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THE FLORIDA CONSTITUTION: STILL CHAMPION OF CITIZENS' RIGHTS?

RACHEL E. FUGATE

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.[1]

1. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977).

I. INTRODUCTION

There are some ideas that seem self-apparent, such as the notion that states may interpret their own constitutions to expand individual rights guaranteed by the United States Constitution. The idea that the federal Constitution represents the "floor" for individual rights and that states may set the "ceiling" is beyond dispute.[2] However, there is a lively debate on whether state courts should first look to their own constitutions when resolving issues, termed the primacy method of analysis,[3] or defer to the interpretations of the United States Supreme Court.[4] This debate is most heated in the criminal procedure area because of the activism of the Warren Court and the retrenchment from that activism by the Burger and Rehnquist courts.[5] The controversy has been heightened by recent assertions of state court independence and an increased willingness for the Supreme Court to review these decisions.[6] At the debate's core are historical notions of federalism that have been brought into question, creating the term "new federalism."[7]

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2. See, e.g., 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) (stating that the states have the power to impose higher standards than those required by the federal Constitution).

3. According to this doctrine the state constitutional claim is decided first. If rights are protected under state law, the court does not have to examine the federal question or rely on the federal Constitution. If certain rights are not protected under state law, then the court looks to the federal Constitution. See Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 TEX. L. REV. 1141, 1170 (1985).

4. Compare Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (encouraging states to explore different means to protect individual rights), and Delaware v. Van Arsdall, 475 U.S. 673, 705-07 (1986) (Stevens, J., dissenting) (stressing the importance of the independence of state constitutions in securing individual rights), with Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring) ("[W]hen 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."), and Earl M. Maltz, False Prophet—Justice Brennan and the Theory of State Constitutional Law, 15 HASTINGS CONST. L.Q. 429, 429 (1988) (arguing that a focus on federalism is not appropriate in state constitutional law).

Notably, Chief Justice Burger generally advocated federalism and the independence of state constitutions; however, he did not support these notions when states were expanding on rights that the U.S. Supreme Court had viewed more restrictively, as was the case in Casal. See, e.g., Crist v. Bretz, 437 U.S. 28, 39 (1978) (Burger, C.J., dissenting) (criticizing the Court's constitutionalization of criminal procedure and stressing that "[C]onstitutional guarantees are trivialized by the insistence on mechanical uniformity between state and federal practice. There is of course, no reason why the state and federal rules must be the same.").

5. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 2-9 (3d ed. 1993).

6. See discussion infra Parts II.D., III.B.3.

7. Federalism is defined as a "[t]erm which includes interrelationships among the states and relationship between the states and the federal government." BLACK'S LAW DICTIONARY 612 (6th ed. 1990). "In the Warren era, federalism was unsuccessfully invoked to support the view of the anti-incorporationists; i.e., that the rights granted in federal courts need not apply with the same breadth or scope in state courts." William J. Bren-

Part II of this Comment examines the history and evolution in the development of federalism and the role that state constitutions have assumed. Part III analyzes the adequate and independent state grounds doctrine, which immunizes state court decisions from federal review. Part IV describes the different methods of constitutional analysis that states employ. Part V discusses the independence of Florida's Constitution and the Florida Supreme Court's decision in Traylor v. State.[8] Part VI examines the future of the independent method of analysis in Florida by focusing on self-incrimination.

II. FEDERALISM AND THE ROLE OF STATE CONSTITUTIONS

Until 1789, when the federal Constitution took effect, only state constitutions protected individuals from government intrusion.[9] These state constitutions began with the rights retained by the people; only after these rights were enumerated were governments created and branches separated.[10] Early state bills of rights were therefore motivated by an interest in protecting individuals against government intrusion,[11] and the federal Bill of Rights drafters looked to state constitutions for guidance. Many states adopting constitutions after 1789 modeled their bills of rights on the existing state constitutions rather than their federal counterpart.[12]

Our federal system, and the principles of federalism, are founded upon a unique division between the states and the federal government.[13] State judges swear an oath to uphold both their state constitutions and the federal Constitution.[14] When state constitutional provisions are at issue, state judges have a responsibility to independently determine protections afforded under the state constitution.[15] If state judges do not rise to this challenge they denigrate the principles of federalism that advocate self governance by the states.[16]

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nan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535, 549 (1986). The retreat of the Supreme Court from the philosophies of the Warren Court has caused federalism to be used as support for state expansion of constitutional guarantees. See id. at 548.

8. 596 So. 2d 957 (Fla. 1992).

