-84 CNC, Chittenden Superior Court. A Temporary Restraining Order was entered on Jan. 27, 1984.

Justice Hans Linde of the Oregon Supreme Court, and a current majority of that court, believe that state constitutional challenges to state legislative or executive action should always be addressed and resolved by state courts before they address federal constitutional challenges.[51] A favorable ruling on a state constitutional challenge removes any possible federal constitutional violation and therefore obviates the necessity of addressing the federal constitutional arguments.[52] The state courts in the abortion funding cases, however, have not pursued this approach.

The United States Supreme Court decided *Harris v. McRae* before the state constitutional challenges were filed;[53] the state litigation was obviously a secondary tactic.[54] Therefore, the *Harris* majority and dissenting opinions have tended to cast a shadow over, and set the agenda for, the state constitutional discourse concerning abortion funding restrictions. Although it is possible for state courts under these circumstances to approach the issue on Justice Linde's "first things first" basis,[55] they have

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51. *See infra* note 55.

52. *See generally* State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983), and materials cited therein; Hewitt v. State Accident Ins. Fund, 294 Or. 33, 653 P.2d 970 (1982).

53. *But see supra* note 44.

54. There is still a marked tendency among civil rights advocates to assert federal constitutional arguments first. *See supra* note 34.

55. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970)[hereinafter cited as *Without "Due Process"*]:

> Judicial review of official action under the state constitution thus is logically prior to review of the effect of the state's total action (including rejection of the state constitutional claim) under the fourteenth amendment. *Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.*

(emphasis in original). *See also* Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379 (1980)[hereinafter cited as *First Things First*]; Linde, Book Review, 52 OR. L. REV. 325, 332-41 (1973)(reviewing B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971)). *Contra*, Kelman, *Foreward: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 429 (1981):

> By proceeding from a failed federal claim to the question whether the state constitution grants broader rights in the circumstances of the case, the state court eliminates an ambiguity that otherwise might shroud its decision. It tells us distinctly, and obliges the court to think more carefully about, whether and why the state constitution differs from or retains the same meaning as the federally interpreted counterpart.

See also Developments In the Law, supra note 2, at 1357:

> When federal protections are extensive and well articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not

not done so. Rather, the state courts, and counsel, have explored the persuasiveness of the *Harris* decision[56] in formulating reasons for either accepting or rejecting it.

At its broadest level, the abortion funding question produces differing judicial perceptions of the constitutional controversy.[57] One either sees the abortion funding question as an attempt by poor persons to obtain funding for the exercise of constitutional rights (a very open-ended concept), or one sees the Medicaid restrictions as discrimination in favor of childbirth and against poor women's rights to choose abortion.[58] These dif-

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> only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the Supreme Court and commentators. In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base. When a state court diverges form the federal view, a reasoned explanation of the divergence may be necessary if the decision is to command respect.
>
> For state constitutional law to assume a realistic role, state courts must acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions.

(footnotes omitted). State courts must now exercise extreme care after Michigan v. Long, 103 S. Ct. 3469 (1983). *See supra* note 13. One commentator has described Justice Linde's position as the "primacy approach." *Developments in the Law, supra* note 2, at 1356. *See also infra* note 116 and accompanying text.

Chief Justice Roberts' majority opinion in Commonwealth v. Tate, 495 Pa. 156, 432 A.2d 1382 (1981), presents a good illustration of a state court approaching a state constitutional issue independently of the Supreme Court's federal constitutional interpretations.

56. The state courts have emphasized that they are not bound by *Harris v. McRae*. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 257, 625 P.2d 779, 781, 172 Cal. Rptr. 866, 868 (1981); Doe v. Maher, slip. op. at 51; Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651, 417 N.E.2d 387, 400 (1981); Right to Choose v. Byrne, 91 N.J. 287, 298-301, 450 A.2d 925, 930-32 (1982); Fischer v. Department of Pub. Welfare, 497 Pa. 267, 439 A.2d 1172 (1982); Fischer v. Department of Pub. Welfare, 66 Pa. Commw. 70, 84, 444 A.2d 775, 781 (1982)("*Harris v. McRae*, as the decision of the highest court of a sister jurisdiction in which was resolved many of the issues here raised, can afford this Court no more and no less than helpful guidance."). *See infra* note 248 and accompanying text.

57. *Cf.*, General Electric Co. v. Gilbert, 429 U.S. 125, 147 (1976)(Brennan, J., dissenting)(noting that the case turns largely on the "conceptual framework chosen to identify and describe the operation features" of the governmental action under review); C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 101-106 (1979); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 662-63 (1981).

58. This also leads to the negative/positive rights analysis in Appleton, *supra* note 40, at 734-737.

fering perceptions are outcome-determinative and reflect legitimate substantive disagreement over controversial constitutional interpretation.

This difference in perception separates the majority from the dissenters in *Harris v. McRae*, and the state court majorities from the Supreme Court majority. One could thus conclude that the state courts simply "disagree" with the United States Supreme Court's perception of the constitutional controversy.[59] The state court could then justify this disagreement in various ways. Our system of federalism has always contemplated such disagreement, but state courts now face mounting criticism for reaching "result-oriented" decisions.[60] Without more of a justification, state courts may face criticism regardless of the persuasiveness of their state constitutional analysis.

The Court's majority opinion in *Harris* has furnished the issues and approaches to arguments pursued by advocates before state courts. Specific aspects of the state's constitutional text or jurisprudence are often urged as requiring a different result on each issue. For example, the "health-penalty" argument (protection of potential life at the expense of woman's health) rejected in *Harris v. McRae*[61] produced a special emphasis on health ar-

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59. There should be nothing inherently wrong with such "disagreement." *See* Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 141 (1979): "To reject the ultimate authority of the Supreme Court is not in the least to reject the binding authority of the Constitution, but only to argue that the Court is to be judged by the Constitution itself rather than the other way around." *See also Developments in the Law, supra* note 2, at 1396 ("Across jurisdictions, alternative interpretations of an open-ended right cannot be considered illegitimate. . . . More important, there is nothing inherently unprincipled in rejecting the reasoning of the Supreme Court when other arguments are seen to be more persuasive."); *see* Hancock, *supra* note 21, at 1126 n.138 (To limit state court independent interpretation of state constitutions to situations in which there is a textual difference "is to deny state courts the fundamental power to interpret their own constitutions as they see fit.").

State court disagreement with Supreme Court reasoning and result is not new. *See, e.g.*, Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 711, 207 P.2d 198, 204-05 (1949); State *Ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 164-65, 115 N.W.2d 761, 769-70 (1962). In 1906 the Wisconsin Supreme Court observed:

> We are fully aware that the contrary proposition has been stated by the great majority of the courts in this country, including the Supreme Court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported.

Nunnemacher v. State, 129 Wis. 190, 198, 108 N.W. 627, 628 (1906)(quoted in Comment, *supra* note 2, at 488).

60. *See supra* note 16-20 and accompanying text.

61. 448 U.S. at 316-17; Appleton, *supra* note 40, at 731-37. Denial of or delay in

guments in the New Jersey case.[62] Similarly, the Supreme Court in *Harris*, although recognizing a woman's privacy interest in choosing an abortion, held that failure to fund an abortion did not infringe upon a woman's privacy right.[63] The California Supreme Court, by contrast, emphasized the California Constitution's special focus on privacy rights in striking down that state's abortion funding restriction.[64]

A substantial textual difference between the federal and state constitution is the most persuasive reason for a state court to reject a United States Supreme Court decision.[65] Thus, advocates and state judges have searched state constitutions for textual support to justify decisions which decline to follow *Harris*.

Arguably, state constitutions containing equal rights amendments[66] provide powerful ammunition for challenges to abortion funding restrictions. State medical assistance programs provide coverage for virtually all medically necessary services related to reproduction for males, with restrictions on financing for medically necessary abortions applying only to females. Although the argument has been raised in several cases, no court has yet reached it. In striking down the funding restriction as a due process violation, the Massachusetts and Connecticut courts reached neither the equal protection nor equal rights amend-

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obtaining an abortion can cause substantial health risks. *See generally* Cates, Kimball and Gold, *The Health Impact of Restricting Public Funds for Abortion*, 69 J. PUB. H. 945 (1979); Pettiti and Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 AM. J. PUB. H. 860 (1977); Roemer, *Equity in Abortion Services*, 68 AM. J. PUB. H. 629 (1978).

62. Right to Choose v. Byrne, 91 N.J. 287, 304, 450 A.2d 925, 934 (1982)("Although we decline to proceed as far as the Chancery Division in declaring that the New Jersey Constitution guarantees a fundamental right to health . . . we recognize that New Jersey accords a high priority to the preservation of health."). *See also id.* at 307, 450 A.2d at 935; Doe v. Maher, slip op. at 58-59 (Conn. Super. Ct. Oct. 9, 1981).

63. 448 U.S. at 312-318.

64. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 262-63, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981).

65. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934 (1976).

66. As to state Equal Rights Amendments, see Driscoll and Rouse, *Through a Glass Darkly: A Look at State Equal Rights Amendments*, 12 SUFFOLK U.L. REV. 1282 (1977); Note, *One Small Word: Sexual Equality Through the State Constitution*, 6 FLA. ST. U.L. REV. 948 (1978); Comment, *The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342 (1980); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086 (1977).

ment arguments.[67] The Pennsylvania court, while preliminarily enjoining the funding restrictions, commented on the absence of a state equal rights amendment claim,[68] and the petitioners have filed an amended petition asserting such a claim.

Many state constitutions contain provisions concerning "equal rights"[69] which differ substantially from the fourteenth amendment's equal protection clause. For example, article I, section 26 of the Pennsylvania Constitution provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." This is a modern provision which was adopted in 1967. Ten states have similar provisions[70] which go far beyond fourteenth amendment notions of "equal protection of the laws." Advocates before the Pennsylvania courts have argued that this provision, prohibiting discrimination against persons in the exercise of their civil rights, is in effect a codification of the "unconstitutional conditions doctrine."[71] Although the United States Supreme Court did not view the abortion funding restriction as an unconstitutional condition, or an attempt to "achieve with carrots what . . . is forbidden to achieve with sticks,"[72] several state courts have emphasized the requirement of "neutrality" in government programs.[73] Article I, section 26 of the Pennsylvania Constitution provides extra support for the neutrality mandate in benefit programs such as Medicaid.

Another example of a state constitutional equality provision is article I, section 20 of the Oregon Constitution: "No law shall be passed granting to any citizens or class of citizens privileges or immunities, which, upon the same terms shall not equally be-

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67. Doe v. Maher, slip. op. 1, 30 n.15 (Comm. Super. Ct. Oct. 9, 1981); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 646, 417 N.E.2d 387, 397 (1981).

