State Constitutions, Freedom of Expression, and Search and Seizure: Prospects for State Court Reincarnation

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This article examines the decisions of ten state high courts in the areas of access to private property for expressive purposes and exclusion of the fruits of illegal searches and seizures. The analysis centers on two questions. First, are some states relying on their own constitutions to resolve individual rights issues while others continue to follow the United States Supreme Court's interpretation of the federal Constitution? Second, have the states that do rely on their own constitutions to resolve individual rights issues developed an independently based state constitutional jurisprudence, or have they simply attempted to circumvent decisions of the Burger Court? The authors find little evidence that the state high courts examined here have begun, as yet, to develop an independent approach to state constitutional analysis.

In 1977 Justice William J. Brennan invited state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[1] He encouraged state courts to rely on the provisions of their own constitutions to provide more protection for individual rights than are offered by parallel provisions in the United States Constitution. Brennan's remarks seemed to signal the end of an era dominated by the United States Supreme Court.

The rediscovery of state constitutional rights law may be largely a response to the Burger Court's retrenchment from the Supreme Court's activism of the 1960s. Nonetheless, it should be remembered that the renewed emphasis on state constitutional law represents a return to the original understanding

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[1]William H. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90 (January 1977): 503.

of the relationship between the federal government and the states.[2]

Much of the enthusiasm about state constitutional law appears to be result-oriented. Ronald K. L. Collins has condemned the "reactionary" approach to state constitutional law:

> [T]oo many courts and commentators have brushed aside many of the core considerations that underlie constitutionalism at the state level—this in their scurry to foil philosophically unaccommodating federal precedents. . . . For them, the state bill of rights is little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions.[3]

Collins asserted that state courts should cease to use state constitutions merely to achieve particular objectives; instead, state courts should develop an independently based state constitutional jurisprudence that would reflect genuine concerns of federalism and principled decisionmaking.

This study of state constitutionalism addresses two questions. First, it seeks to determine whether state court "reincarnation" is a nationwide trend as opposed to a vehicle used by some states to avoid unpopular decisions of the U.S. Supreme Court. Second, it seeks to determine whether the states that do rely on their own constitutions to resolve individual rights issues have developed an independently based state constitutional jurisprudence or whether they have simply taken a "reactionary" approach in order to avoid decisions of the Burger Court.

In order to answer these questions, we have examined the decisions of ten state high courts in two areas: access to private property for expressive purposes and exclusion of the fruits of illegal searches and seizures.[4] These two areas were chosen because the U.S. Supreme Court has rendered restrictive decisions in each area and has consequently given state courts the opportunity to use their own constitutions to provide greater protection of the rights involved in each of these areas. More specifically, the Supreme Court has ruled that the First Amendment does not guarantee freedom of expression on private property. Several state high court decisions, however, have recognized such a state constitutionally based right. Also, the Supreme Court,

[2]Justice Shirley Abrahamson of the Wisconsin Supreme Court has characterized the revival of state constitutional law as the "reincarnation" of state courts because, as she has said, she wishes to conjure up an image of the old concepts of states' rights and individual rights returning to the earth in new forms. "Reincarnation of State Courts," *Southwestern Law Journal* 36 (November 1982): 951.

[3]Ronald K. L. Collins, "Reliance on State Constitutions—Away From a Reactionary Approach," *Hastings Constitutional Law Quarterly* 9 (1981): 2.

[4]We did not restrict our analysis of state high court decisions to a particular time period. The cases examined in the area of freedom of speech on private property are those that were decided after the U.S. Supreme Court retreated from protecting individual rights claimants in that area. The exclusionary rule cases, on the other hand, take as their point of reference the key U.S. Supreme Court cases establishing the rule (*Weeks* v. *U.S.* and *Mapp* v. *Ohio*). Nevertheless, the emphasis is on the cases that have been decided by state high courts since the Burger Court has retreated from protecting rights claimants. The study includes cases decided through May 1985.

during the last fifteen years, has narrowed the application of the exclusionary rule while some state high courts have extended the rule.

Five of the states included in the study were chosen because they have acquired a reputation for relying on their own constitutions to protect individual rights. These states, labeled "activist" states, were California, New Jersey, Wisconsin, Oregon, and Washington. The remaining five states, Alabama, Texas, Virginia, Georgia, and Kansas,[5] labeled "non-activist" states, were chosen on the basis of geographical location, political culture,[6] and other sociopolitical factors.

STATE CONSTITUTIONALISM: AN OVERVIEW

State high courts may not interpret provisions of the federal Constitution differently from the U.S. Supreme Court. Furthermore, the states may not provide less protection than that required by the federal Constitution as interpreted by the U.S. Supreme Court. State courts in this situation would have to rely on federal decisions. State courts may, however, rely on their own state constitution in order to provide protection for individual rights above and beyond the federal requirements. Under the doctrine that the U.S. Supreme Court does not review judgments of state courts that rest on adequate and independent state grounds, such decisions are immune from review by the Supreme Court.[7]

There are three identifiable approaches to state constitutional decision-making: the primacy approach, the dual state-federal approach, and the supplemental approach. If a state court uses the primacy approach, it will look initially to the state constitution and will resort to the U.S. Constitution only after all claims resting on state law have failed to provide the requested

[5]Alabama is a southern state with a traditionalistic political culture and a significant minority population. Texas is a state whose political culture is characterized as traditionalistic-individualistic, and which has a racially diverse population. Virginia is another traditionalistic state—one of the original thirteen states, and one whose constitution closely resembles the federal constitution. Georgia, also traditionalistic, has a large urban and cosmopolitan area and a new constitution, which was ratified in 1982. Finally, Kansas, which was included because it is a midwestern state with both rural and large urban areas and is considered to be typical of "middle America," is the only state in the "non-activist" group that is not traditionalistic but instead moralistic-individualistic.