9. See Charles G. Douglas, III, Federalism and State Constitutions, 13 VT. L. REV. 127, 127 (1988).

10. See id.

11. See Delaware v. Van Arsdall, 475 U.S. 673, 707 n.14 (1986) (Stevens, J., dissenting).

12. See Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting).

13. See State v. Ball, 471 A.2d 347, 350 (N.H. 1983).

14. See id.

15. See id.

16. See id.

A. Historical Role of State Constitutions

For the first century of this nation's history, state constitutions protected individual rights from abuse by state authorities.[17] As Judge Skelly Wright noted, "[O]n the whole, for the first century of our existence as a nation, the state courts, not the federal courts, stood alone as the champions of our individual liberties."[18] During this formative period, when state constitutions were the prime protectors of individual liberties, the Supreme Court relied upon state courts for guidance in developing federal constitutional law.[19]

For seventy-five years the federal Constitution only applied to the actions of the federal government and not to those of the states.[20] Prior to the adoption of the Fourteenth Amendment, the Supreme Court held that the Bill of Rights contained "no expression indicating an intention to apply them to the state governments."[21] However, after the Civil War and the passage of the Fourteenth Amendment, the Court reconsidered this holding.[22] For a substantial period of time the Fourteenth Amendment's chief impact was on state economic legislation.[23] Unless faced with a gross abuse of power, the Court generally left state courts' decisions alone.[24]

Thus, "[i]n the beginning, states' rights were a given."[25] The federal Bill of Rights was intended to supplement rather than supplant state constitutions. This resulted in a dual system of protection founded upon joint state and federal participation to achieve full protection of individual liberties.[26] State constitutions served as feasible counterparts and protectors of individual liberties within the framework of federalism.[27]

B. The Post-Incorporation Years and the Warren Court

Beginning in the 1920s the Supreme Court expressed the view that some of the protections contained in the federal Bill of Rights

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17. See Delaware v. Van Arsdall, 475 U.S. 673, 705 (1986) (Stevens, J., dissenting).

18. J. Skelly Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 HASTINGS CONST. L.Q. 165, 166 (1984).

19. See Abrahamson, supra note 3, at 1146.

20. See Douglas, supra note 9, at 129.

21. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

22. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37 (1872) (finding that the purpose of the Fourteenth Amendment was not to transfer all the protections of the Bill of Rights from the states to the federal government).

23. See Douglas, supra note 9, at 130.

24. See id. at 131.

25. Stanley Mosk, State Constitutionalism: Both Liberal and Conservative, 63 TEX. L. REV. 1081, 1081 (1985).

26. See Stephen F. Aton, Note, State Constitutions Realigning Federalism: A Special Look at Florida, 39 U. FLA. L. REV. 733, 737-38 (1987).

27. See Stanley H. Friedelbaum, Judicial Federalism: Current Trends and Long-Term Prospects, 19 FLA. ST. U. L. REV. 1053, 1054 (1992).

are incorporated in the Fourteenth Amendment and are applicable to the states.[28] However, the Court refused to incorporate the complete Bill of Rights into the Fourteenth Amendment.[29] By the 1960s the historical relation of state bills of rights to the federal Constitution "had been turned on its head,"[30] and a lethargy in state courts' development of state constitutional law was apparent.[31] During Chief Justice Earl Warren's tenure on the Supreme Court virtually every guarantee in the federal Bill of Rights that applied to criminal procedure was found fundamental to due process of law and was imposed on the states through incorporation into the Fourteenth Amendment.[32]

> In order to ensure a uniform system of justice nationwide, the Warren Court made avid use of the incorporation concept previous decisions had developed as a means of determining which Bill of Rights guarantees were so fundamental that, as a matter of due process, they applied to the states under the Fourteenth Amendment.[33]

As a result of Warren Court decisions, the Court applied the "minimum" guarantees contained in most of the first eight amendments to the states.[34] In turn, this relieved state courts of their responsibility to construe their own constitutions to develop state law.[35]

Incorporation of the Bill of Rights was beneficial to individuals. However, it reduced the importance of state constitutions by making

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28. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating in dictum that the rights protected by the First Amendment are among the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment).

29. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932) (employing a "fundamental fairness" test to determine whether a right was incorporated into the Fourteenth Amendment).

30. Developments in the Law: The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1328 (1982) [hereinafter Developments].

31. See Ken Gormley, State Constitutions and Criminal Procedure: A Primer for the 21st Century, 67 OR. L. REV. 689, 691 (1988).

32. The Warren Court imposed the following federal constitutional guarantees upon the states by incorporating them into the Fourteenth Amendment through the following cases: In re Winship, 397 U.S. 358 (1970) (Fifth Amendment's reasonable doubt standard of proof); Benton v. Maryland, 395 U.S. 784 (1969) (Fifth Amendment's ban against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (Sixth Amendment's right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (Sixth Amendment's right to compulsory process for obtaining witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Sixth Amendment's right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment's right to confront and cross-examine witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment's privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment's right to counsel); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment's ban against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment's exclusionary rule).