68. Fischer v. Department of Pub. Welfare, 66 Pa. Commw. 70, 75 n.3, 444 A.2d 774, 777 n.3 (1982). The trial court's permanent injunction does rely on the Pennsylvania equal rights amendment.

69. For a partial listing, see Sachs, *Fundamental Liberties and Rights: A 50-State Index*, in CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE 7, 41 (1980).

70. *See, e.g.*, MAINE CONST. art. I, § 6A.

71. Brief of Amicus Curiae, American Civil Liberties Union at 11-22, Fischer v. Department of Pub. Welfare, 497 Pa. 267, 439 A.2d 1172 (1982).

72. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10 at 933 n.77 (1978).

73. *Myers*, 29 Cal. 3d at 265, 625 P.2d at 786, 172 Cal. Rptr. at 973; *Maher*, slip op. at 48; *Moe*, 382 Mass. at 654, 417 N.E.2d 401-02.

long to all citizens." The Oregon Supreme Court has referred to this clause as the "antithesis" of the fourteenth amendment's equal protection clause.[74] This clause prohibits the state from enlarging the rights of a select class of citizens, as opposed to curtailing the rights of other citizens.[75] This clause is present in several state constitutions and dates from an earlier period than the fourteenth amendment.[76] Thus, a medical assistance program granting complete medical service relating to reproduction for males but prohibiting the use of its funds for abortions could be viewed as discrimination in favor of men, as in the Oregon case.[77]

A difference in the technique of analysis for resolving the constitutional issue is another approach state courts have used in rejecting *Harris*.[78] For example, after the Supreme Court rejected the unconstitutional conditions argument in *Harris*,[79] the California Supreme Court relied upon its own test[80] for evaluating government benefit programs.[81] Also, the New Jersey Supreme Court specifically rejected the Supreme Court's "two-tiered"[82] equal protection analysis and applied its own balancing approach.[83]

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74. Hewitt v. State Accident Ins. Fund Corp. 294 Or. 33, 42, 653 P.2d 970, 975 (1982); Linde, *Without "Due Process," supra* note 55, at 141.

75. *Hewitt*, 294 Or. at 42, 653 P.2d at 975; Linde, *Without "Due Process," supra* note 55, at 141.

76. *See* State v. Clark, 291 Or. 231, 236, 630 P.2d 810, 814 (1981), *cert. denied*, 454 U.S. 1084 (1981); Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 42, 653 P.2d 970, 975 (1982).

77. Planned Parenthood Assoc. v. Department of Human Resources, 63 Or. App. 41, ___, 663 P.2d 1247, 1257-59 (1983).

78. *See generally* Williams, *supra* note 2, at 187. *See also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982): "[A] state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, *or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.*" (emphasis supplied). Hancock, *supra* note 21, at 1122-23 (1982): "As arbiters of their own constitutions, state courts have the power, not only to mandate higher standards, but also to create the theory, analysis and reasoning that go into producing those higher standards." As to federal analysis, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214-20 (1978)(discussing "federal judicial constructs").

79. 448 U.S. at 311 n.19.

80. *Myers*, 29 Cal. 3d at 257-258, 625 P.2d at 781, 172 Cal. Rptr. at 868.

81. *Id.* at 262-286, 625 P.2d at 784-99, 172 Cal. Rptr. at 871-886.

82. 448 U.S. at 321-23. *See also id.* at 341-42 (Marshall, J., dissenting)(criticizing the "two-tiered" approach).

83. *Byrne*, 91 N.J. at 309-10, 450 A.2d at 936-37. *See also Moe*, 382 Mass. at 655-58,

The Supreme Court's opinion in *Harris*[84] gave little consideration to the argument that the Medicaid funding restriction was intended to interfere with poor women's freedom of choice.[85] In fact, funding restrictions are but one of a wide range of legislative components of "collateral deterrance" advocated by abortion opponents.[86] In the Pennsylvania Legislature, for example, a funding restriction proponent made the following statement:

> First of all I do not think there is any question as to what the intent of the amendment is. We all feel that if this amendment is adopted, we are going to prevent in the Commonwealth approximately 10,000 abortions from taking place in the next fiscal year. This is clearly all of our intents.[87]

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417 N.E.2d at 402-03 (interest balancing in due process analysis).

84. 448 U.S. at 315-18, 324-26. As might be expected, the dissenters emphasized this point. *See id.* at 330 n.4, 332 (Brennan, J., dissenting); *id.* at 338 (Marshall, J., dissenting).

85. This is Perry's main criticism. *See* Perry, *supra* note 42.

86. "Collateral deterrence" consists of "indirect means of noncompliance with a judicial ruling." Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POPULATION & DEVEL. REV. 45 n.1 (1977). For a description of "collateral deterrence" in reaction to *Roe v. Wade*, see Johnson and Bond, *Coercive and Noncoercive Abortion Deterrence Policies: A Comparative State Analysis*, 2 LAW & POL'Y Q. 106, 114 (1980):

> State use of coercion to deter abortion has concentrated on rising the costs of having or providing abortions. The costs could be economic or psychological. State laws that could function to increase the economic costs of abortion include facility requirements, consultations by more than one doctor, residence requirements, and limits on the use of public funds for abortions.

87. Pa. Leg. J., House, September 24, 1980, at 2244-45 (Remarks of Rep. Mullen). The act, as passed, declared that "it is the public policy of the Commonwealth to favor childbirth over abortion." Act of December 19, 1980, P.L. 239, *as amended* 62 PA. STAT. § 453 (Supp. 1981-82).

For a description of the political efforts to secure earlier funding restrictions in Pennsylvania, see Margolis, *Pressure Politics Revisited: The Anti-Abortion Campaign*, 8 POL'Y STUD.J. 698, 703-07 (1980). *See also* Palley, *supra* note 23.

Of course, poor women possess little political power to protect their right to choose abortion from attempts by the legislature to interfere with that choice. As Dr. Richard Kaufman observed:

> The surrender, compromise or conquest in the politics of abortion has been the accessibility of abortion services for the poor. Although poor women arguably have a greater need than nonpoor women for abortions, as an interest group in their own behalf, they lack sufficient resources and power to defend themselves against elitist and pluralistic decisionmaking that clearly is not in their best interest.

Kaufman, *supra* note 23, at 387. *See also id.* at 392 (asserting that rights of poor women were sacrificed to protect abortion rights of nonpoor women); Davidson, *supra* note 32, at 38. Kaufman was relying on Earl Latham's observation that "The legislature referees

Several state courts facing the funding issue have given weight to the argument that such restrictions constitute an intentional infringement on poor women's rights to choose abortion.[88]

State courts have put forth other justifications for rejecting *Harris* and striking down abortion funding restrictions. Several courts have relied upon scholarly criticisms of *Harris*.[89] Interestingly, state courts rejecting *Harris* give rather short shrift to "horizontal federalism,"[90] or supporting sister state decisions re-

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the group struggle, ratifies the victories of the successful coalitions, and records the terms of the surrenders, compromises, and conquests in the form of statutes." Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376, 390 (1952), *reprinted in* H. EULAN, S. ELDERSUELD & M. JANOWITZ, POLITICAL BEHAVIOR: A READER IN THEORY AND RESEARCH 232, 239 (1956).

Kaufman's observation resembles Justice Stone's famous observation in footnote 4 of United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), and could generate a powerful argument supporting state court judicial intervention. *See generally* Bennett, *supra* note 42; Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262, 1265, 1268 (1972); *Developments in the Law, supra* note 2, at 1488. *See also* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 281-82, 625 P.2d 779, 796-97, 172 Cal. Rptr. 866, 883-84 (1981).

Some Supreme Court decisions can be viewed as compromises, not among members of the Court, but as to the reach of federal constitutional doctrine. In fact, some have characterized the Supreme Court's abortion funding decisions this way. Lawrence Friedman observed:

> The funding cases are best understood as a kind of compromise. They may not be good compromise or fair compromise (women with money can do as they wish; the poor are out of luck); but they are compromise all the same. The Court is, no doubt, shocked by the passions let loose by *Roe v. Wade*. But the justices believe in that decision and see no reason to turn back. As they ride out the storm of public opinion, they look on the funding cases as ballast to be thrown overboard. Whether the storm gods will be satisfied with these actions remains to be seen.

Friedman, *supra* note 37, at 26. Of course, Supreme Court decisions expanding constitutional rights also involve compromise. *See* Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 613 (1970). If this is true, there is no necessary reason for state supreme courts, which did not decide *Roe v. Wade*, to engage in such compromise.

88. *Moe*, 382 Mass. at 654-55, 417 N.E.2d at 402 (citing Perry, *supra* note 42); *Cf. Myers*, 29 Cal. 3d at 271-72, 276, 283, 625 P.2d at 790, 793, 797-98, 172 Cal. Rptr. at 877, 880, 884-85; *Maher*, slip op. at 53. The argument has been made in Pennsylvania, but neither court has yet addressed it.

89. *Myers*, 29 Cal. 3d at 267 n.17, 294 n.9, 625 P.2d at 787 n.17, 805 n.9, 172 Cal. Rptr. at 874 n.17, 892 n.9 (Byrd, C.J., concurring); *Maher*, slip op. at 50.

One might refer to these state courts as in Professor Sanford Levinson's term, "protestants": "Instead of taking down the relevant volume of the *United States Reports* and pointing to the dispositive decision, the lawyer might wish to note that some commentators criticize the decision as a 'mistake.'" Levinson, *supra* note 59, at 143.

90. This is a term from M. PORTER & G. TARR, STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM xxi-xxii (1982). *See also* Collins, *Reliance on State Constitu-*

jecting the United States Supreme Court's analysis of the abortion funding issue. The cases are noted, but almost as a passing reference.[91] The major focal point is the Supreme Court decision itself.

B. The Influence of the Supreme Court Dissents

The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the majority, and thus engender want of confidence in the conclusions of courts of last resort.

Justice Byron R. White[92]
United States Supreme Court

A Supreme Court decision interpreting a federal constitutional provision often establishes the framework for later state court interpretations of similar or identical state constitutional provisions. But because the Supreme Court's decision is not binding, its persuasiveness becomes very important. Under these circumstances, the Supreme Court's dissenting opinions perform a function not clearly described before.[93]

Supreme Court dissenting opinions serve several functions.

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tions—Away from a Reactionary Approach, 9 HASTINGS CONST. L.Q. 1, 14-15 (1981). The precedential value of the state court cases, still unanamous in their rejection of *Harris v. McRae*, should be very powerful. Robert Cover stated: "If a large number of jurisdictions arrive *independently* at the conclusion that a certain kind of conduct is wrong or detrimental, then the conclusion is more apt to reflect the problematic character of the conduct than the problematic character of the norm articulation process." Cover, *supra* note 57, at 675 (emphasis in original)(footnote omitted).