It is interesting to note that, although the five "activist" states were not chosen for this study on the basis of their political culture, four of these states (California, Washington, Oregon, Wisconsin) are categorized by Daniel J. Elazar as moralistic, while New Jersey's political culture is individualistic. Thus, the "activist" and "non-activist" states differ in their political culture. With the exception of Kansas, all of the "non-activist" states are traditionalistic while four of the five "activist" states are moralistic. For a complete explanation of state political cultures, see Daniel J. Elazar, *American Federalism: A View from the States* (3rd ed.; New York: Harper and Row, 1984), p. 109. See also Ronald K. L. Collins, Peter J. Galie, and John Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey," *Publius: The Journal of Federalism* 16 (Summer 1986): 141–162.

[6]Elazar defined political culture for the purposes of the study of federalism as "the particular pattern of orientation to political action in which each political system is embedded"; Elazar, *American Federalism*, p. 85.

[7]*Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945).

protections. The primacy approach assumes that state constitutions are the basic charters of individual liberties and of the limits of governmental authority.[8] With the dual approach, a court addresses the state and federal constitutions and bases its decisions on both. Finally, if a state court uses the supplemental approach, it will consider the U.S. Constitution first. If the challenged restraint is found valid or uncertain under that Constitution, the state court will then resort to the state constitution.

When a court uses the primacy approach and examines its state law first, there is no need to justify a departure from U.S. Supreme Court decisions. When a court uses the supplemental approach, however, it looks to federal constitutional principles first, and only if it finds them inappropriate, does it then resort to state constitutional analysis. With the supplemental approach, the state court needs to justify its departure from federal precedent. Such a justification may be based on perceived flaws or eccentricities in the federal doctrine which suggest that the doctrine should not be carried over intact into state law. Alternately, the court may see general institutional differences between the state government and its federal counterpart which suggest that constraints on the federal doctrine might be less relevant on the state plane. Finally, the state court may find distinctive state-specific factors which suggest that state constitutional doctrine should differ from the doctrines of the federal system and of other states.[9] A state court's use of the supplemental approach may be either reactive, in which case it merely responds to, criticizes, and/or amends the relevant federal doctrine, or it may be self-reliant and construct an original state doctrine that is independent of federal analysis.[10]

Where state courts have turned to their own constitutions, we have examined the approach that each state has adopted—the primacy, the dual, or the supplemental. We have also attempted to assess the extent to which state high courts have been reactive or self-reliant. We hope that this method of analysis will enable us to answer the question of whether the re-emergence of state constitutionalism is more than result-oriented.

FREEDOM OF EXPRESSION ON PRIVATE PROPERTY

The U.S. Supreme Court has ruled that because the First Amendment provides a guarantee only against governmental infringement of free speech, it does not guarantee the right of freedom of expression in privately owned shopping centers.[11] The supreme courts of three of the five "activist" states,

[8]See, for example, Hans A. Linde, "First Things First: Rediscovering the States' Bills of Rights," *University of Baltimore Law Review*" 9 (1980): 379–396 and "E Pluribus—Constitutional Theory and State Courts," *Georgia Law Review* 18 (1984): 165–200. See also, Collins, "Reliance on State Constitutions," 1–18.

[9]Note, "The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (April 1982): 1359.

[10]For a complete explanation of the supplemental approach and the self-reliant and reactive positions see, ibid., 1356–1366.

[11]*Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972) and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

however, have construed the free speech provisions of their own constitutions as protecting expressive activities on privately owned property.

The Activist States

In 1979 the Supreme Court of California held that the California Constitution protects the right to petition in shopping centers.[12] The court asserted that the U.S. Supreme Court's decisions do not preclude the state court from ruling that the California Constitution creates broader speech rights as to private property than does the U.S. Constitution.[13] The court first examined the U.S. Supreme Court's rulings in order to determine whether the Court had established a federally protected property right that was immune from state regulation. The Supreme Court of California found not only that the federal case law did not establish such a property right but also that property rights may be regulated in the interests of society. Moreover, the growing importance of shopping centers made such regulation imperative if free speech rights were to be protected. The court next examined the state case law and concluded that the California Constitution guarantees the right to gather signatures at shopping centers.

The California court's initial consideration of whether the U.S. Supreme Court's decisions precluded expansion of state constitutional rights in the shopping center context makes its use of the supplemental approach readily apparent. The court's use of that approach also is revealed in the statement that: "The duty of this court is to help determine what liberty of speech means in California. Federal principles are relevant but not conclusive so long as federal rights are protected."[14]

In New Jersey the issue of freedom of expression on privately owned property arose in the context of the right of a non-student to distribute political material on the campus of Princeton University.[15] Justice Alan B. Handler, writing for the majority, examined the federal case law and considered the

[12]Article I, Section 2 of the California Constitution provides: "Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press." Article I, Section 3 provides in part: "[P]eople have the right to . . . petition government for redress of grievances." It has been pointed out that "the free speech guarantees in forty-three other state constitutions are linguistically similar to the California guarantee, notably in their provision of an affirmative right rather than simply a restraint on state action." Note, "Private Abridgment of Speech and the State Constitutions," *Yale Law Journal* 90 (November 1980): 180–181, note 79.

[13]*Robins* v. *Pruneyard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341 (1979).

[14]23 Cal.3d 899, 908, 592 P.2d 341, 346. The Supreme Court of California also used the supplemental approach in the context of abortion funding and the constitutional protection of the right to privacy. Chief Justice Rose Bird, in a concurring opinion, stated: "California citizens' basic right of privacy has never been dependent upon federal recognition of a similar right. Therefore, this court is not obligated to limit our citizens' rights simply because the federal courts have decided to change direction. When the federal courts radically depart from *Roe* and its progeny, it is this court's duty to examine the state's constitutional requirements in order to decide if such a change is permissible." *Committee to Defend Reproductive Rights* v. *Myers*, 29 Cal.3d 252, 625 P.2d 779 (1981).