33. WHITEBREAD & SLOBOGIN, supra note 5, at 2.

34. See Gormley, supra note 31, at 692.

35. See id.

the federal Constitution the prime protector of individual rights, significantly altering state constitutional interpretation.[36] During the incorporation of federal guarantees, "[S]tate judges forgot their own constitutions [and] . . . [s]tate judges started to parrot federal cases and law clerks researched them to the exclusion of state charters."[37] Consequently, "this revolution in the application and interpretation of federal constitutional law not only rendered ambiguous the level of protection the state bills of rights afforded, but also raised the question whether they still served a worthwhile purpose."[38]

C. The Retrenchment of the Burger and Rehnquist Courts

The Warren era marked an expansion in individual rights even if protecting these rights meant that a guilty person was set free.[39] However, following four appointments to the Supreme Court by President Nixon, the Court's composition changed drastically.[40] Beginning with the Burger Court the Court shifted its focus from protecting individual rights to facilitating law enforcement.[41] Finally, and arguably the most important difference between the Warren Court and the Burger Court, the Burger Court believed that state judges could be entrusted to enforce federal constitutional rights.[42]

The Court's retreat from the philosophies promulgated by the Warren Court[43] continued under the leadership of Chief Justice William Rehnquist.[44] The Court continued the move away from the rights of criminal defendants and has shown a greater sensitivity toward states' rights.[45] As several commentators noted, "the Supreme Court no longer deems itself the keeper of the nation's conscience."[46]

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36. See Aton, supra note 26, at 742; see also WHITEBREAD & SLOBOGIN, supra note 5, at 950.

37. Douglas, supra note 9, at 133.

38. Developments, supra note 30, at 1328.

39. See id.

40. See WHITEBREAD & SLOBOGIN, supra note 5, at 3.

41. See id. (noting that the Burger Court was more willing to grant government officials wider latitude when handling criminal cases, stressing the need for effective law enforcement).

42. See id. at 7.

43. See Developments, supra note 30, at 1328.

44. See David G. Savage, Opinions on Rehnquist, A.B.A. J., Oct. 1996, at 42, 43.

45. See id. (quoting Professor Akhil Reed Amar of Yale Law School).

46. Mosk, supra note 25, at 1087 (citing A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873, 878 (1976); Donald E. Wilkes, Jr., The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 KY. L.J. 421, 421 (1974)).

D. The Rise of "New Federalism"

Several state courts have reacted to the Supreme Court's retrenchment the same way they responded to the Warren Court's activism: they have adhered to decisions and adopted the reasoning handed down by the Supreme Court.[47] However, many state courts have rebelled against the deterioration of the rights guaranteed in the Warren era by relying on their own constitutions as independent protectors of individual rights.[48] The rationale for state-based decisions is found in the language of the Tenth Amendment: "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[49] The Court advanced the idea that state law restrictions on state action may be more stringent than those required under federal law and that states may expand upon the rights guaranteed in the federal Constitution.[50] This is the strength of federalism—it provides a double source of protection for individual rights and liberties.[51]

Justice William J. Brennan, Jr., viewed the Burger Court's diminished federal scrutiny as a clear invitation to state courts to step into the breach and increase their own scrutiny.[52]

> Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.[53]

Proponents of this state court revolution rely on historical notions of federalism, allowing states to interpret their constitutions differ-

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47. See WHITEBREAD & SLOBOGIN, supra note 5, at 948.
48. See id.
49. U.S. CONST. amend. X; see also WHITEBREAD & SLOBOGIN, supra note 5, at 948.
50. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 705-07 (1986) (Stevens, J., dissenting) (advocating the view that state courts should have primary responsibility for deciding issues arising under their constitutions and statutes); City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 293 (1982) (stating that a state court "is entirely free to read its own State's constitution more broadly than [the Supreme] Court reads the Federal Constitution . . . ."); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 91 (1980) (Marshall, J., concurring) (finding that a state can adopt in its own constitution individual liberties that are more expansive than those conferred by the federal Constitution); Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) ("Each state has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."); Oregon v. Hass, 420 U.S. 714, 728 (1975) (Marshall, J., dissenting) (noting that the lower court's opinion rested in part on independent state grounds with federal constitutional decisions serving merely as persuasive authority); Lego v. Twomey, 404 U.S. 477, 489 (1972) (stating that states are free to adopt a higher standard than the federal standard in criminal law cases).
51. See Brennan, supra note 1, at 503.
52. See id.
53. Id.

ently than the federal Constitution.[54] What is "new" about this type of federalism is that states may utilize it to give greater protections to their citizens than those guaranteed in the federal Constitution.[55] The post-Warren Court has curtailed their predecessor's groundbreaking decisions, sending a clear message to state courts that federal standards are not the most progressive approach to protecting individual rights and liberties.[56] As the Supreme Court constricts the scope of rights protected under the Fourteenth Amendment, state courts may exhume state constitutions to adopt more rigorous standards than those promulgated by the Court.[57]

This "new federalism" has caused a realigning of philosophies. Conservatives who historically trumpeted federalism and states' rights now criticize the expansion of states' rights,[58] while liberals now praise the notions of federalism that allow states to provide their citizens more protection than the federal Constitution guarantees.[59]

Since the demise of the Warren Court, the Supreme Court has shown a new concern for uniformity when state courts expand constitutional protections.[60] The Court does not defend diversity,[61] which was paramount to earlier notions of federalism.

III. THE SUPREMACY CLAUSE AND ADEQUATE AND INDEPENDENT STATE GROUNDS

Independent state constitutional analysis regards Supreme Court decisions as establishing minimum rather than maximum guarantees.[62] There is a strong tendency on the part of states to treat Supreme Court decisions as interpreting rights in an absolute sense.[63] "But the temptation to jump to this conclusion must not be permitted

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54. See Abrahamson, supra note 3, at 1156.