Justice Linde observed: "Diversity is the price of a decentralized legal system, or its justification, and guidance on common issues may be found in the decisions of other state courts as well as in those of the United States Supreme Court." State v. Kennedy, 295 Or. 260, ___, 666 P.2d 1316, 1323 (1983). *See also* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954)("Federalism was the means and price of the formation of the Union.").

91. *Myers*, 29 Cal. 3d at 285, 625 P.2d at 799, 172 Cal. Rptr. at 886; *Maher*, slip op. at 55-57 ("No state that has an opportunity to rule on the issue, has followed *McRae*"); *Byrne*, 91 N.J. at 310 n.8, 450 A.2d at 937 n.8; *Moe*, 382 Mass. at ___, 417 N.E.2d at 396-97.

92. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 608 (1895)(White, J., dissenting).

93. Williams, *supra* note 2, at 189-90. Reliance on dissenting opinions was also described in *Developments in the Law*, *supra* note 2, at 1385, 1389.

First, dissenting opinions influence the Court's majority opinion.[94] For example, dissents reduce the majority opinion's persuasiveness by depriving it of unanimity.[95] This alone is ground for criticizing the majority opinion.[96] Dissenting opinions also ensure that the majority opinion fully considers the issues presented in the case,[97] and they reveal the divisions within the Court over difficult and controversial issues.[98]

A dissenting opinion's most widely acknowledged function, however, is to influence the Court's future decisions—the dissenter's ultimate vindication. Justice Cardozo said, "The dissenter speaks of the future, and his voice is pitched to a key that will carry through the years."[99] Similarly, Chief Justice Hughes observed: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[100] Yet future vindication of a dissenting Justice's position is fairly rare. One study has indicated that Justice Holmes was vindicated on less than ten percent of his dissents.[101]

It is now becoming clear that Supreme Court dissenting opinions may influence the legislative branch[102] or state courts as well as current or future Court majorities. That is, Supreme

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94. *See generally* P. JACKSON, DISSENT IN THE SUPREME COURT (1969); Moorehead, *Concurring and Dissenting Opinions*, 38 A.B.A.J. 821 (1952); ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORN. L.Q. 186 (1959).

95. For example, all of the state courts have noted that *Harris v. McRae* was a 5-4 decision. *Myers*, 29 Cal. 3d at 257, 260, 625 P.2d at 781, 783, 172 Cal. Rptr. at 868, 870; *Maher*, slip op. at 49 (*Harris* described as a "bare bone majority" and a "slim majority"); *Moe*, 382 Mass. at 650, 417 N.E.2d at 399-400; *Byrne* 91 N.J. at 301, 450 A.2d at 932.

96. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804 (1982). *But see* Rehnquist, *"All Discord, Harmony* Not Understood": The Performance of the Supreme Court of the United States, 22 ARIZ. L. REV. 973 (1980).

97. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962).

98. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A.J. 801, 863 (1951).

99. B. CARDOZO, LAW AND LITERATURE 36 (1931)(quoted in P. JACKSON, *supra* note 94, at 17).

100. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928)(quoted in P. JACKSON, *supra*, note 94, at 17).

101. ZoBell, *supra* note 94, at 211. *See also* Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 CAL. L. REV. 11, 22-23 (1965)(tracing the vindication of some of Justice Traynor's dissenting positions).

102. Fuld, *supra* note 97, at 927; Schaefer, *supra* note 101, at 23.

Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions.[103] Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis. One might ask, then, whether Justice Brennan's and Marshall's dissents, among others, have not enjoyed a much higher vindication rate in state cases than Holmes ever achieved in later Supreme Court decisions.

Although not true in the *Harris v. McRae* example, some Supreme Court dissenters[104] have specifically invited state courts to consider rejecting the Court's reasoning and result.[105] Justice Brennan has made this general recommendation in a now famous article.[106] It is important to note, however, that Supreme Court statements that state courts may interpret their constitutions more expansively than the federal constitution are not the source of that state power. Rather, these statements merely recognize such state authority in the absence of countervailing federal rights.[107]

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103. Chief Justice Hughes once observed: "The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges. . . ." Minnesota v. National Tea Co., 309 U.S. 551, 558 (1940). In 1962, the Wisconsin Supreme Court, in State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962), relied upon a Supreme Court dissent in rejecting the Court's majority approach.

104. Even Supreme Court *majority* opinions sometimes suggest this. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 240-41 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967).

105. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 396 (1976)(Marshall, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 120-21 (1975)(Brennan, J., dissenting). Paul Bator has criticized this practice: "I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court." Bator, *supra* note 19, at 605 n.1.

106. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For other statements by Justice Brennan on this theme, see Collins, *supra* note 90, at 1-2. *See generally* Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962).

The Connecticut Superior Court decision rejecting *Harris* quotes from the Brennan article. *Maher*, slip op. at 52-52. *See also* Right to Choose v. Byrne, 91 N.J. 287, 300, 450 A.2d 925, 931 (1982).

107. Thus, state courts need not cite the Supreme Court as authority for state courts to interpret their constitutions more broadly than the Supreme Court interprets the federal provisions. *See also* State v. Benoit, ___ R.I. ___, ___, 417 A.2d 895, 899

The state abortion financing decisions rejecting *Harris v. McRae* neatly illustrate many of these points. The majority opinions[108] all rely to a certain extent explicitly, and to a greater extent implicitly, on the reasoning and result of dissenting Justices Brennan, Marshall, Blackmun, and Stevens in *Harris*.[109]

C. *Abortion Financing Decisions—Reactive or Independent Interpretation*

As the ongoing process of constitutional decisionmaking continues through the "second looks" of state constitutional interpretation, commentators attempt to categorize state judicial decisions rejecting United States Supreme Court reasoning and result. These commentators often pay little attention to state cases "following" the Supreme Court's lead. But, where state courts diverge, commentators contrast a "reactive"[110] or "reactionary"[111] approach with a "self-reliant"[112] or "independent"[113] approach.

> The reactive court focuses its attention on federal precedent, often a recent Supreme Court case denying federal protection in an analogous situation, and arrives at its result by responding to the federal reasoning, often by attacking it frontally or by articulating state-specific or institutional reasons for divergence from the federal result.
>
> The self-reliant approach, on the other hand, focuses on the state constitution as an independent source of rights to be elaborated on its own terms. Courts using this approach examine the full panoply of considerations appropriate to judicial interpretation of fundamental law.[114]

Several commentators have, not surprisingly, characterized

(1980).

108. Predictably, the state court dissenting opinions rely on the Supreme Court's majority opinion in Harris v. McRae, 448 U.S. 297 (1980).

109. *See, e.g. Maher*, slip op. at 50, 55, 58, 64; *Moe*, 382 Mass. at 653, 655, 417 N.E.2d at 401, 402; *Byrne*, 91 N.J. at 302-03, 306.

110. *Developments in the Law, supra* note 2, at 1358, 1362, 1494. *See also* Note, *supra* note 16, at 305-06 ("Supreme Court oriented" interpretation).

111. Collins, *supra* note 90, at 2.

112. *Developments in the Law, supra* note 2, at 1358, 1362, 1364, 1495. *See also* Note, *supra* note 16, at 305-06 ("pure" state constitutional interpretation).

113. Collins, *supra* note 90, at 3, 5.

114. *Developments in the Law, supra* note 2, at 1363-64 (footnotes omitted).

state decisions rejecting *Harris v. McRae* as reactive, using the term in a generally perjorative sense.[115] Under the circumstances, though, with a highly visible and controversial 5-4 Supreme Court decision casting its shadow over the state court proceedings, it seems hardly possible that these state courts could have performed "zero-based state interpretation."[116] After all, a one-vote difference of the Supreme Court would have rendered unnecessary the state court's need to examine the issue. What would be said about a state court decision that did not even cite a Supreme Court decision on point?

One could argue that state courts are merely reacting to the unfairness of legislative interference with poor women's right to choose abortion, rather than to a Supreme Court decision. Under this view, these state decisions are consistent with basic constitutional notions of equality and fairness. Alternatively, state courts may view abortion funding restrictions as a response to a vocal single-issue minority and not as an accurate reflection of majority sentiment. Thus, the abortion funding cases could reflect state court protection of majority rights.[117] Still, the state courts would be in substantive disagreement with the United States Supreme Court's conclusion.[118] Although these state courts would likely have reached the same conclusion in the absence of a Supreme Court decision, they cannot control the litigation strategy often pursued by civil rights advocates: litigate federal constitutional claims—aiming for a nationwide decision—prior to litigating state constitutional claims in smaller, state "universes."[119] Further, state courts have little control over the agenda-setting impact of United States Supreme Court decisions and the way such decisions influence preparation of state constitutional cases by counsel.

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115. Collins, *supra* note 90, at 18 n.63; *Developments in the Law, supra* note 2, at 1364 n.156.

116. Kelman, *supra* note 55, at 429. *See also Developments in the Law, supra* note 2, at 1419: "Commentators who condemn state judiciaries for referring to federal doctrine when interpreting their own charters would force an irrational chauvinism on the state courts." (footnote omitted).

117. *See supra* notes 86, 87; *Developments in the Law, supra* note 2, at 1498-1502.

118. *See supra* note 59.

119. *See supra* note 34 and accompanying text.

D. Legislative Reaction

In *Harris v. McRae* and its companion case,[120] the Supreme Court held that statutes restricting the use of Medicaid funds for abortion did not violate poor women's federal constitutional rights.[121] States were not required to restrict funding,[122] however, and remained free to provide state dollars for such coverage.[123] In fact, a number of states legislatively maintained prochoice policies[124] in their Medicaid programs after the Supreme Court upheld state statutes restricting state-funded abortions in 1977[125] and after Congress enacted the Hyde Amendment.

At least nine states and the District of Columbia have legislatively decided to expend state funds for abortions for poor women since the Supreme Court's decision in *Harris*.[126] These states have initiated this policy even though as a matter of federal constitutional and statutory law they are not required to do so.[127] These legislative decisions may be viewed as legislative "constitutional" decisions, based upon notions of fairness to poor women.[128] The executive branch, through the governor's power to propose budget items and utilize the veto power, influences these legislative decisions in many important, though not

120. 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980).

121. 448 U.S. at 322.

122. In *Harris* the Court observed: "A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable. . . . We hold only that a State *need* not include such abortions in its Medicaid plan." 448 U.S. at 311 n.16 (emphasis in original). *See also* Williams v. Zbaraz, 448 U.S. 358, 367 n.9 (1980).