[15]*State* v. *Schmid*, 84 N.J. 535, 535, 423 A.2d 615 (1980).

propriety of applying it to the facts of the Princeton case. After determining that there were too many "crosscurrents of policy," he turned to the state constitution.[16] Noting that the language of the state constitution is broader than that of the First Amendment, he asserted that even if the state and federal provisions were identical, the state court could give different interpretations to its own constitutional provisions.[17] The state constitution, Handler found, protects free speech against infringement by private persons as well as against governmental bodies. Consequently, factors other than state involvement should determine the extent of speech and assembly rights on privately owned property.

Handler formulated a state constitutional test that must take into account the nature, purposes, and primary use of private property; the extent and nature of the public's invitation to use that property; and the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.[18] When he applied those factors to the issue of free speech on the Princeton campus, Handler considered the university regulations which stated that freedom of speech and peaceable assembly are basic requirements of the university "as a center for free inquiry and the search for knowledge and insight." Handler then concluded that the use of the campus by a non-student was clearly consonant with wide and continuous exchange of opinions. In short, expressive activities did not conflict with the normal uses of the campus; hence, free speech prevailed over the rights of private property. The New Jersey Supreme Court's use of the supplemental approach is evidenced by its initial consideration and subsequent rejection of the relevant federal case law.[19]

In 1981 the Supreme Court of Washington also used the supplemental approach to reach a decision that soliciting signatures and demonstrating in a shopping center is protected by the Washington Constitution.[20] Writing for the majority, Justice Robert F. Utter referred first to U.S. Supreme Court rulings, particularly the Court's decision that upheld California's ruling in favor of the right to petition in shopping centers. He then asserted that "individuals . . . are entitled to speak or petition in privately owned centers if state law confers such a right and if its exercise does not unreasonably interfere with constitutional rights of the owner."[21] He stressed the impor-

[16]The free speech provision in the New Jersey Constitution (Article 1, Section 6) is identical to California's.

[17]Justice Handler quoted California's Stanley Mosk: "It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *People* v. *Brisendine*, 13 Cal.3d 528, 531 P.2d 1099, 1113, quoted at 423 A.2d 615, 626, n. 8.

[18]84 N.J. 535, 563.

[19]See also, the discussion of *State* v. *Hunt*, 91 N.J. 338, 450 A.2d 952 (1982), *infra*, pp. 21–22.

[20]Article I, Section 3 of the Washington Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

[21]*Alderwood Associates* v. *Washington Environmental Council*, 96 Wash.2d 230, 635 P.2d 108, 112.

tance of state constitutional analysis:

> When a state court neglects its duty to evaluate and apply its state constitution, it deprives the people of their "double security." It also removes from the people the ability to try "novel social and economic experiments"—which is another important justification for the federal system.[22]

Utter also suggested that departure from federal precedent is justified "where controlling federal principles have not changed with the evolution of our society" or where the state's previous cases have relied on overturned federal precedent.[23]

Because he found both characteristics to be present in this case, Justice Utter examined Washington law to determine whether it confers a speech right in privately owned shopping centers. First, he found that the free speech provisions in the Washington Constitution, like those in the constitutions of California and New Jersey, but unlike the First Amendment, are not limited to governmental actions. Second, he asserted that there are important differences between state and federal judicial decisionmaking that warrant fewer restraints on state courts. When the U.S. Supreme Court interprets the Fourteenth Amendment, for example, it establishes a rule for the entire country. Moreover, federalism concerns prevent the Supreme Court from adopting a rule that would discourage state experimentation. Consequently, a state court is free to evaluate in each case the actual harm to speech and property interests. Utter also asserted that the state court was not bound to treat the state and federal constitutions as coextensive where their language is different.

The supreme courts of California, New Jersey, and Washington have all utilized the supplemental approach to provide protection for freedom of expression on privately owned property under their own constitutions. All three courts respectfully examined the U.S. Supreme Court's rulings. When they found the federal case law either not entirely applicable or uncertain in the state context, they moved on to examine and ultimately to rely on their own constitutional provisions. The courts' use of the supplemental approach may be construed as more reactive than self-reliant in that no systematic set of criteria was provided for departing from the U.S. Supreme Court's interpretation of federal constitutional provisions that could be applied in other areas of the law. Nevertheless, it must be noted that the opinions of the New Jersey and Washington high courts both attempted to set forth justifications for their reliance on state constitutional provisions rather than the U.S. Constitution.

In 1972 the U.S. Supreme Court held that a privately owned shopping center in Portland, Oregon has the right to prohibit expressive activities when

[22]Ibid., 113.
[23]Ibid.

those activities are unrelated to the shopping center's operations.[24] Later in the same year, the Supreme Court of Oregon, hesitant to depart from a decision of the U.S. Supreme Court, ruled that the owner of a shopping center has the right to prohibit members of a religious group from chanting, marching, and offering a religious magazine for sale in the mall of a shopping center.[25]

The Oregon high court indicated its approval of the supplemental approach by stating that

> we are free to enforce the guarantees of our state Constitution so as to allow greater freedom or to give greater protection to individual liberties than are given under the federal Bill of Rights as interpreted by the United States Supreme Court.[26]

Nevertheless, the court found the 1972 U.S. Supreme Court decision, which it construed as a ruling that balanced the rights of property owners and freedom of expression in favor of the rights of property, to be controlling.[27] Consequently, although the Oregon Supreme Court found the supplemental approach attractive, it was unwilling to depart from recent United States Supreme Court rulings, particularly since the most recent decision arose from a case in Oregon.[28]

The Wisconsin Supreme Court's only contact with the question of freedom of expression on privately owned property was in a case in which the court upheld an ordinance that makes it unlawful to picket homes, except in a lawful manner during a labor dispute of a place of employment. The majority opinion referred only to U.S. Supreme Court decisions.[29] The Wisconsin high court has, however, addressed the relationship between the state and federal constitutions in other areas within the realm of free speech. For example, in a 1963 obscenity case,[30] the court emphasized that although it recognized decisions of the U.S. Supreme Court as binding, such decisions are not the controlling authority on the meaning of the term "obscene" in the state statutes and on the question of whether the prohibition or suppression of a particular piece of material violates the state constitution.[31]

[24]*Lloyd* v. *Tanner*, 407 U.S. 551.