55. See Brennan, supra note 7, at 548.

56. See WHITEBREAD & SLOBOGIN, supra note 5, at 951.

57. See id.

58. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel . . . experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Dissenting justices on the Warren Court "extolled the virtues of allowing the States to serve as 'laboratories' and objected to incorporation as 'press[ing] the States into a procrustean federal mold.'" Brennan, supra note 7, at 549.

59. See Brennan, supra note 7, at 550.

60. See, e.g., Florida v. Casal, 463 U.S. 637, 639 (1983) (Burger, C.J., concurring) (reminding the citizens of Florida that when state courts interpret the Florida Constitution to require more than the federal law requires they can amend their constitution to ensure rational law enforcement).

61. See Brennan, supra note 7, at 550.

62. See David J. Fine, Project Report: Toward an Activist Role for State Bills of Rights, 8 HARV. C.R.-C.L. L. REV. 271, 284 (1973).

63. See id. at 284-85.

to shield the fact that such an interpretation is not, and cannot be, compelled by the Supreme Court."[64]

A. The Supremacy Clause Issue

The Supremacy Clause[65] requires that inconsistencies between state and federal law be decided in favor of federal law. As the final arbiter of federal questions, the Supreme Court may review state court decisions that are contrary to federal law, even if the state court relied on its own law.[66] "The supremacy of federal law is absolute."[67] Therefore, it is often assumed that the Supremacy Clause forecloses states from interpreting provisions of their own constitutions, especially when the wording is identical to the federal Constitution.[68]

However, state constitutions may always be used to expand rights guaranteed in the federal Constitution.[69] However, state constitutions may not be used to undermine or infringe federally guaranteed constitutional rights because "[f]ederal law sets a minimum floor of rights below which state courts cannot slip."[70]

B. Adequate and Independent State Grounds Doctrine

For more than a century the Supreme Court has adhered to the rule that it will not review a state court decision resting on adequate and independent state grounds. Therefore, a state basing its ruling on its own constitution can evade Supreme Court oversight as long as the decision does not infringe upon the minimum guarantees of the federal Constitution.[71] This doctrine protects state court deci-

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64. Id. at 285.
65. U.S. CONST. art. VI, cl. 2.
66. See Developments, supra note 30, at 1333.
67. Id. at 1334.
68. See, e.g., Gormley, supra note 31, at 696.
69. See id. at 697:
> Support for state supplementation of federal policy inheres in the text of the supremacy clause itself. The clause directs that a state court obey federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." When a state law supplements some federal provision, it is not "contrary" to the federal provision, and execution of the federal law can occur "notwithstanding" state law.

70. Id.
71. See Herb v. Pitcairn, 324 U.S. 117, 125 (1945):
> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Id. at 125-26; see also WHITEBREAD & SLOBOGIN, supra note 5, at 961.

sions that construe state constitutions to afford greater protection to individual rights than does the federal Constitution.[72]

1. Background

The adequate and independent state grounds doctrine stems from article III of the federal Constitution, which extends judicial power to cases that arise under the Constitution.[73] When a state court rests its decision on state law without violating the Supremacy Clause, there is no "case or controversy" within the definition of article III, thus removing the Supreme Court's jurisdiction to review the decision.[74] Traditionally, if a state court decision did not clearly rest on state grounds the Court would presume state grounds and decline review, or remand the case back to the state for further consideration.[75] Historically, the presumption was strong that a decision was based on adequate and independent state grounds, even if the state court relied on federal precedent.[76] "The reason for this deferential treatment was apparently to allow states to exercise their proper role in the dual system of federalism."[77] However, deferential treatment to state courts vanished in the early 1980s when state courts, refusing to follow the retrenchment of the Burger Court, began using the doctrine to insulate opinions by expanding individual rights under state constitutions.[78]

2. Michigan v. Long

In Michigan v. Long,[79] apparently frustrated by state court activism,[80] the Burger Court held that a state decision must clearly rest on independent state grounds to remove the Court's jurisdiction.[81]

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72. See WHITEBREAD & SLOBOGIN, supra note 5, at 961.

73. Judicial power extends "to all Cases, in Law and Equity, arising under this Constitution." U.S. CONST. art. III, § 2, cl. 1.

74. See Aton, supra note 26, at 743-44.

75. See Herb, 324 U.S. at 126-27.

76. See, e.g., Minnesota v. National Tea Co., 309 U.S. 551, 553 (1940) (noting that the state court did not rely on any specific provision of its own constitution and cited federal cases); see also Aton, supra note 26, at 746.

77. Aton, supra note 26, at 746.

78. In Michigan v. Long, 463 U.S. 1032, 1040-41 (1983), the Court placed the burden on the state court to show that its decision was based on independent state law grounds. The Court emphasized that if a state court refers to federal precedent in its decision, then it must make a plain statement that it is only using the federal decisions as guides. If the state court does not make an adequate plain statement, then the Court is not barred from reviewing the decision. Justice Stevens, in his dissenting opinion, argued that traditionally the presumption has been against asserting jurisdiction over a case that might have been decided on an independent state law ground. See id. at 1066-67 (Stevens, J., dissenting).

79. 463 U.S. 1032 (1983).