123. The Hyde Amendment merely prohibited the use of federal funds for abortion. The argument that states were therefore required to fund abortions from state funds was rejected in Harris v. McRae, 448 U.S. 297, 308-11 (1980). There was no implication, however, that states could not choose to expend their own funds for this purpose.

124. "[B]y, in effect, placing part of the burden of decisionmaking on the states, the court has . . . significantly broadened the scope of state action." Nicholson and Stewart, *Preliminary Analysis, supra* note 23, at 159. *See also* Stewart and Nicholson, *Follow-Up Analysis, supra* note 23.

125. *See supra* note 37 and accompanying text.

126. Alaska, Colorado, Hawaii, Maryland, Michigan, New York, North Carolina, Oregon and Washington. Brozan, *supra* note 30.

127. *See generally* Williams, *supra* note 2, at 192-93; Tarr and Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919 (1982).

128. *See supra* note 117 and accompanying text.

always obvious, ways.[129]

On purely fiscal grounds, providing Medicaid funds for abortion is much less expensive than prohibiting the use of such funds for abortion.[130] A study commissioned by a Florida legislative committee in 1978 estimated that over a thirty-year period the cost to the state of providing Medicaid abortions would be between 8.5 and 9.7 million dollars, while the medical, social service and other costs associated with the births of unwanted children to Medicaid-eligible women who would otherwise have abortions was between 834 million and 3.4 billion dollars.[131] But fiscal arguments are not always persuasive in a legislative debate over Medicaid funding for abortion, and Florida declined to provide state abortion funding.

State legislative decisions providing Medicaid funding for abortion do not involve the legitimacy questions raised by state court decisions "evading" *Harris v. McRae*. The issue is addressed simply as a legislative policy choice, albeit a controversial one. The question of state funding for abortion appears likely to remain on state legislative agendas for the forseeable future,[132] although in states legislatively providing full state funding, a second judicial look at the question through state constitutional litigation obviously will not be necessary.[133]

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129. *See, e.g.*, Opinion of the Justices, 373 Mass. 911, 370 N.E.2d 1350 (1977)(upholding gubernatorial veto of appropriation rider limiting abortion funding).

130. One commentator has described the Hyde Amendment as a "spendthrift measure." Perry, *supra* note 42, at 1124. Justice Stevens made this observation in *Harris*. 448 U.S. 297, 355-56 (Stevens, J., dissenting).

Several state courts which rejected *Harris* have observed that this fiscal argument undercuts any state interest in preserving funds by terminating abortion funding. *See* Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 656 n.20, 417 N.E.2d 387, 403 n.20 (1981); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 277, 625 P.2d 779, 794, 172 Cal. Rptr. 866, 881 (1981).

131. H. GITLOW, BANNING VERSUS NOT BANNING MEDICAID FUNDS FOR ABORTIONS IN FLORIDA: A THIRTY-YEAR PROJECTION OF COSTS 7 (April 1978). *See also* Kaufman, *supra* note 23, at 391.

132. A description of the political forces on both sides of this issue is beyond the scope of this article. *See generally* Kaufman, *supra* note 23; Margolis, *supra* note 86; Palley, *supra* note 23.

133. *But see* Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

E. *The Constitutional Decisionmaking Process Continues: State Constitutional Amendment*

Where resort to the state constitution is a selective, issue-by-issue process, it will come as little surprise when the public manifests its outrage, backed by its amendment muscle, at novel state constitutional decisions.[134]

A state court decision interpreting the state constitution is insulated from vertical, federal judicial review.[135] Such a decision is not, however, insulated from horizontal, political review via a proposed state constitutional amendment.[136] This form of constitutional "backlash,"[137] unlikely in the federal system,[138] seems a possibility when controversial questions such as abortion are involved.[139] In fact, the process has already begun in Massachusetts in response to that state's abortion financing decision.[140] Of course, if such an amendment were adopted, its adoption procedure faces a likely challenge.[141] Nevertheless, one cannot help but wonder whether such an overruling amendment might inhibit other state courts from invalidating abortion funding restrictions.[142]

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134. Collins, *supra* note 87, at 17-18 (footnote omitted). Collins uses the Massachusetts abortion funding case, Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981), as an example of a decision which might generate a reactive state constitutional amendment. Collins, *supra* note 90, at 18 n.63.

135. *But see* Michigan v. Long, 103 S. Ct. 3469 (1983), *supra* note 13.

136. On January 4, 1983, the Massachusetts Legislature approved the following constitutional amendment: "The General Court may regulate or prohibit abortion and may regulate or prohibit private or public funding for abortion or the provision of services or facilities therefore." Journal of the Massachusetts Senate, p. 1408. The amendment will be placed on the ballot if the Legislature approves it once more.

137. Williams, *supra* note 2, at 192 n.100.

138. *But see* Linde, *supra* note 22, at 235 (describing the twenty-sixth amendment, concerning 18-year-old voting, in response to Oregon v. Mitchell, 400 U.S. 112 (1970): "The real constitutional decision was made ultimately by the Twenty-Sixth amendment.").

139. Williams, *supra* note 2, at 176: "Recent events indicate . . . that proposed amendments to state constitutions sometimes provide a forum for resolving major societal conflicts."

140. *See supra* note 136.

141. *See generally* Williams, *supra* note 2, at 224-27.

142. *See supra* note 14. *See generally* Williams, *supra* note 2, at 192 n.100; Collins, *supra* note 106, at 17 n.62; *Developments in the Law*, *supra* note 2, at 1351 n.91. Justice Handler noted that state constitutional amendments might override judicial interpretations of the state constitution in State v. Hunt, 91 N.J. 287, 338 n.1, 450 A.2d 925, 964

One could argue that because state constitutions are relatively easy to amend, thereby correcting "mistakes," state courts should be willing to render more expansive or controversial state constitutional interpretations.[143] Amendments to state constitutions overruling judicial interpretations are nothing new.[144] One of the most famous examples is the New York constitutional amendment overruling, almost immediately, the New York Court of Appeals' 1911 decision declaring workmen's compensation unconstitutional.[145] Such constitutional amendments, "correcting" judicial interpretations of state constitutions regarding governmental power and structure, have been common.

Constitutional amendments overturning judicial interpretations of state Declarations of Rights, however, are relatively new.[146] These amendments usually arise in emotional contexts, often in response to a decision concerning the rights of minorities, the powerless, or other unpopular people.[147] The political discourse surrounding such amendments usually portrays the motivating judicial decision as illegitimate. Hence, some might view an amendment's adoption under these circumstances as a popular rebuff to undemocratic judicial activism.

This possibility of popular rebuff to state court action has

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n.1 (1982).

143. *Compare* Commonwealth v. O'Neal, 369 Mass. 242, 275, 339 N.E.2d 676, 694 (1975); *and* Howard, *supra* note 65, at 939, *with* Allen v. Quinn, 459 A.2d 1098, 1102 (Me. 1983); State v. Baker, 81 N.J. 99, 115-26, 405 A.2d 368, 375-81 (1979)(Mountain, J., dissenting); Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U.L. REV. 567, 568 (1978); *and Developments in the Law, supra* note 2, at 1500 n.21.

144. Williams, *supra* note 2, at 178 n.36.

145. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911)(state and federal due process). For the Court of Appeals' views after the amendment, see Jensen v. Southern Pac. Ry., 215 N.Y. 514, 109 N.E. 600 (1914)(federal due process).

146. *See generally* Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HAST. CONST. L.Q. ___ (1984). *See also* M. PORTER & G. TARR, *supra* note 90, at xii ("Only rarely, as when California voters amended their constituion to legitimize the judicially invalidated death penalty, is activist policymaking challenged."); Galie, *The Other Supreme Courts, supra* note 2, at 791-92; *Developments in the Law, supra* note 2, at 1354. *But see* the 1936 amendment to the Michigan Constitution which overruled a line of cases culminating in People v. Stein, 265 Mich. 610, 251 N.W. 788 (1933)(discussed in People v. Gonzales, 356 Mich. 247, 259, 97 N.W.2d 16, 22 (1959)); Kelman, *supra* note 55, at 432 n.84.

147. FLA. CONST. art. I, § 12 (1968, amended 1982) (search and seizure interpretation must follow federal interpretation); MASS. CONST. pt. 1, art. 26 (1780, amended 1982)(death penalty not cruel and unusual punishment); CAL. CONST. art. 1, § 27 (same); CAL. CONST. art. 1, § 7 (1974 amended 1979)(busing decisions must not go beyond federal mandate).

encouraged the trend among state courts and commentators to formulate criteria to justify state court rejection of Supreme Court decisions. Adequate justification for state constitutional decisions is seen as a way to diffuse such adverse voter reactions. Yet, constitutional amendments overriding civil liberties decisions are usually based upon popular disagreement with the decision's substantive outcome, not the court's reasoning process. Thus, in the political debate surrounding the proposed amendment, the state court's justification for its decision as resting, for example, upon textual differences between the state and federal constitution may be of no consequence.

The most dramatic event in the "overruling" amendment controversy has been Chief Justice Burger's recent comments in *Florida v. Casal*.[148] There, he lauded the Florida constitutional amendment overruling judicial interpretation of the state's search and seizure protections. This amendment, a meat-axe approach to overruling judicial decisions, linked all future interpretations (under all circumstances, not just those in the case overruled) to Supreme Court interpretation of the fourth amendment.[149]

In *Casal*, the Supreme Court dismissed the writ of certiorari as improvidently granted because the Florida decision was based upon an adequate and independent state ground. Chief Justice Burger concurred, noting:

> I question that anything in the language of either the Fourth Amendment of the United States Constitution or Art. I, [section] 12 of the Florida Constitution required suppression of the drugs as evidence. However, the Florida Supreme Court apparently concluded that state law required suppression of the evidence, independent of the Fourth Amendment of the United States Constitution.
>
> The people of Florida have since shown acute awareness of the means to prevent such inconsistent interpretations of the two constitutional provisions.
>
> . . . .

148. 103 S. Ct. 3100, 3101 (1983)(Burger, C.J., concurring). See also Colorado v. Nunez, 104 S. Ct. 1257 (1984), where Chief Justice Burger and Justices White and O'Connor concurred in the dismissal of the writ of certiorari as improvidently granted. They agreed that the Colorado court's judgment rested on adequate and independent state grounds, but pointed out the case would have been resolved differently under federal law.

149. FLA. CONST. art. I, § 12 (1968, amended 1982). *See infra* note 252.

> With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement.[150]

The Chief Justice's comments represent a profound departure from the spirit of many expressions, by Justices of different persuasions, that state courts are free to interpret their constitutions more broadly than the Supreme Court interprets the federal constitution.[151] Chief Justice Burger's surprising advice to state electorates seems to reflect his belief that Supreme Court decisions enjoy presumptive validity as guides for state court interpretations of similar or identical state constitutional provisions.