[25]*Lenrich Associates* v. *Heyda*, 264 Ore. 122, 504 P.2d 112.

[26]504 P.2d 112, 115. Article I, Section 8 of Oregon's Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

[27]The Oregon Supreme Court's construal of *Lloyd* v. *Tanner* was in sharp contrast to the California high court's finding (in *Pruneyard*) that the U.S. Supreme Court decisions were primarily concerned with freedom of speech and did not create a federally protected property right.

[28]In *State* v. *Spencer*, 289 Ore. 225, 611 P.2d 1147 (1980), the Supreme Court of Oregon invalidated a disorderly conduct statute and took the primacy approach when Justice Arno H. Deneke stated that the statute deprives the defendant of liberties secured by the Oregon Constitution, and that this obviates any need to reach the First Amendment question.

[29]*City of Wauwatosa* v. *King*, 49 Wis.2d 398, 182 N.W.2d 530 (1971).

[30]*McCauley* v. *Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545.

[31]Wisconsin's constitutional provision states: "Every person may freely speak, write and

Of the five "activist" states, Wisconsin has been the least willing to depart from federal constitutional doctrine. In the free speech area, the court has followed the U.S. Supreme Court's interpretation of the federal Constitution. When the Wisconsin high court has mentioned state constitutional provisions, it has done so only to the extent of utilizing the dual approach; that is, it has tied its decisions to both state and federal constitutional provisions but has not considered them independently.[32]

The Non-Activist States

An examination of the cases decided by the courts of the five "non-activist" states since 1972 revealed the following. First, the question of freedom of expression on private property has neither been considered to the extent that it has been by the high courts of Washington, California, Oregon, and New Jersey, nor has the issue been resolved. Second, in the cases in which the courts have given some consideration to the issue, no decisions have been based on the state constitution. Finally, examination of free speech decisions in the "non-activist" states suggests that, although the high courts of these states abide by the decisions of the U.S. Supreme Court, they interpret the federal requirements narrowly. What is most noteworthy, however, is the complete absence of state constitutional analysis.

The Supreme Court of Georgia considered and denied the right of freedom of expression on private property in 1983 in a case that is readily distinguishable from those decided in California, Washington, New Jersey, and Oregon.[33] When an argument between a tenant and members of a group canvassing an apartment complex escalated into a gathering of an angry crowd of 150–200 tenants threatening the canvassers, the police decided that a riot was brewing and ordered the canvassers to disperse. The Supreme Court of Georgia upheld the convictions for failure to disperse. The presence of a hostile audience was clearly a major factor in this decision and differentiates the Georgia case from the shopping center cases of Washington, Oregon, and California, and from New Jersey's private university case. What is noteworthy here is not that the Georgia court found no First Amendment violation in the convictions of the canvassers, but that it did not consider the parallel provision of the state constitution.[34]

publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

[32]See, for example, *State ex rel La Follette* v. *Democratic Party*, 93 Wis.2d 473, 287 N.W.2d 519 (1980), holding that the open primary did not violate the federal or state constitution.

[33]*Sabel* v. *State*, 250 Ga. 640, 300 S.E.2d 663 (1983).

[34]Article I, Section I of Georgia's Constitution reads: "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty" (*Code of Georgia Annotated*, 1983 Revision). In 1969 the Supreme Court of Georgia decided a case in which it considered the issue of freedom of expression on private property. The court held that the free speech rights of non-students did not prevail over a private university's rights of property under circumstances where twenty to thirty people occupied a vacant lot owned by the university, refused to leave, erected tents, posted signs that attracted crowds, and accumulated large amounts of

The Texas courts have decided several cases, at the intermediate appellate level, in the context of free speech on private property.[35] In 1973 the Court of Civil Appeals dissolved an injunction prohibiting the display of signs and parading in front of a doctor's office in protest of high prices.[36] The court relied entirely on the First Amendment and on relevant decisions of the U.S. Supreme Court. In another case, which was an appeal from a temporary injunction granted to a grocery company prohibiting the United Farm Workers union from picketing in front of the company, the Court of Civil Appeals upheld the injunction but narrowed it so as to enjoin only unlawful conduct. The state constitution was not considered.[37] In 1985 a Texas appellate court upheld a trespass conviction for picketing inside a building that housed an abortion clinic. The court ruled that a privately run clinic is not a public forum for First Amendment purposes.[38] The Texas court's total reliance on federal case law in its interpretation of the extent of rights of freedom of expression and the absence of any mention of the state constitution provide a clear contrast to the supplemental approach of the "activist" states.

The other three "non-activist" states have not confronted the question of freedom of expression on private property. Nevertheless, an examination of freedom of expression cases in tangentially related areas revealed that the courts in these states do not utilize state constitutional analysis; instead, they rely on the U.S. Supreme Court's interpretations of the First Amendment. For example, the Alabama Court of Criminal Appeals in 1980 upheld a conviction for disobeying a court order that provided that individuals may not be allowed into the circuit courts if they fail to show that they have specific business there.[39] In another case in 1980, the Court of Criminal Appeals upheld a conviction under a statute that prohibits persons from disturbing an assembly of people who are gathered for religious worship.[40] In neither case did the court mention the state constitution.[41]

The Supreme Court of Virginia has suggested that it is not amenable to extending the rights of expression beyond those required by the U.S. Supreme Court.[42] The Virginia high court has held, for example, that a trespass

trash creating a sanitation problem (*Griffin* v. *Trustees of Atlanta University*, 225 Ga. 859, 171 S.E.2d 618 [1969]).

[35]Article I, Section 7 of the Texas Constitution provides: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

[36]*Stansbury* v. *Beckstrom*, Tex. Civ. App., 491 S.W.2d 947.

[37]*United Farmworkers* v. *Butt Grocery Co.*, Tex. Civ. App., 590 S.W.2d 600 (1979).

[38]*Hoffart* v. *State*, Slip opinion, 17 January 1985.