80. See WHITEBREAD & SLOBOGIN, supra note 5, at 961-62.

81. See Long, 463 U.S. at 1040-41.

> [W]hen, 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 possible 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.[82]

In Long, the Supreme Court reviewed the case despite the fact that the Michigan Supreme Court held a vehicle search invalid because it was "proscribed by the Fourth Amendment to the United States Constitution and article 1, section 11 of the Michigan Constitution."[83] The Court was not convinced that the decision rested on grounds independent of federal law and found that the state court relied on the federal Constitution when applying its own law.[84]

After Long, Justice Brennan noted that many critics feared that the Court would become hostile to state courts' protection of individual rights and would thus refuse to find independent state grounds, allowing the Court to interfere in these cases.[85] Justice Brennan stated, however, that he was not so pessimistic. He believed the Court had set appropriate ground rules for federalism and was convinced that if a state court clearly rested its opinion on state grounds, the Supreme Court would honor the decision.[86] Based upon the recent decisions of the Rehnquist Court it appears that Justice Brennan's faith was misplaced.

3. Impact of the Plain Statement Requirement

In Arizona v. Evans,[87] the Supreme Court reviewed whether the state supreme court erred when it suppressed evidence obtained due to a clerical error committed not by the arresting officer but by a court employee.[88] The Court asserted jurisdiction because it determined that indications it relied primarily on Arizona's "good-faith" statute rather than the Fourth Amendment.[89] The Supreme Court

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82. Id.
83. Id. at 1037 n.3 (emphasis added).
84. See id. at 1043-44.
85. See Brennan, supra note 7, at 551.
86. See id. at 552.
87. 514 U.S. 1 (1995).
88. See id. at 4. The court employee committed a clerical error, resulting in an invalid arrest warrant.
89. See id. at 9-10.

determined that the state supreme court's decision to invoke the exclusionary rule was "based squarely upon its interpretation of federal law"[90] and the Court reversed the Arizona court's decision.[91]

In Pennsylvania v. Labron,[92] the Court further narrowed the plain statement rule. In Labron, the Pennsylvania Supreme Court suppressed evidence obtained in a warrantless automobile search.[93] Under the Supreme Court's interpretation of the Fourth Amendment this search fell into the automobile exception to the Fourth Amendment's warrant requirement.[94] However, in an attempt to secure greater protections for its citizens, the Pennsylvania Supreme Court suppressed the evidence by basing its opinion on "this Commonwealth's jurisprudence of the automobile exception."[95] The United States Supreme Court found that the state supreme court did not clearly base its opinion on independent state grounds.[96]

Thus, according to Labron, a statement that the court is relying on its own jurisprudence is not enough to satisfy the plain statement requirement.[97] The Court acknowledged that the Pennsylvania Supreme Court discussed its own decisions.[98] The problem, as the Court saw it, was that many of the state precedents the Pennsylvania Su-

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> [W]e conclude that we have jurisdiction. In reversing the Court of Appeals, the Arizona Supreme Court stated that "[w]hile it may be inappropriate to invoke the exclusionary rule where a magistrate has issued a facially valid warrant (a discretionary judicial function) based on an erroneous evaluation of the facts, the law, or both, it is useful and proper to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest." Thus, the Arizona Supreme Court's decision to suppress the evidence was based squarely upon its interpretation of federal law. Nor did it offer a plain statement that its references to federal law were "being used only for the purpose of guidance, and d[id] not themselves compel."

(citations omitted); but see State v. Evans, 866 P.2d 869, 871 (Ariz. 1994) (stating that United States v. Leon, 468 U.S. 897 (1984), which established that it is not mandatory for courts to suppress evidence seized in violation of the Fourth Amendment due to an invalid search warrant, and which was relied on by the appeals court, was "not helpful" to the court's analysis).

90. Evans, 514 U.S. at 10.

91. See id. In a dissenting opinion, Justice Ginsburg stated that she would overrule Long. See id. at 24 (Ginsburg, J., dissenting). Justice Ginsburg supports the opposite of the plain statement rule—that absent a plain statement to the contrary, a state court's decision, like the one in this case, rests on independent state law grounds. See id. at 26. Justice Ginsburg was concerned that the application of the Long presumption increased the number of Supreme Court decisions that were not dispositive, because on remand the state courts merely reinstated their prior judgments after clarifying the reliance on state grounds with a "plain statement." See id. at 33. However, what troubled Justice Ginsburg most notably was that the Long presumption interfered "prematurely with state-court endeavors to explore different solutions to new problems facing modern society." Id.

92. 116 S. Ct. 2485 (1996).

93. See id. at 2486.

94. See id.

95. Id.

96. See id. at 2487.

97. See id.

98. See id.

preme Court based its decision on relied on United States Supreme Court decisions.[99] Therefore, the Court stated, "[t]he law of the Commonwealth thus appears to us 'interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'"[100]

In his dissenting opinion, Justice Stevens noted that "given the explicit and nearly exclusive references to state law," the Court's decision to review this case "not only extends Michigan v. Long beyond its original scope, but it stands its rationale on its head."[101] Justice Stevens emphasized that the state court "expressly indicated [an] intent to extend the protections of its constitution beyond those available under the Federal Constitution."[102] The majority's opinion was particularly unnecessary[103] and showed a lack of respect for the state court's independence.[104]

These cases demonstrate a new interest in uniformity by a Court that usually extols the virtues of federalism and states' rights.[105] It appears the value of federalism and state independence is not as high when states are asserting themselves as the protectors of individual rights and granting their citizens more freedom than the Supreme Court. Therefore, it seems that criticism of Long is warranted.