150. 103 S. Ct. 3100, 3101-02 (1983)(Burger, C.J., concurring)(emphasis in original). This statement calls to mind Paul Bator's criticism of justices campaigning for the enactment of unreviewable state constitutional law. *See supra* note 19.

151. *Compare* expressions noted in *supra* note 105 *with* Bustop Inc. v. Los Angeles Bd. of Ed., 439 U.S. 1380, 1382 (1978)(Rehnquist, J., opinion in chambers): "So far as this Court is concerned they [state courts] are free to interpret the Constitution of the State to impose more stringent restrictions. . . ." *See also* Justice Rehnquist's opinion for the Court in PruneYard Shopping Center v. Robins, 447 U.S. 47, 81 (1980)(state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971)(Burger, C.J., dissenting); Burger, *To Weaken Our State Courts Is To Destroy Federalism*, 17 JUDGES' J. 11, 12 (No. 2, 1978).

III. LEGITIMACY OF STATE JUDICIAL DISAGREEMENT WITH THE UNITED STATES SUPREME COURT

[U]nmistakeably, a high state court judge and a United States Supreme Court Justice must often look at the same case with different eyeglasses.

Justice William J. Brennan, Jr.[152]
United States Supreme Court

A. *Criteria for Disagreement with the United States Supreme Court*

The development of criteria to justify a state court decision rejecting a Supreme Court interpretation of a similar or identical federal constitutional question can, in the long run, impede independent state constitutional interpretation. Such unforseen impairment is well illustrated by *Right to Choose v. Byrne*,[153] the New Jersey abortion funding decision. It is important to focus on the divergence of opinion and methodology in *Byrne* because New Jersey is often cited as a leader in state constitutional interpretation.[154]

Each state court rejecting *Harris v. McRae* has stressed state courts' prior record of interpreting their constitutions to provide "more" rights than the federal constitution.[155] After making this general point, each state court then lists previous cases where it has gone beyond Supreme Court decisions.[156]

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152. Brennan, *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225, 227 (1966). See also Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 949 (1964), where Justice Brennan posits that the roles of state supreme court justices and United States Supreme Court Justices, even in the same case, are functionally different.

153. 91 N.J. 287, 450 A.2d 925 (1982).

154. See Cohn, *Justice Pashman As Federalist: The New Jersey Constitution Unbound*, 35 RUTGERS L. REV. 213, 216 n.22 (1983), and authorities cited therein. *See also* Mosk, *Justice Pashman*, 14 RUTGERS L.J. iv (1982).

155. *See, e.g.*, Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 261 n.4, 625 P.2d 779, 783-84 n.4, 172 Cal. Rptr. 866, 870 n.4 (1981); Right to Choose v. Byrne, 91 N.J. 287, 300-301, 450 A.2d 925, 932 (1982).

156. *Myers*, 29 Cal. 3d 252, 261 n.4, 625 P.2d 779, 783-84 n.4, 172 Cal. Rptr. 866, 870 n.4 (1981); Doe v. Maher, slip op. at 52-53; *Moe*, 382 Mass. at 651, 417 N.E.2d at 400; *Byrne*, 91 N.J. at 300, 450 A.2d at 931-32.

Interestingly, this approach encourages lawyers to cite all of that state's cases reach-

Byrne, however, varies this approach somewhat. In *Byrne*, Justice Pollock first noted the advisability in a federal system of uniform interpretation of similar constitutional provisions.[157] He then observed: "Where provisions of the federal and state Constitutions differ, however, or where a previously established body of state law leads to a different result, then we must determine whether a more expansive grant of rights is mandated by our state Constitution."[158]

Another example of New Jersey's criteria justification is Justice Handler's concurring opinion in *State v. Hunt*.[159] Cited by Justice Pollock with approval in *Byrne* and rendered on the same day, Justice Handler's *Hunt* opinion portrays the state constitution as a "fall-back" source of rights to which state courts may "resort" under certain circumstances. But the Justice cautioned:

> There is a danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere. The erosion or dilution of constitutional doctrine may be the eventual result of such an expedient approach.[160]
>
> . . . .
>
> It is therefore appropriate, in my estimation, to identify and explain *standards or criteria* for determining when to invoke our State Constitution as an independent source for pro-

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ing a different result from the United States Supreme Court. Supposedly, this list of cases lends credence to the argument that the court should not follow the Supreme Court decision in the case at bar. A good but outdated state-by-state survey of independent state constitutional interpretation can be found in *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L.L. REV. 271, 322-350 (1973).

157. Right to Choose v. Byrne, 91 N.J. at 301, 450 A.2d at 932.

158. *Id.*, 450 A.2d at 932. For a complete exposition of Justice Pollock's views on the methodology of state constitutional interpretation, see Pollock, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUT. L. REV. 707 (1983). *See also* State v. Benoit, ___ R.I. ___, ___, 417 A.2d 895, 899 (1980).

159. 91 N.J. 338, 450 A.2d 952 (1982). In *Hunt*, the New Jersey Supreme Court found a defendant's telephone toll billing records to be protected from unreasonable search and seizure under the New Jersey Constitution, rejecting a contrary holding as to a pen register listing of numbers dialed in Smith v. Maryland, 442 U.S. 735 (1979). One commentator has criticized the criteria argument. Collins, *supra* note 90, at 17.

160. *Hunt*, 91 N.J. at 349, 450 A.2d at 963-64 (Handler, J., concurring). Justice Handler noted the possibility that state court constitutional interpretations could be overruled by state constitutional amendments. *Id.* at 361 n.2, 450 A.2d at 964 n.2 (Handler, J., concurring). *See supra* notes 14, 134-151 and accompanying text.

tecting individual rights.[161]

Justice Handler listed seven criteria or standards that would justify a result different from the Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state.[162] He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."[163]

Justice Handler denied that his analysis created a presumption in favor of the Supreme Court result,[164] but Justice Pashman in a separate concurrence disagreed.[165] Importantly, Justice Pashman observed that such a presumption limits a state court's authority to interpret its constitution.[166]

The New Jersey Supreme Court thus appears to require some objectively verifiable difference between state and federal constitutional analysis—whether textual, decisional, or historical—to justify a state court's interpretational divergence. This view implies that in the absence of one or more of the criteria

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161. *Hunt*, 91 N.J. at 363, 450 A.2d at 965 (Handler, J., concurring)(emphasis added).

162. *Id.* at 363-368, 450 A.2d at 965-67 (Handler, J., concurring).

163. *Id.* at 367, 450 A.2d at 967 (Handler, J., concurring).

164. *Id.* n.3, 405 A.2d at 967 n.3 (Handler, J., concurring). In a recent article, Justice Handler stated: "I wrote separately in *Hunt* to express my view that resort to the state constitution as an independent source for protecting individual rights is most appropriate when supported by sound reasons of state law, policy or tradition." Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 197, 204 (1983). *See also id.* at 206 n.29; State v. Williams, 93 N.J. 39, 57, 459 A.2d 641, 650 (1983)("We have not hesitated to recognize and vindicate individual rights under the State Constitution where our own constitutional history, legal traditions, strong public policy and special state concerns warrant such action.").

165. *Hunt*, 91 N.J. at 346 n.1, 348, 450 A.2d at 960 n.1, 962 (Pashman, J., concurring). *See also* Right to Choose v. Byrne, 91 N.J. 287, 332-33, 450 A.2d 925, 949 (1982)(Pashman, J., concurring in part and dissenting in part).

166. "Although the factors listed [by Justice Handler] are potentially broad, they impose clear limits." *Hunt*, 91 N.J. at 354, 450 A.2d at 960 (Pashman, J., concurring). *See also* State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982)(federal constitutional interpretations do not limit state constitutional rights).

identified, it is illegitimate for a state court to reject the reasoning or result of a Supreme Court decision.[167]

Thus, the New Jersey approach treats the Supreme Court's reasoning and result as presumptively correct[168] for state constitutional analysis. As a result of this presumption, the state court is compelled to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent.[169] A constitutional interpretation "that will stand the test of detached criticism"[170] is not enough. Justification in this manner raises several critical issues: (1) Is disagreement over substantive constitutional interpretation illegitimate? (2) Does the persuasive power of Supreme Court decisions depend upon the Court's institutional position or the soundness of its reasoning? Since the New Jersey view places a high value on the institutional aspect of constitutional interpretation at the expense of independent state constitutional jurisprudence, it is submitted that this approach attributes too much to Supreme Court decisions.

The type of criteria, factors, and standards listed by the New Jersey Justices and other commentators[171] reflect circumstances under which state courts have interpreted their constitutions to provide more extensive rights than their federal counterpart. They properly serve as important guides for courts and advocates.[172] But they should not serve as limitations on state court authority to disagree with Supreme Court constitutional

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167. *But see supra* note 59 and accompanying text.

168. *See supra* notes 164-166 and accompanying text. Justice Linde refers to the notion of presumptive validity as a "*non sequitur.*" State v. Kennedy, 295 Or. 260, ___, 666 P.2d 1316, 1322 (1983).

169. *See* Note, *supra* note 16, at 318: "The court must convince the legal community and the citizenry at large that it was justified in its disagreements with the Supreme Court and that the state constitution supports different outcomes." (footnote omitted).

170. Howard, *supra*, note 65, at 934. *But see* Linde, *supra* note 22, at 248 (citing the importance of constitutional decisions even when they are vulnerable to academic criticism).

171. *See, e.g.*, Galie, *The Other Supreme Courts, supra* note 2; Howard, *supra* note 65, at 934-44; Williams, *supra* note 2, at 185-91, *Developments in the Law, supra* note 2, at 1330 n.27. Several commentators have presented similar factors as "criteria." *See, e.g.*, Deukmejian and Thompson, *supra* note 19, at 986-96; Note, *supra* note 16, at 318-19.

172. Justice Linde has stated that "to make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result." Linde, *First Things First, supra* note 55, at 392.

analysis even if none of the factors are present.

B. *Supreme Court Decisions Cannot Have Presumptive Validity for State Constitutional Interpretation*

Litigants and other interest groups[173] often resort first to the federal courts. They seek, ultimately, a nationally applicable federal constitutional ruling. Of course, state courts may not disregard Supreme Court decisions establishing minimum federal constitutional protections.[174] But Supreme Court federal constitutional interpretations failing to recognize rights may be inappropriate guides for state constitutional interpretation. The institutional limitations inherent in Supreme Court federal constitutional rulings upholding state policies provide state courts with ample reasons for discounting such interpretations, even as to identically-worded state constitutional provisions. Further, this is true even in the absence of specific or explicit evidence that such limitations influenced a particular Supreme Court decision.