[39]*Cottonreeder* v. *State*, Ala. Cr. App., 392 So.2d 869.

[40]*Hill* v. *State*, Ala. Cr. App., 381 So.2d 20.6.

[41]Article I, Section 4 of the Alabama Constitution reads: "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[42]Article I, Section 12 of the Virginia Constitution provides in part: "That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right."

statute applies to public as well as private property,[43] and has upheld convictions of students for demonstrating on school grounds after being asked to leave by the principal.[44]

The Supreme Court of Kansas has not decided any cases that pertain to freedom of expression on private property. A cursory examination of decisions in the general area of freedom of expression revealed no references to the state constitution.[45]

EXCLUSION OF THE "FRUITS" OF AN ILLEGAL SEARCH OR SEIZURE

In *Mapp* v. *Ohio* (1961) the U.S. Supreme Court held that evidence obtained as a result of an unlawful search or seizure violates the due process guarantee of the Fourteenth Amendment and must be excluded from state criminal trials.[46] The *Mapp* decision ended a forty-seven year debate regarding the extent to which the U.S. Constitution mandates the exclusion of the fruits of an illegal search or seizure from state criminal trials. During the past fifteen years, the Burger Court has slowly but steadily narrowed the application of the exclusionary rule.[47]

The Activist States

Probably influenced by the adoption of the exclusionary rule in federal cases,[48] Wisconsin, Oregon, and Washington adopted exclusionary rules in the early 1920s, long before the U.S. Supreme Court held in 1949 that the Fourth Amendment applies to the states.[49] In 1923 the Supreme Court of

[43]*Johnson* v. *Commonwealth*, 212 Va. 579, 186 S.E.2d 53 (1972).

[44]*Pleasants* v. *Commonwealth*, 214 Va. 646, 203 S.E.2d 114 (1974).

[45]Section 11 of the Kansas Bill of Rights provides: "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right." See, for example, *State* v. *Huffman*, 228 Kan. 186, 612 P.2d 630 (1980) upholding vagueness and overbreadth challenge to disorderly conduct statute and *State* v. *Dargatz*, 228 Kan. 322, 614 P.2d 430 (1980) upholding incitement to riot statute against vagueness challenge.

[46]367 U.S. 643.

[47]See, for example, *Chambers* v. *Maroney*, 399 U.S. 42 (1970) warrantless investigatory search of automobile; *U.S.* v. *Harris*, 403 U.S. 573 (1971) illegally obtained evidence can be introduced for impeachment purposes; *Cady* v. *Dombrowski*, 413 U.S. 433 (1973) failure to list seized evidence in search warrant not fatal; *South Dakota* v. *Opperman*, 428 U.S. 364 (1976) warrantless inventory searches; *Stone* v. *Powell*, 428 U.S. 465 (1976) exclusion cannot be raised via habeas corpus; *U.S.* v. *Janis*, 428 U.S. 433 (1976) no exclusion in civil proceeding; *Rakas* v. *Illinois*, 439 U.S. 128 (1978) no automatic standing; *Michigan* v. *Defillippo*, 443 U.S. 31 (1979) "good faith" exception to arrest under an unconstitutional statute; and *U.S.* v. *Salvucci*, 448 U.S. 83 (1980) further limitation on automatic standing. One of the most significant developments in this area came in *U.S.* v. *Calandra*, 414 U.S. 338 (1974), when the Court in holding that a grand jury witness may not refuse to answer questions on the grounds that they are based on the fruits of an illegal search or seizure, referred to the exclusionary rule as a judicially created remedy as opposed to a constitutionally mandated one.

[48]*Weeks* v. *U.S.*, 232 U.S. 383 (1914).

[49]*Wolf* v. *Colorado*, 338 U.S. 25. See, *Hoyer* v. *State*, 180 Wisc. 407, 193 N.W. 89 (1923); *State* v. *Landry*, 103 Ore. 443, 204 P. 958, 206 P. 290 (1922); *State* v. *Gibbons*, 118 Wash. 171, 203 P. 390 (1922).

Wisconsin held that the state constitution independently protects citizens against unreasonable searches or seizures.[50] The court adopted the exclusionary rule in the belief that any use of tainted evidence would undercut the state constitutional guarantee against compulsory self-incrimination.[51] Since *Mapp*, however, the Wisconsin high court has relied almost exclusively on federal case law.

Although the Oregon high court has used the primacy approach in several instances,[52] initially, it was hesitant to deviate from the search and seizure case law developed by the U.S. Supreme Court following *Mapp*. In 1982, however, the court abandoned the federal line of cases, noting that eight years of uniformity with federal court decisions had not resulted in simplification of the law of search and seizure in Oregon.[53] The court went on to state that the goal of simplification was better served by relying on the state constitution to formulate an independent rule.

The following year, in *State* v. *Lowry*,[54] the court appeared to adopt the primacy approach in a case in which it invalidated the warrantless search of the contents of a pill bottle seized during an arrest. The court noted that it is "the responsibility of Oregon courts to enforce Oregon law, including this state's rules against conviction on illegally seized evidence, before turning to claims under the federal constitution."[55] Justice Jones, in a concurring opinion, criticized the abandonment of the federal approach, stating that the result did not improve the criminal justice system nor vindicate any significant values of privacy.

The Washington Supreme Court also was initially hesitant to depart from federal precedent. Subsequently, however, it has indicated a willingness to rely on its own constitution and appears to have adopted the supplemental approach. Washington adopted the exclusionary rule in 1922 based on an

[50]*Hoyer* v. *State*, 180 Wis. 407, 193 N.W. 89.

[51]Article I, Section 8 of the Wisconsin Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." Article I, Section 11 provides: "The right of the people to be secure in their persons, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

[52]*Sterling* v. *Cupp*, 290 Ore. 611, 625 P.2d 123 (1980) (en banc). The court in this decision, per Linde, said that when parties allege violations of both federal and state constitutions, the "proper sequence is to analyze the state law, including its constitutional law, before reading a federal claim." Linde went on to state that: "This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal constitution when the claim before the Court in fact is fully met by state law" (citations omitted). See also, *State* v. *Kennedy*, 295 Ore. 260, 666 P.2d 1316 (1983) and *Hewitt* v. *SAIF*, 294 Ore. 33, 663 P.2d 970 (1982).