4. State Court Reaction to the Plain Statement Requirement

In response to the Court's broad interpretation of the scope of Long and the strict reading of the plain statement requirement,[106] states have begun to put blanket disclaimers in their opinions. The New Hampshire Supreme Court routinely puts the following statements in all of its decisions involving state constitutional issues: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."[107]

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99. See id.

100. Id. (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)).

101. Id. at 2490 (Stevens, J., dissenting).

102. Id. at 2492.

103. See id. at 2491-92 ("The harms are particularly unnecessary given the likely result on remand. . . . While the result will be identical, resources and respect will have been unnecessarily lost.").

104. See id.

105. See Brennan, supra note 7, at 549-50.

106. See, e.g., Arizona v. Evans, 514 U.S. 1, 31-32 (1995) (Ginsburg, J., dissenting).

107. State v. Ball, 471 A.2d 347, 352 (N.H. 1983); see also State v. Grant-Chase, 665 A.2d 380, 382 (N.H. 1995) (citing State v. Maya, 493 A.2d 1139, 1143 (N.H. 1985): "We cite 'decisions of the Supreme Court of the United States and of courts of other jurisdictions for their helpfulness in analyzing and deciding the State issue.'"); State v. Chaisson, 486 A.2d 297, 301 (N.H. 1984) ("In construing the State Constitution, we refer to federal constitutional law as only the benchmark of minimum constitutional protection.").

Several other states have followed the lead of New Hampshire and put disclaimers in their decisions.[108] In State v. Jewett,[109] the Vermont Supreme Court sent a warning to litigators about the danger of using federal cases when briefing state constitutional issues and advised them against stating that any federal case "compelled" a certain result.[110] The court advised the lower New Hampshire state courts to cite to federal cases helpful for their logic and reasoning but only for that limited purpose.[111]

IV. METHODS OF STATE COURT ANALYSIS

The first step in "new federalism" is for state courts to base their decisions on their own constitutions.[112] This entails state courts considering their own constitution before the federal Constitution, or as Justice Hans Linde of the Oregon Supreme Court noted, state constitutions are first in both time and logic.[113] However, the amount of independence a state court asserts depends on the method of constitutional analysis the state employs.[114] There are generally three methods of state constitutional interpretation: lock-step, interstitial, and primacy.[115]

A. Lock-Step/ Dependent Approach

Under a lock-step approach, a state court ties itself, on one or more issues, to the decisions of the United States Supreme Court.[116] If the federal Constitution protects a specific right, then the state court follows this precedent, as required under the Supremacy Clause.[117] However, if the federal Constitution does not protect a certain right, the state court follows this precedent without doing an independent interpretation of its state constitution.[118] Some state courts impose the lock-step doctrine upon themselves,[119] while other

108. See, e.g., Large v. Superior Court, 714 P.2d 399, 405 (Ariz. 1986) (en banc) (referring to federal constitutional law only as the benchmark of minimum protection).

109. 500 A.2d 233 (Vt. 1985).

110. Id. at 238.

111. See id.

112. See Ted M. Benn, Individual Rights and State Constitutional Interpretations: Putting First Things First, 37 BAYLOR L. REV. 493, 507 (1985).

113. Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379, 380 (1980).

114. See Benn, supra note 112, at 507.

115. See Aton, supra note 26, at 764.

116. See id.

117. See State v. Gomez, 932 P.2d 1, 6 (N.M. 1997).

118. See id.

119. See, e.g., People v. Kimery, 676 N.E.2d 656, 664 (Ill. 1997) (Nickels, J., dissenting) ("We are bound to follow the United States Supreme Court's decisions on matters of federal constitutional law. However, the obligation to apply those decisions when interpreting parallel provisions of our state constitution is one that this court has imposed

states have provisions in their constitutions requiring state courts to follow Supreme Court jurisprudence.[120]

When states follow federal jurisprudence in lock-step, the Supreme Court, not the state court, determines the degree of protection state citizens receive.[121] In reality, state courts assume the role of a "mimicking court jester"[122] when their constitutions are placed in lock-step with the decisions of the Supreme Court. Deferential conformity to federal precedent is contrary to the history of federal and state bills of rights, inconsistent with notions of federalism, undercuts the state judge's oath to uphold the state constitution,[123] and raises the question of whether state bills of rights serve a worthwhile purpose.[124]

B. Interstitial/ Supplemental Approach

States employing an interstitial method of analysis consider the federal Constitution issue first. If the federal Constitution does not protect a certain right the state court looks to the state's constitu-

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upon itself under the so-called 'lock step doctrine.'"); Gomez, 932 P.2d at 6-7 (stating that for several decades New Mexico also interpreted their constitution in lock-step with federal precedent; however, the court rejected the method in this case).