A United States Supreme Court decision, at least one interpreting the fourteenth amendment, "must operate in all areas of the nation and hence it invariably represents the lowest common denominator."[175] Federalism concerns[176] and the fourteenth

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173. *See generally* Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore,"* 35 FORDHAM L. REV. 15 (1966); Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); O'Connor and Epstein, *An Appraisal of Hakman's "Folklore," 16* LAW & SOC'Y REV. 311 (1982).

174. *But see* Wiggins v. State, 275 Md. 689, 690-91, 344 A.2d 80, 81 (1975)(Maryland courts not bound by lower federal court interpretations of the federal Constitution).

175. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 242, 635 P.2d 108, 115 (1981). *See also infra* note 208 and accompanying text.

176. Most Supreme Court decisions involving constitutional challenges to state statutes, regulations, or executive action arise under the fourteenth amendment. The body of the federal Constitution, however, contains similar limiting provisions. *See, e.g.*, U.S. CONST. art. I, § 10.

The Supreme Court's most explicit recognition of federalism limits in fourteenth amendment interpretation appears in San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 44 (1973). *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217-18 (1978)(referring to federalism as an "institutional" rather than an "analytical" limitation). Still, federalism concerns (not always explicit) are present in much of the federal constitutional interpretation with respect to states. *See also id.* at 1218-19:

> [T]here are certainly other norms which are significantly underenforced. While there is no litmus test for distinguishing these norms, there are indicia of un-

amendment's state action requirement[177] impose well-known limitations on Supreme Court constitutional analysis. Also, when viewed through Supreme Court federal constitutional interpretations, "states' rights" issues often portray states as fungible political entities possessing a uniform set of rights and powers. This, of course, is not the case.

The fourteenth amendment is "a prominent example of a constitutional norm which is underenforced to a significant degree by the federal judiciary."[178] The Supreme Court's "underenforcement" of federal constitutional guarantees for institutional rather than analytical reasons has been documented.[179] Such limits on the reach of federal constitutional interpretation have nothing to do with the substantive constitutional guarantee of equality.[180] Although the Supreme Court does not speak of underenforcement, in a 1973 case Justice Powell explicitly noted the federalism limitations present in equal protection cases:

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derenforcement. These include a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies. . . .

The Supreme Court expressed no explicit federalism concerns in the abortion financing cases. *But see infra* note 180 and accompanying text. In *Harris*, the Court applied fifth amendment analysis in upholding a federal statute and in *Williams*, the companion case, it applied the same analysis under the fourteenth amendment. *See infra* note 178.

As to federalism concerns associated with applying the eighth amendment against the states through the fourteenth amendment, see Powell v. Texas, 392 U.S. 514, 547-48 (1968)(Black, J., concurring); Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1798 (1970).

177. *See* Williams, *supra*, note 2, at 187-88. The state action requirement in federal constitutional interpretation has been described as a "judicial balancing of competing interests." Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 242, 630 P.2d 108, 115 (1981)(citing Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 222, 232-36 (1976)).

178. Sager, *supra* note 176, at 1218. Of course, *Harris* was decided under the fifth amendment, which applies directly only to the federal government and which lacks an equal protection clause. Fourteenth amendment equal protection doctrines have become part of the fifth amendment's due process clause by "reverse incorporation." *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

179. Sager, *supra* note 176, at 1218-20.

180. One commentator has characterized Maher v. Roe, 432 U.S. 464 (1977), which was held to be controlling in *Harris v. McRae*, as based upon institutional constraints. Sager, *supra* note 176, at 1227 n.48.

> It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.[181]

The ever-present federalism concerns implicated in Supreme Court review of state statutes or executive actions are illustrated by the Court's approach to enforcing specific Bill of Rights' protections against state action. Originally, of course, the Bill of Rights applied only against the federal government and not the states.[182] The adoption of the fourteenth amendment in 1868, however, fundamentally altered the relationship between the states and the federal government.

The question of whether the fourteenth amendment's due process or privileges and immunities clauses[183] made the Bill of Rights applicable to the states (incorporated) was essentially a question of federalism.[184] Interestingly, in *Adamson v. California*,[185] both Justice Frankfurter's concurring opinion opposing incorporation[186] and Justice Black's dissenting opinion supporting incorporation[187] were based upon federalism concerns.

The Supreme Court has never adopted Justice Black's total

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181. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 44 (1973). *See also* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532 (1959)(Brennan, J., concurring): "The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which the Court examines state action."

182. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

183. Beginning with the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), the privileges and immunities approach was rejected. *See generally* Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 767-68 (1961).

184. *See generally* Adamson v. California, 332 U.S. 46, 53 (1947).

185. 332 U.S. 46 (1947).

186. *Id.* at 59. *See generally* Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

187. *Adamson*, 332 U.S. at 68. Black viewed incorporation as a limiting doctrine, providing objective limits rooted in the first eight amendments. To Black, the "ordered liberty" approach contained in Palko v. Connecticut, 302 U.S. 319 (1937), was too subjective. *See Adamson*, 332 U.S. at 70, 75, 82-83, 90-92 (Black, J., dissenting). For a similar, more modern statement of this position, see Pointer v. Texas, 380 U.S. 400, 413-14 (1965)(Goldberg, J., concurring).

incorporation approach.[188] Rather, the Supreme Court has used "selective incorporation" in applying the Bill of Rights against the states through the fourteenth amendment's due process clause.[189]

The selective incorporation approach, however, often required the Court to determine the substantive content of a Bill of Rights' provision while simultaneously deciding whether the substantive right applied to the states. For example, Justice Reed's majority opinion in *Adamson v. California*[190] was willing to assume *arguendo* an expansive interpretation of the fifth amendment protection against self-incrimination when the right did not apply against the states.[191] In contrast, Justice Reed's plurality opinion in *Louisiana ex rel. Francis v. Resweber*,[192] decided just months before *Adamson*, assumed that the eighth amendment's proscription against cruel and unusual punishment applied to the states[193] but concluded that the death penalty (even a second attempt after a failed electrocution) did not constitute cruel and unusual punishment.[194]

Thus, the application of Bill of Rights' protections against the states through selective incorporation raises questions about whether and to what extent federalism concerns have con-

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188. Justice Black viewed "selective incorporation" as still better and more objective than the *Palko* "natural rights" approach. *Adamson*, 332 U.S. at 89. *See also* Duncan v. Louisiana, 391 U.S. 145, 171 (1968)(Black, J., concurring).

189. *See generally* R. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS (1981); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Israel, *Foreward: Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

190. 332 U.S. 46 (1947).

191. *Id.* at 50. *See also id.* at 69 (Black, J., dissenting).

192. 329 U.S. 459 (1947).

193. *Id.* at 462. As two commentators recently noted, the holding in *Francis* was predicted largely on federalism concerns. Miller and Bowman, *Slow Dance on the Killing Grounds: The Willie Francis Case Revisited*, 32 DE PAUL L. REV. 1 (1983). According to recently available correspondence, Justice Frankfurter, who cast the deciding swing vote, stated in his private correspondence that his sole reason for voting to uphold Louisiana's actions was "the disciplined thinking of a lifetime regarding the duty of the Court in putting limitations upon the power of a state. . . ." *Id.* at 23-4.

194. *Id.* at 463-64. In Twining v. New Jersey, 211 U.S. 78, 114 (1908), the Court also engaged in this "assumption without deciding" technique of reasoning. For a criticism of his approach, see Justice Harlan's dissenting opinion in *Twining*, 211 U.S. at 114-116 (Harlan, J., dissenting). *See also* Palko v. Connecticut, 302 U.S. 319, 322-23 (1937)(assuming content of fifth amendment double jeopardy); Rummel v. Estelle, 445 U.S. 263, 277 n.13 (1980)(tracing cases assuming states could not inflict cruel and unusual punishments).

strained the Court's development of such constitutional protections. Could Justice Reed's assumption about the eighth amendment's application to the states have caused the Court to limit the scope of that right? Is it not possible that the content of constitutional rights could be diluted when applied against the states? Would the result in *Francis* have been the same if it involved federal rather than state officials? Although the answers to such questions are unknowable, these questions nevertheless illustrate how federalism concerns may cause the court to limit the scope of federal constitutional rights when applied against the states. Further, these questions suggest reasons why state courts should not accord such decisions presumptive validity for state constitutional interpretation.

From the beginning of this century-long process of determining the federal constitutional limits on state activity, the Supreme Court has frequently expressed concern for the perogatives of the sovereign states. In 1908, Mr. Justice Moody cautioned in *Twining v. New Jersey*:[195] "But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union."[196]

During the incorporation debate, the possibility that the scope of constitutional rights could be different in their direct application against the federal government than in their indirect application against the states was clearly recognized.[197] This was even more likely to occur under Justice Cardozo's approach in *Palko v. Connecticut*.[198] Under the *Palko* approach, certain protections in the Bill of Rights were enforced against the states by a "process of absorption"[199] into the fourteenth amendment's due process clause. These rights were absorbed not because they were contained in the Bill of Rights,[200] but because they were

195. 211 U.S. 78 (1908).

196. *Id.* at 92.

197. *See generally* Henkin, *supra* note 189.

198. 302 U.S. 319 (1937). Justice Brennan attempted to dispel this possibility in Malloy v. Hogan, 378 U.S. 1, 10 (1964), and Eaton v. Price, 364 U.S. 263, 275 (1960). *See also* Brennan, *supra* note 183, at 777.

199. 302 U.S. at 326.

200. *Id.* at 325, 327.

"implicit in the concept of ordered liberty."[201]

Justice Harlan consistently warned that incorporation of Bill of Rights' provisions into the fourteenth amendment's protections against certain state actions not only violated state sovereignty, but would also dilute the substantive content of these rights as against the federal government.[202] When the Court held in *Duncan v. Louisiana*[203] that "the fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the sixth amendment's guarantee,"[204] Justice Harlan dissented, expressing concern that "provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity."[205] In his view, this happened two years later in *Williams v. Florida*,[206] when the Court held that states were not required to employ twelve-person juries.

> The internal logic of the selective incorporation doctrine cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal bill of rights and recogniz-

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201. *Id.* at 325. For a further exposition of the difference between incorporation of specific Bill of Rights' protections into the fourteenth amendment and absorption of protections in the due process notion of "immunities . . . implicit in the concept of ordered liberty," see Justice Frankfurter's concurring opinion in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466-72 (1947), and Brennan, *supra* note 183, at 769. In determining what was required under the *Palko* "ordered liberty approach," Justice Frankfurter warned that "great tolerance toward a State's conduct is demanded of this Court." 329 U.S. at 470 (citing Malinski v. New York, 324 U.S. 401, 438 (1945)).