Article I, Section 9 of the Oregon Constitution reads: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, support by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

[53]*State* v. *Caraher*, 293 Ore. 741, 653 P.2d 942, 946 (en banc).

[54]295 Ore. 337, 667 P.2d 996 (en banc).

[55]667 P.2d 999.

interpretation of the state constitution,[56] but noted that it was guided by the decisions of the U.S. Supreme Court. From 1964 until 1981 the state high court followed the federal line of cases on the exclusionary rule. Cases decided during this period indicate the court's growing dissatisfaction with the federal case law.

In 1982 the court concluded that the framers of the state constitution had rejected the language of the Fourth Amendment because they wanted to protect personal rights of privacy and not merely deter governmental action.[57] The court asserted that the exclusion of illegally seized evidence is a constitutionally required, as opposed to a judicially created, remedy for such violations—a position inconsistent with federal case law.

It took another year for the court finally to announce: "We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings."[58] The Washington court also announced the approach it would use in construing the state constitutional provisions when it stated:

> In construing Const. [sic] art. 1, section 7 we look initially to its origins and to the law of search and seizure at the time our constitution was adopted. We next examine the evolution of state court analysis of Const. [sic] art. 1, section 7 in light of United States Supreme Court decisions interpreting U.S. Const. [sic] amend. 4. Finally, we review our own decisions to discern possible trends in our analysis and federal decisions to provide a historical context and guidance for our doctrinal developments.[59]

Washington, like Oregon, returned to its state constitution because it was dissatisfied with the federal case law on the exclusionary rule. Since both states had developed extensive case law under their own constitutions prior to *Wolf* or *Mapp*, their present reliance on state constitutional law appears to reflect their continual struggle to develop a fair and workable approach to the problem of evidence seized in questionable ways.

Although New Jersey, unlike the other "activist" states, did not adopt the exclusionary rule until after *Mapp*,[60] it has gone further than the others in developing a coherent approach to constitutional interpretation. In 1975

[56]*State* v. *Gibbons*, 118 Wash. 171, 203 P. 390. Washington's Article I, Section 7 provides: "No person shall be disturbed in his private affairs or his home invaded, without authority of law."

[57]*State* v. *White*, 97 Wash.2d 92, 640 P.2d 1061.

[58]*State* v. *Ringer*, 100 Wash.2d 686, 647 P.2d 1240, 1247 (en banc).

[59]The Supreme Court of Washington has reaffirmed this approach in two subsequent decisions. In *State* v. *Chrisman*, 100 Wash.2d 814, 676 P.2d 419 (1984) (en banc), the court based its reasoning exclusively on the constitution and laws of the state and noted that the independent state grounds were based primarily on the difference in language between the federal and state constitutions. In *State* v. *Jackson*, 53 U.S.L.W. 2159, 6 September 1984, the court discussed the federal law and went on to state that prior reliance on federal precedent and federal constitutional law does not preclude the court from taking a more expansive view of the state constitution.

[60]The New Jersey court first rejected the doctrine in *State* v. *Black*, 5 N.J.Misc. 48, 135 A. 685 (1926).

the state supreme court used the supplemental approach to provide greater protection under the state constitution than under the U.S. Constitution, but the court failed to provide any clear reasons for departing from the federal precedent.[61]

In a 1981 case the court held that the passengers in an automobile had standing to challenge the search and seizure in question despite the absence of any ownership or possessory interest in the weapons that were seized—a departure from federal precedent.[62] Here the court did give reasons for deviating from federal precedent. The court found that the Supreme Court decisions did not afford sufficient protection against unreasonable searches and seizures. It also concluded that the federal standard was too vague. Finally, the court found state and federal precedent that it believed to be in accord with its own interpretation of the state constitutional provision. Still, it did not indicate clearly when deviation would be warranted in cases in which both state and federal constitutional claims are raised.

In 1982 the Supreme Court of New Jersey held that a warrantless seizure of private telephone toll billing records was illegal because the records were protected by the right to privacy under the state constitution.[63] In a concurring opinion, Justice Handler listed the following criteria for determining when the state court should depart from the U.S. Supreme Court's decisions:

> (1) Textual Language—where the state constitutional provision either grants rights not included in the federal constitution or is substantially different in wording so as to allow interpretation on an independent basis; (2) Legislative History—where the legislative history of the state provision supports an independent interpretation; (3) Preexisting State Law—where preexisting state law suggests that the state constitutional rights are different from their federal counterpart; (4) Structural Differences—where the philosophical structure of the two constitutions is different, the federal constitution being one granting numerated powers to government, whereas the state constitution serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected officials; (5) Matters of Particular State Interest or Local Concern—where there is no need for a uniform national policy; (6) State Traditions; and (7) Public Attitudes—attitudes of the state's citizens that are distinctive from federal precedents.[64]

A unanimous court adopted Justice Handler's criteria in a case decided one year later. Handler wrote the majority opinion in which he added three criteria to his initial seven. The additional factors were: (1) whether there has been a definitive determination of the issue by the U.S. Supreme Court; (2) the importance of the constitutional issue raised—the more important, the more likely the state court would base its decision on the state constitu-

[61]*State* v. *Johnson*, 68 N.J. 349, 346 A.2d 66 rejecting *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) and invalidating a non-custodial search conducted without the consent of the accused.
[62]*State* v. *Alston*, 88 N.J. 211, 440 A.2d 1311.
[63]*State* v. *Hunt*, 91 N.J. 338, 450 A.2d 952 (1982).
[64]450 A.2d 965-967.

tion; and (3) the extent of the public's interest.[65] An examination of cases decided after the New Jersey court adopted Handler's criteria revealed that the application of this formula has been inconsistent insofar as the cases either fail to distinguish between federal and state decisions or fail to refer to the Handler criteria.