120. See FLA. CONST. art. I, § 12 (amended 1982). The amendment begins with wording identical to the Fourth Amendment of the United States Constitution, but then adds: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Id.

121. See Benn, supra note 112, at 507.

122. Id. An example of the Florida Supreme Court acting as a "mimicking court jester" is apparent in Perez v. State, 620 So. 2d 1256 (Fla. 1993). In Bernie v. State, 524 So. 2d 988, 991 (Fla. 1988), the court stated that because of the 1982 amendment which required the state to follow the interpretations of the United States Supreme Court on issues involving the Fourth Amendment, Florida courts were subsequently bound to prospective decisions of the Supreme Court. The impact of this holding was felt in Perez: "[I]n what must be the first time in history, this Court is issuing a majority decision with which the majority disagrees." Perez, 620 So. 2d at 1262 (Barkett, J., dissenting). Because of the 1982 amendment and its decision in Bernie, the Florida Supreme Court is bound to relevant Supreme Court decisions, even when the court does not agree with those decisions and even if a different outcome would be reached under the state constitution.

In his dissenting opinion in Perez, Justice Kogan noted that at the time Bernie was written, the Supreme Court had not begun to "retreat from its own precedent that characterizes the nation's high Court today. . . . Few could have foreseen the extent of the high Court's recent activities." Id. at 1270 (Kogan, J., dissenting). Justice Kogan further pointed out that the implication of the 1982 amendment, coupled with the court's decision in Bernie, required "that the authority to interpret part of the Florida Constitution is vested exclusively in the United States Supreme Court," a proposition that Justice Kogan found defied logic, "stretched credulity beyond the stars," and was absurd. Id. at 1271-72.

123. See Abrahamson, supra note 3, at 1168.

124. See, e.g., Developments, supra note 30, at 1328; see also Perez, 620 So. 2d at 1272 (Kogan, J., dissenting) (stating that the lock-step approach vests authority to interpret part of the Florida Constitution exclusively in the United States Supreme Court, nullifying that part of the state constitution).

tion.[125] In other words, if a right is protected under the federal Constitution, the state court will not consider its own constitution. State courts using an interstitial method of analysis can diverge from federal precedent because of flawed federal analysis, structural differences between state and federal constitutional provisions, or distinctive state characteristics.[126] Thus, the state constitution serves as additional or supplemental protection for individual rights.[127]

This approach allows state courts to assume a moderately independent role and still preserve a degree of uniformity.[128] However, a state court using this method "renounces its federalistic powers and submits to the judgment of the Supreme Court."[129]

> In practice, this approach is not very different from the dependent lock-step approach because federal law is so pervasive that comparatively few gaps remain for a state willing to let the Supreme Court settle its law. On the other hand, state constitutions can resolve many issues, and foreclosing the option of considering state arguments dissolves the essence of federalism by abrogating the state's responsibility to provide the other half of the dual protection.[130]

In essence, the "floor" set by the federal Constitution becomes the state's "ceiling" because the state court will not attempt to build its own body of state constitutional law.[131]

C. Primacy/ Independent Approach

States adopting the primacy method of analysis first look to their own constitution and only refer to the federal Constitution if a certain right is not protected under state law.[132] "The proper sequence is

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125. See, e.g., Abrahamson, supra note 3, at 1171 (stating that a court will turn to a state constitution only if the federal constitution does not adequately protect a defendant).

126. See State v. Gomez, 932 P.2d 1, 7 (N.M. 1997).

127. See Benn, supra note 112, at 507.

128. See, e.g., State v. Hunt, 450 A.2d 952, 955 (N.J. 1982). In Hunt, the court stated that the function of state constitutions is to serve as a second line of defense for those rights protected by the federal Constitution. See id. at 955. Therefore, only strong policy reasons justify a departure from federal precedent. See id. The court recognized that notions of federalism justify the departure; however, it noted that divergent paths are unsatisfactory to the public and it stressed the need for application of uniform rules of criminal procedure. See id.; Benn, supra note 112, at 508.

129. Aton, supra note 26, at 768.

130. Id.

131. See id.

132. See, e.g., id. (stating that under an independent approach to federalism questions, a state "only reaches the federal Constitution when the issues cannot be resolved under state law"). Some of the states utilizing a primacy analysis include: Large v. Superior Ct., 714 P.2d 399, 405 (Ariz. 1986); State v. Hoey, 881 P.2d 504, 523 (Haw. 1994); State v. Perry, 610 So. 2d 746, 751 (La. 1992); City of Portland v. Jacobsky, 496 A.2d 646, 648 (Me. 1985); State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986); State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983); Autran v. State,

to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required . . . 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."[133]

"State bills of rights are first in two senses: first in time and first in logic."[134] Historically, state bills of rights were first in time as protectors of individual rights and liberties. It follows that state courts should look to their own laws first for reasons of constitutional logic.[135] When state courts rely upon their own constitutions they do not reach federal questions unless certain rights are not protected by state laws.[136] Furthermore, the United States Supreme Court often exercises restraint in construing the extent of protection of the federal Constitution.[137] Therefore, it is entirely appropriate for state courts to look to their own constitutions first to determine if individual rights should require more protection than federal law guarantees.