202. In 1963 Justice Harlan cautioned that "if the court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in derogation of the law enforcement standards in the federal system—unless the Fourth Amendment is to mean one thing for the States and something else for the Federal Government." Ker v. California, 374 U.S. 23, 45-46 (1963). *See also* Benton v. Maryland, 395 U.S. 784, 808 (1969)(Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14-15, 27-28 (1964)(Harlan, J., dissenting); Aguilar v. Texas, 378 U.S. 108, 116 (1964)(Harlan, J., concurring). *See generally* Welsh, *supra* note 12; Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

203. 391 U.S. 145 (1968).

204. *Id.* at 149.

205. *Id.* at 182 n.21. When the Court considered whether to apply *Duncan v. Louisiana* retroactively, the states asserted reliance on past cases holding that the sixth amendment right to jury trial did not apply to the states. This argument influenced the Court's decision not to apply *Duncan* retroactively. DeStefano v. Woods, 392 U.S. 631, 634 (1968). *See also* Tehan v. U.S. *ex rel.* Shott, 382 U.S. 406, 417 (1966)(declining to apply retroactively Griffin v. California, 380 U.S. 609 (1965)).

206. 399 U.S. 78 (1970).

> ing the governmental diversity that exists in this country.[207]
> . . . .
> Today's decisions demonstrate a constitutional schizophrenia born of the need to cope with national diversity under the constraints of the incorporation doctrine. . . . The . . . rule of today's decisions simply reflects the lowest common denominator in the scope and function of the right to trial by jury in this country.[208]

The Supreme Court's 1972 decision in *Apodaca v. Oregon*,[209] approving non-unanimous jury verdicts, seems to provide further evidence of the "constitutional schizophrenia" of which Justice Harlan warned. Indeed, Justice Powell recognized this fact in his concurring opinion.[210] But other members of the Court steadfastly denied that incorporation would dilute the substantive content of any federal constitutional right applied against the federal government.[211] At least three members of the current Court, however, have expressed the view that constitutional guarantees against government action can be more stringent when applied to federal rather than state action.[212]

The preceding discussion was not intended to prove that incorporation has diluted all Bill of Rights' protections, nor to suggest that counsel and state courts search Supreme Court opinions for evidence of such dilution.[213] Persons who believe the Supreme Court has gone too far in applying constitutional rights against the states would give little credence to this dilution the-

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207. *Id.* at 129 (Harlan, J., dissenting).

208. *Id.* at 136 (Harlan, J., dissenting).

209. 406 U.S. 404 (1972).

210. 406 U.S. 356, 375 (1972)(Powell, J., concurring)(observing that the incorporation doctrine had contributed to the "dilution of federal rights").

211. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 106-07 (1970)(Black J., concurring in part and dissenting in part); *id.* at 116-17 (Marshall, J., dissenting in part); Benton v. Maryland, 395 U.S. 784, 794-95 (1969); Pointer v. Texas, 380 U.S. 400, 406 (1965); *Id.* at 413 (Goldberg, J., concurring); Malloy v. Hogan, 378 U.S. 1, 10-11 (1964).

212. Crist v. Bretz, 437 U.S. 28, 39-40 (1978)(Burger, C.J., dissenting); *id.* at 52-53 (Powell, J., dissenting); Ballew v. Georgia, 435 U.S. 223, 246 (1978)(Powell, J., concurring); Ludwig v. Massachusetts, 427 U.S. 618, 632 (1976)(Powell, J., concurring); Buckley v. Valeo, 424 U.S. 1, 291 (1976)(Rehnquist, J., concurring in part and dissenting in part); Johnson v. Louisiana, 406 U.S. 356, 369-77 (1972)(Powell, J., concurring).

213. Of course, there are cases, such as San Antonio Indep. School Dist. v. Rodriquez, 401 U.S. 1, 44 (1973), which expressly contain federalism concerns. The Supreme Court's 1976 death penalty decisions also contain such express references. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 176, 179, 186-87 (1976).

ory. Those persons use federalism arguments to criticize Supreme Court decisions recognizing federal constitutional rights against the states and to criticize commentators who support such decisions.[214] On the other hand, persons who support Supreme Court constitutional interpretations recognizing rights against state action usually do not acknowledge the federalism concerns discussed here. It simply cannot be denied, however, that questions surrounding the scope of constitutional rights[215] asserted against state governments are inextricably intertwined with the structural issue of whether those rights apply against the states.

Even after the Supreme Court decides to apply a constitutional right against the states, the fact that such federal constitutional interpretations apply a uniform national mandate to a diverse group of state governments further influences the Court's constitutional analysis.[216] State courts must always consider this structural factor, roughly referred to as "federalism concerns," when considering a state constitutional challenge (previously rejected by the Supreme Court as a federal constitutional challenge) because state courts, by definition, are not subject to the same federalism concerns.[217] Also, state courts must remember that independent state constitutional analysis is unnecessary when the Supreme Court interprets the federal constitution expansively.[218] It is only when the Supreme Court declines to recognize asserted federal constitutional rights that state courts are called upon to interpret their constitutions independently. In this ensuing "second look," state courts should always suspect federalism concerns, whether expressed or not, as a contributing factor to the Supreme Court's decision against the

214. *See, e.g.*, Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 OHIO ST. L.J. 209 (1981).

215. This is true regardless of how the constitutional interpretation is approached. *See generally Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

216. *See supra* notes 202-211 and accompanying text.

217. *See generally* Howard, *supra* note 65, at 941. Several state courts have recognized the absence of federalism concerns in rendering interpretations of state constitutions that reject Supreme Court results under the federal constitution. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 766 n.46, 557 P.2d 929, 951 n.46, 135 Cal. Rptr. 345, 367 n.46 (1977); State v. Sanders, 75 N.J. 200, 216-17, 381 A.2d 333, 341 (1977); Robinson v. Cahill, 62 N.J. 473, 490-91, 303 A.2d 273, 281-82 (1973).

218. This is because litigants usually assert federal constitutional challenges first. *See supra* notes 34, 119.

asserted federal constitutional right.[219] For these reasons, Supreme Court interpretations of the federal constitution as applied against the states should not be viewed as presumptively valid precedent for state constitutional analysis.

C. *The Position and Function of the State Judiciary*

The typical state court system occupies a different institutional position and performs a different judicial function from its federal counterpart. The typical state constitution also differs from its federal counterpart in many ways. Consequently, state court judicial revew of state statutes or executive actions is or should be qualitatively different from the Supreme Court's judicial review of the same statutes or actions. These differences between the state and federal judicial systems and their respective constitutions make presumptive validity of Supreme Court federal constitutional interpretations particularly inappropriate for state constitutional analysis.

First, the typical state court's institutional position in the state system is different from the Supreme Court's position in the federal system. That is, the relationship between state supreme courts and state legislatures is fundamentally different from the Supreme Court's relationship to Congress. Beginning soon after independence, the balance of power between state legislatures and judiciaries has been gradually shifting, increasing judicial authority at the expense of legislative authority.[220] In fact, the legislative article of most state constitutions contains many procedural and substantive restrictions on the legislature's once unrestricted, plenary authority.[221] The original state constitutions did not include these restrictions, but they were later ad-

219. It has been reported that at least one member of the current Surpeme Court, Justice Rehnquist, does not believe in incorporating the Bill of Rights into the fourteenth amendment. Fiss and Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, March 10, 1982, at 14 (quoted in Note, *The Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434, 436 n.18 (1982)). *See also* Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982). Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 302 (1976)(noting "a kind of 'natural law' of states' rights" in Justice Rehnquist's opinions). *See also* O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

220. Williams, *supra* note 2, at 201-02.

221. *Id.*

ded in response to perceived abuses of state legislative authority. Most of these restrictions are enforceable by state courts.[222]

Also, state courts quite obviously occupy a stronger position vis-a-vis the state legislative and executive branches than does the United States Supreme Court. This is not to discount the judicial deference to which state legislative and executive actions are entitled,[223] but to highlight the extra measure of deference, based upon federalism and other institutional concerns, which the Supreme Court accords to state legislative and executive action.[224]

Further, state court decisions directly affect only the state in which they are rendered. Judges and commentators often note this fact in support of the idea of states as "laboratories"; in other words, ill-advised experiments will affect only the citizens of the experimenting state. By the same token, however, state courts are now limiting the effect of Supreme Court decisions rejecting federal constitutional challenges by rendering independent state constitutional interpretations.[225] For all these reasons, state courts are often deeply involved in the state's ongoing policymaking process (constitutional and nonconstitutional).[226] Although the extent of this involvement may vary

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222. Some state courts have determined that certain procedural restrictions on state legislation contained in state constitutions are not judicially enforceable. *See generally* Dodd, *Judicial Non-Enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54 (1931); Grant, *Judicial Control of Legislative Procedure in California*, 1 STAN. L. REV. 429 (1949); Note, *Judicial Review of the Legislation Process of Enactment: An Assessment Following* Childers v. Coney, 30 ALA. L. REV. 495 (1979); Note, *Pennsylvania Enrolled Bill Rule: A Reappraisal in Light of HB1413 and* Velasquez v. Depuy, 75 DICK. L. REV. 123 (1970).

223. *See generally* Barrett, *supra* note 14; Singer, *supra* note 18; Wright, *supra* note 87.

224. *See, e.g.*, State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 267-68, 448 A.2d 791, 794-95 (1982).

225. In discussing state court jurisdiction to interpret federal law, Professor Cover has noted: "If there were a unitary source of norm articulation over a given domain, the costs of error or lack of wisdom in any norm articulation would be suffered throughout the domain." Cover, *supra* note 57, at 673.

226. H. GLICK, SUPREME COURTS IN STATE POLITICS 5 (1971): "State supreme courts are not simply duplications of the national court at a lower level of the judicial hierarchy. Instead, they are distinctive institutions which are integral parts of state political and legal systems." *See also* H. JACOB & K. VINES, POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 246 (3d ed. 1976)("[I]t becomes apparent that the state courts make significant policies in many of the same substantive areas as the other organs of government.").

from state to state,[227] such judicial involvement nevertheless reflects a very different institutional position from that occupied by the United States Supreme Court.