By formulating a set of criteria for deciding when to deviate from the decisions of the U.S. Supreme Court, the New Jersey Supreme Court has established a solid basis for using the supplemental approach. Nevertheless, the court's reason for turning to such an approach remains unclear, and it has failed to apply the criteria consistently.[66]

California adopted the exclusionary rule in 1955 and, until recently, had what many considered the strongest rule in the country.[67] The Supreme Court of California frequently departed from federal case law and relied instead on independent state constitutional grounds. These decisions were criticized because the state court failed to develop any guidelines as to when deviation from federal law was appropriate.[68] In 1982, however, the state electorate adopted Proposition 8, a constitutional amendment that leaves state law regarding searches and seizures unchanged, but forbids the exclusion of evidence not deemed illegal under the U.S. Constitution.[69] In 1985 the Supreme Court of California, in a four to three decision, held that the voters intended to eliminate the exclusion of evidence as a means of remedying violations of state substantive constitutional rights.[70] The court relied upon the "plain meaning" of the section and the explanation of the proposition that had been distributed to the electorate. It rejected any contention that the exclusionary rule is a fundamental aspect of Article I, Section 24 of the state constitution.[71] Thus, California's attempt to broaden the exclusionary rule

[65]*State* v. *Williams*, 93 N.J. 39, 459 A.2d 641, 650–651 (1983).

[66]As one commentator noted: "In the eight cases where the court rejected claims of denial of constitutional rights, only four received some state constitutional review. In the other four, the court cited only the federal authority for its decision. This might imply the adoption of the federal standard as state law. The court's failure to express its reason for only reviewing under federal law creates uncertainty and leaves unclear the court's methodology in constitutional cases." Note, "The New Jersey Supreme Court's Interpretation and Application of the State Constitution," *Rutgers Law Journal* 15 (1984): 508–509.

[67]*People* v. *Cahan*, 44 Cal.2d 434, 282 P.2d 905. California was one of the states mentioned most prominently by the Court in *Mapp* as indicating the correctness of extending the exclusionary rule to the states (367 U.S. 651–653).

[68]John K. Van de Kamp and Richard W. Gerry, "Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution," *Hastings Law Journal* 33 (1982): 1113–1119.

[69]The California Constitution Article I, Section 28, is also known as the "Truth-in-Evidence" voter initiative. The amendment reads: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding."

[70]*People* v. *Lance*, 37 Cal.3d 873 (1985).

[71]Article I, Section 24 of the California Constitution reads: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." California's equivalent of the Fourth Amendment, Article I, Section 13, reads: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures may not be violated, and a warrant may not be issued except on probable cause, sup-

by using the supplemental approach has been checked at the polls.

The Non-Activist States

Of the five "non-activist" states, only Texas adopted an exclusionary rule prior to *Mapp*. In fact, thirty-six years before *Mapp*, the state legislature passed a provision requiring the exclusion of illegally obtained evidence.[72] The statute was passed to enforce Article I, Section 9 of the Texas Constitution.[73]

Texas' highest criminal court has applied the exclusionary rule to arrest situations where the state law requires a valid warrant, but where the federal law does not.[74] The Texas provision also covers searches and seizures by private as well as public persons. Consequently, the state rule has been applied to actions outside the scope of the Fourth Amendment.[75] Nevertheless, there has been no real movement by a majority of the court to determine independently what the Texas constitutional provisions should mean.[76]

During the first ten years following *Mapp*, the Texas Court of Criminal Appeals followed the federal law in deciding constitutional questions involving search and seizure. This pattern, however, may not continue as the U.S. Supreme Court undergoes further changes. Some Texas judges have urged the court to determine independently of the federal court decisions what the state constitutional provisions should mean and have advocated that the court adopt the primacy approach to constitutional interpretation.[77] Whether such minority opinions signal an inclination toward independent interpretation of constitutional issues remains to be seen.

Alabama rejected the exclusionary rule in 1894.[78] Prior to *Mapp*, the state supreme court excluded evidence of an illegal search and seizure only when the evidence was made inadmissible by state statute.[79] In 1981 the state high court, after lengthy discussion of the origins and purposes of the exclusionary

ported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

[72]Article 38.23, Code of Crim. Proc., 1979.

[73]"No evidence obtained by an officer or other person in violation of any provision of the constitution or laws of the State of Texas or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

[74]*Lowery* v. *State*, 499 S.W.2d 160 (1973); *Milton* v. *State*, 549 S.W.2d 190 (1977).

[75]See, for example, *Irvin* v. *State*, 563 S.W.2d 920 (Tex. Crim. App., 1978) (en banc) private security guards; *Stone* v. *State*, 574 S.W.2d 85 (Tex. Crim. App., 1977) babysitter; *Jackson* v. *State*, 548 S.W.2d 685 (Tex. Crim. App., 1977) ambulance driver.

[76]It has been suggested that one reason for Texas' failure to develop an independent state constitutionally based jurisprudence is the tendency of the Texas legislature to resolve issues in areas traditionally resolved by the courts. Robert O. Dawson, "State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience," *Texas Law Review* 59 (1981): 219.

[77]For example, Justice Roberts' dissent in *Gillet* v. *State*, 588 S.W.2d 361 (Texas Crim. App., 1979) (en banc) joined by Justices Phillips and Clinton.

[78]*Shield* v. *State*, 104 Ala. 35, 10 So. 85 (1894).

[79]*Duncan* v. *State*, 278 Ala. 145, 176 So.2d 840 (1965). The court in *Duncan* referred to Section 210, Title 29, Ala. Code, 1940 which prohibited admission of evidence obtained from any unlawful search of a private dwelling for liquor (176 So.2d at 850). The court also cited several examples of such instances. *Duncan* was the first state case to apply the *Mapp* holding.

rule, concluded:

> given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, we are simply not willing to extend the rule any further than is necessary to comply with decisions of the United States Supreme Court.[80]

Kansas, like Alabama, did not adopt the exclusionary rule until *Mapp*. The state high court in one post-*Mapp* decision upheld an implied consent statute that allows blood samples to be taken from persons suspected of drunk driving.[81] The court discussed both the Fourth Amendment to the U.S. Constitution and Section 15 of the Kansas Bill of Rights and based its ruling on the federal precedent.[82] In a 1984 decision, the state high court rejected another challenge to the implied consent statute.[83] The court referred once more to federal precedent in upholding the statute. In short, Kansas appears to be unwilling to address this question independently under state law.

Although Georgia did not adopt the exclusionary rule until *Mapp*, the state supreme court has maintained stricter due process requirements than those imposed by the Fourth Amendment with respect to governmental regulation, seizure, and control of property rights. This is due primarily to a legislatively created exclusionary rule enacted in 1966.[84] In 1975 the state supreme court noted:

> The presence of the statute [exclusionary rule] does mean, however, that in the event the [United States] Supreme Court should abolish the rule, it would take a further act of the Georgia legislature to remove it from the body of our state law.[85]

Nevertheless, the court refused in this case to extend the protection of the state exclusionary rule to questionable seizures by government officials other than peace officers.

In a 1982 case, the Georgia high court excluded evidence obtained from an unlawful warrantless arrest. Following the supplemental approach, the court first discussed federal law and then Chapter 27-313(a)(1) of the Georgia Code. It then relied upon state statutory law rather than the state constitution.[86] Finally, in a 1983 decision,[87] the state high court refused to recognize the "good faith" exception to the exclusionary rule, citing Article I, Section 1, Paragraph 10 of Georgia's 1976 Constitution prohibiting general warrants;

[80] *Taylor* v. *State*, 399 So.2d 881, 893 (Ala. Sup. Ct.).
[81] *State* v. *Gordon*, 219 Kan. 643, 549 P.2d 886 (1976).
[82] Section 15 of the Kansas Bill of Rights is identical to the Fourth Amendment.
[83] *Divine* v. *Groshong*, 679 P.2d 700.
[84] Chapter 27-3, Georgia Laws.
[85] *State* v. *Young*, 234 Ga. 488, 216 S.E.2d 586, 590.
[86] *William A. Durden* v. *State*, 250 Ga. 325.
[87] *Landers* v. *State*, 301 S.E.2d 633.

the court also cited a state statute.[88] The court's use of the primacy approach is clear here insofar as it made no reference to federal law and relied instead solely on the state law. Still, while the Supreme Court of Georgia appears to be willing to depart from federal constitutional minimums, it does not appear to have adopted any coherent approach to constitutional decisionmaking.

Virginia did not adopt the exclusionary rule until after *Mapp*.[89] Nearly a decade later, the state court rejected an attempt to assert a state statutory basis for the exclusion of unlawfully obtained evidence, stating that the state statute provided no greater protection than the Fourth Amendment to the U.S. Constitution.[90] Virginia seems intent on following federal precedent. In fact, it just recently embraced the U.S. Supreme Court's "good faith" exception to the exclusionary rule.[91] It seems unlikely that Virginia will use its statutes or state constitution to provide protection in the area of questionable searches and seizures beyond that which is required by the U.S. Supreme Court.

CONCLUSION

Clearly some state courts are relying on their state constitution to provide protection for individual rights, at least in the two areas examined here. While we expected the "activist" states to be in the forefront of any movement toward state court reincarnation, we were somewhat surprised to discover that only three states—California, New Jersey, and Washington—have unequivocally departed from federal precedent in the area of access to private property for expressive purposes. A fourth state, Oregon, has indicated a willingness to depart from the federal case law, but has failed to take a decisive stand. The same states have also departed from federal precedent in the search and seizure area. Wisconsin is the only "activist" state that has made no discernible movement toward judicial independence.

We were not surprised to discover that, with the exception of Georgia, the "non-activist" states have not been inclined to depart from federal precedent in either of the two areas studied. Nevertheless, various statements from the Texas courts suggest that, at least in the search and seizure area, some "non-activist" state courts are becoming more receptive to deviation. In fact, neither Texas nor Georgia may really fit neatly into the "non-activist" category.

Among the states that have either departed from federal precedent or indicated that they may be willing to do so, only one, Oregon, has chosen the primacy approach. The others have relied on the supplemental approach.

[88]Georgia adopted a new constitution in 1982 but did not change this provision.

[89]*Hawley* v. *Commonwealth*, 206 Va. 479, 144 S.E.2d 314 (1965), cert. den., 383 U.S. 910 (1966).

[90]*Thims* v. *Commonwealth*, 235 S.E.2d 443 (1977).

[91]*McCary* v. *Commonwealth*, No. 831434, 12 November 1984.

There are several possible reasons for preferring the supplemental approach over the primacy approach. The supplemental approach, by examining the federal law first, acknowledges the authority of the U.S. Constitution, while the primacy approach does not. The supplemental approach allows the state court to discuss and use federal case law, whereas the primacy approach does not. The supplemental approach, consequently, may provide a smoother route to state court independence. Because any departure from the U.S. Constitution is relatively new for state judges, even those who sit on courts of the "activist" states seem to be proceeding cautiously and to be choosing the least disruptive approach to the revival of state constitutional law.

We were also concerned with determining whether the states that use their own constitutional provisions are developing an independently based state constitutional jurisprudence as opposed to merely reacting to Burger Court decisions. The evidence is far from conclusive. Only New Jersey appears to have begun to develop a self-reliant approach insofar as it has attempted to set forth objective criteria to determine when departure from federal precedent will be warranted. The other states that have used the supplemental approach appear to have used it, at least so far, in a reactive way. They have not provided reasons for deviating from federal precedent and have not adopted any consistent approach to explain when departure from federal precedent can be expected.

It is possible that the lack of independent state constitutional analysis is due to the relatively recent reemergence of state constitutionalism. Indeed, the cases we examined may represent merely the beginning of a series of developments that will, in time, constitute a genuine reincarnation of state constitutional rights law.