Second, the typical state court's judicial function is different from the Supreme Court's. For example, state courts have traditionally performed much nonconstitutional lawmaking. As Justice Linde observed:

> When a state court alters the law of products liability, abolishes sovereign or charitable tort immunity, redefines the insanity defense, or restricts the range of self-exculpation in contracts of adhesion, its action is rarely attacked as "undemocratic." Nor is this judicial role peculiar to matters of common law subject to legislative reversal. The accepted dominance of courts in state law extends to their "anti-majoritarian" role in review of their coordinate political branches in state and local governments.[228]

Federal courts have been denied this general[229] lawmaking power since 1938.[230]

Most state supreme courts promulgate law through rulemaking powers.[231] They also exercise various "inherent powers," usually at the expense of the legislative branch.[232] Once thought to be legislative in nature, these powers have devolved upon state judiciaries during this century.

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227. *Id.* at 151; H. GLICK & K. VINES, STATE COURT SYSTEMS (1973); M. PORTER & G. TARR, *supra* note 90 (The latter book contains an exhaustive and up-to-date bibliographical essay on state supreme courts by G. Alan Tarr.). *Compare* R. LEHNE, THE QUEST FOR JUSTICE (1978)(describing the New Jersey Supreme Court) *with* T. MORRIS, THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLICY ANALYSIS (1975); Porter and Tarr, *The New Judicial Federalism, and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO STATE L.J. 143 (1984).

228. Linde, *supra* note 22, at 248. *See also* Baum and Canon, *State Supreme Courts as Activists: New Doctrines in the Law of Torts*, in M. PORTER & G. TARR, *supra* note 90, at 83. The "legitimacy" of such common-law decisions is sometimes attacked as invading the province of the legislature. *See generally* Bischoff, *The Dynamics of Tort Law: Court or Legislature?* 4 VT. L. REV. 35 (1979).

State Supreme Courts also pursue policy initiatives outside their formal judicial role in the adversary process, including direct and indirect contact with legislators. *See* Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 LAW & SOC. REV. 271 (1970).

229. As to remaining areas of "federal common law," see Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

230. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

231. Williams, *supra* note 2, at 208-09.

232. *Id.* at 211-12.

State supreme courts do not face the same overwhelming caseload pressures and jurisdictional restrictions as does the United States Supreme Court. Some state courts even have "reach down" provisions,[233] enabling them to obtain jurisdiction quickly over state constitutional conflicts requiring early resolution. Therefore, state courts are able to approach state constitutional analysis on a narrower, more incremental basis[234] than the Supreme Court, which labors under intense pressure for broader, more sweeping pronouncements.

Further, state courts may be viewed as closer to state affairs and more accountable[235] than federal courts. Standing and justiciability barriers are usually lower at the state level.[236] And in certain areas, such as criminal procedure, state trial judges are more experienced than federal judges in the problems of administering Supreme Court formulations on a daily basis. Many state judges now view their roles as sometimes requiring controversial constitutional rulings.[237]

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233. *See, e.g.*, England, Hunter and Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147, 193-96 (1980); England and Williams, *Florida Appellate Reform One Year Later*, 9 FLA. ST. U.L. REV. 221, 250-53 (1981).

234. *Cf.* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 778-79 (1971).

235. *See Developments in the Law, supra* note 2, at 1351. *See also* Ladinsky and Silver, *Popular Democracy and Judicial Independence*, 1967 WIS. L. REV. 128; Moser, *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 MARQ. L. REV. 1 (1982)(tracing various methods of ensuring judicial accountability); *But see* Canon, *The Impact of Formal Selection on the Characteristics of Judges Reconsidered*, 6 LAW & SOC'Y REV. 591 (1972)(citing lack of difference between elected and appointed judges); Flango and Ducat, *What Difference Does Method of Judicial Selection Make: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25 (1979)(same).

In 1808 two Ohio judges were impeached apparently because they held a legislative act unconstitutional. *See* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 193 n.3 (6th ed. 1890).

236. Linde, *supra* note 22, at 248; Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1400-02 (1978).

237. Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 791 (1981). *See also* Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 159 n.8 (1981). *But see* Karst, Book Review, 28 STAN. L. REV. 829, 834-35 (1976)(correlating the method of judicial selection with state constitutional activism).

A recent study concluded that state supreme court justices "have come to view their

Third, state constitutional rights may differ qualitatively from federal constitutional rights. Some state constitutions, for example, grant or are judicially interpreted to provide citizens with certain affirmative rights.[238] These rights may require different and more aggressive judicial enforcement than is necessary in federal constitutional law, which is concerned primarily with limiting governmental power.[239]

Also, the text of a state constitution may provide for state judicial review of legislative and executive action.[240] This is certainly true with respect to state supreme courts' advisory opinions.[241] In fact, judicial review itself was a phenomenon of state law before *Marbury v. Madison*.[242] And contrary to the federal experience, most judiciary provisions of state constitutions have been revised and ratified in this century without a serious struggle over the exercise of judicial review.

State constitutions are generally longer and more detailed than their federal counterpart. Many state constitutions directly regulate or restrict state government activities. The state constitution is a document that primarily limits the legislature.[243] State courts interpreting state constitutions are therefore thrust more deeply, and more often, into the affairs of the coordinate branches of government[244] than is the Supreme Court.

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role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change." Kagan, Cartwright, Freidman and Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 155 (1977).

238. Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 240-43, 635 P.2d 108, 114-15 (1981).

239. Handler, *supra* note 164, at 205 (citing Right to Choose v. Byrne, 91 N.J. at 331-32, 450 A.2d at 948-49 (Pashman, J., concurring in part and dissenting in part)). *See also Alderwood Assocs.*, 96 Wash. 2d at 240, 635 P.2d at 114.

240. *See, e.g.*, Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief* for Violations of Rights, 10 U. BALT. L. REV. 102, 107-11 (1980); ILL. CONST. art. IV § 13 (1970)(whether a special act of the legislature is or could be governed by general law is a judicial question).

241. *See generally* Williams, *supra* note 2, at 212-13; Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

242. 5 U.S. (1 Cranch) 137 (1803). *See generally* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972).

243. Williams, *supra* note 2, at 178-79.

244. *See generally* Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

State judicial review, therefore, is not simply a miniature replication of Supreme Court judicial review. Federal judicial review since *Marbury*[245] takes place in a unique institutional setting. The "rediscovery" of state constitutional protections of civil liberties after a generation of "federalized" civil rights law is relatively recent. Thus, viewing Supreme Court interpretations of cognate federal constitutional provisions as presumptively valid for state constitutional analysis denigrates the importance of state constitutional jurisprudence. Any attempt to limit independent state constitutional interpretation in these "second look" cases to only those cases fitting categorical formulations, or meeting certain criteria, further frustrates state constitutional processes.[246] This attempt, after less than a decade of experience with truly independent state constitutional interpretation, will stifle creative, state-specific constitutional jurisprudence in cases where none of the listed factors are present. In fact, the formulation of criteria in New Jersey for disagreement with the Supreme Court may have already had this effect.[247]

IV. CONCLUSION

The United States Supreme Court does not have a monopoly on correct constitutional interpretation. This fact is a cornerstone of federalism, justifying substantive disagreement by state courts. Although factors such as textual differences between the federal and state constitutions can certainly contribute to a state court's reasoning, the presence of these factors should not be viewed as a necessary condition precedent to independent analysis, under state constitutions, of claims rejected by the United States Supreme Court.

The Pennsylvania Commonwealth Court, in its abortion financing case, noted: "*Harris v. McRae*, as the decision of the

245. *See supra* note 242 and accompanying text. Of course, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), invalidated a federal, not a state, statute. But the Marshall Court soon invalidated state laws in cases such as Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). *See generally* J. NOWAK, R. ROTUNDA, & N. YOUNG, CONSTITUTIONAL LAW 15-21 (2d ed. 1983).

246. *Cf.* Kelman, *supra* note 55, at 414-15.

247. *See, e.g.*, State v. Bass, 189 N.J. Super. 445, 459-61, 460 A.2d 214, 222 (Law Div. 1983). *See supra* note 47 and accompanying text.

highest court of a sister jurisdiction in which was resolved many of the issues here raised, can afford this Court no more and no less than helpful guidance."[248] It is submitted that as a matter of persuasive authority in state constitutional interpretation, Supreme Court interpretations of similar or identical federal constitutional provisions are entitled to *less* weight than decisions of sister state jurisdictions.[249] Horizontal federalism, or reliance upon decisions of other states, should be more persuasive. The Supreme Court, and the Constitution it interprets, differ in too many ways from state courts and state constitutions for that Court's decisions to carry presumptive weight in state constitutional analysis.[250]

The new state constitutional civil liberties movement has struggled to move beyond process issues. Should state courts disagree with the Supreme Court? If they do disagree, will their decisions be insulated from Supreme Court review? How does their analysis compare with the Supreme Court's? These questions illustrate the dominance of the federal constitutional law point of view, and more specifically, Supreme Court decisions, in present thought about constitutional law.[251] State constitutional law questions continue to be filtered almost exclusively through the federal constitutional law perspective. That a state court disagrees with the Supreme Court still seems more important than the evolving state constitutional jurisprudence.

A state court may certainly be justified in declining requested relief in a suit raising state constitutional challenges. Such a result, however, should be based upon state constitu-

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248. Fischer v. Department of Pub. Welfare, 66 PA. COMM. 70, 84, 444 A.2d 774, 781 (1982). *See also* State v. Kaluua, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974) (same). An early commentator made the same point. *See* Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 283-84 (1973).

249. *See supra* notes 90-91 and accompanying text.

250. The Supreme Court occasionally even relies on state constitutional interpretaitons in elaborating the federal constitution. *See, e.g.*, Perry v. Louisiana, 103 S. Ct. 2438 (1983)(Stevens, J., concurring in denial of certiorari); Williams, *supra* note 2, at 189 n.87.

In fact, Roe v. Wade, 410 U.S. 113 (1973), cited with approval California's earlier ruling on the right to abortion under the California Constitution, People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). *Cf.* Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal protection Review*, 17 GA. L. REV. 77 (1982)(fundamental state constitutional rights should trigger federal equal protection scrutiny).

251. Williams, *supra* note 2, at 228 n.275.

tional analysis and not upon misplaced reliance upon Supreme Court federal constitutional interpretations. The latter approach constitutes an unwarranted delegation of state power to the Supreme Court and a resultant abdication of state judicial responsibility.[252] By the same token, state court dissenters remain free to criticize the majority's reasoning and result, but they should not blindly advocate allegiance to Supreme Court interpretations of a different Constitution.

252. As Justice Linde recently observed:

> The point is not that a state's constitutional guarantees are more or less protective in particular applications, but that they were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case-law both in method and in specifics. State courts cannot abdicate their responsiblity for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

State v. Kennedy, 295 Or. 260, ___, 666 P.2d 1316, 1323 (1983). *See also* "Judicial Product," 69 A.B.A.J. 1356 (1983). *See generally* Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).