The Supreme Court often exercises restraint because its precedent binds all states to a guaranteed "minimum" protection of rights, precluding further experimentation below the established floor.[138] Additionally, decisions suitable in some states may not be suitable in others, because the Court is ill-equipped to familiarize itself with local problems, conditions, and traditions of all fifty states.[139] States, however, are not faced with these same prudential concerns.[140] State court decisions only bind the courts within the state; one state's precedent will not foreclose experimentation in other jurisdictions.[141] Furthermore, no other court is more sensitive or responsible to the needs of diverse localities within a state, or the state as a whole, than that state's own high court.[142]

> Overall, the independent approach taken by an increasing number of states best preserves the meaning and purpose of federalism. By

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887 S.W.2d 31, 36-37 (Tex. Crim. App. 1994); State v. Jewett, 500 A.2d 233, 238 (Vt. 1985); State v. Coe, 679 P.2d 353, 361-62 (Wash. 1984).

133. State v. Johnson, 719 P.2d 1248, 1255 (Mont. 1986).

134. Linde, supra note 113, at 380.

135. See Wallace P. Carson, Jr., "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L. REV. 641, 648 (1983) ("[T]he United States Constitution is the supreme law of the land."). However an independent analysis of state constitutions does not diminish the supremacy of federal rights because nothing in a state law or state constitution can infringe upon federally guaranteed rights. See id.

136. See, e.g., id. at 648.

137. See, e.g., Traylor v. State, 596 So. 2d 957, 961 (Fla. 1992).

138. See id.

139. See id.

140. See id.

141. See id.

142. See id.

> allowing each state to decide independently what protections it will provide, rather than merely parroting the views of the Supreme Court, state residents receive the benefit of the dual protection of federalism, and have a judiciary that is both accountable to them and mindful of their special history, culture, and tradition.[143]

1. Perceived Dangers in an Independent Analysis

The most common criticism of state usage of the primacy doctrine is that it is result-oriented.[144] Critics regard "deviation from the federal standard [as being] based on ideology, not sound constitutional doctrine."[145] Many commentators view "new federalism" as an ideological reaction to the Supreme Court's departure from the policies promulgated by the Warren Court and not as an objective attempt to cultivate a coherent state constitutional doctrine.[146]

If state courts consistently look to their state constitutions first when constitutional issues are raised, and make a principled decision based on state law, then they are not selectively using their state constitutions merely to reach a certain outcome. "As long as the state court is reasonably consistent, the criticism of a lack of neutral principles is groundless, and amounts to nothing more than a plea for consistency with federal case law."[147]

2. Perceived Dangers in Diversity

Many critics view the diversity inherent in an independent analysis with skepticism.[148] These critics see no need for the state to deviate from Supreme Court decisions and prefer that state courts conform their law to the federal law.[149] According to this view, inde-

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143. Aton, supra note 26, at 771.

144. See, e.g., West v. Thomson Newspapers, 872 P.2d 999, 1005 (Utah 1994) (stating that the court had not developed a consistent approach for cases in which both state and federal constitutional claims were made and was criticized for being result-oriented); State v. Jewett, 500 A.2d 233, 236 (Vt. 1985) (stating that it would be a mistake for the court to use its state constitution to evade the decisions of the United States Supreme Court and that its decisions must be principled, not result-oriented).

145. Abrahamson, supra note 3, at 1178.

146. See, e.g., WHITEBREAD & SLOBOGIN, supra note 5, at 959 ("Many commentators view the current renaissance in state constitutional litigation as an ideological reaction to the retrenchment of the United States Supreme Court, rather than as an objective effort to develop state constitutional doctrine.").

147. Aton, supra note 26, at 756.

148. See, e.g., WHITEBREAD & SLOBOGIN, supra note 5, at 956-59 (rebutting arguments commonly advanced to support such an independent analysis).

149. See, e.g., Earl M. Maltz, The Dark Side of State Court Activism, 63 TEX. L. REV. 995, 1005-06 (1985) (arguing that there is no need for double constitutional protections).

pendent state constitutional analysis undercuts the need for uniformity with federal law and creates uncertainty.[150]

"Uniformity must be distinguished from consistency."[151] Uniformity requires laws to be the same in all jurisdictions. Consistency, however, "pertains to a system whose laws do not contradict each other, but fit together in the overall scheme of the system."[152] Our system of dual protection does not require that the laws throughout the fifty states be uniform.[153] Thus, it is possible for an individual state to be internally consistent without being uniform with federal jurisprudence.[154]

Federalism requires uniformity in only one aspect—federally guaranteed constitutional rights are the irreducible minimum that must be honored throughout the country. A higher standard only applies in the occasional situations where a state court actually raises this minimum.[155] "In short, only one standard will apply to state officials at any given time."[156] Thus, even if a uniform application of laws was attainable in our system of federalism and dual protection, the claim that uncertainty results from laws that may not be uniform, but are consistent, is greatly exaggerated.[157]

V. PUTTING FIRST THINGS FIRST: FLORIDA'S CONSTITUTION

The Florida Supreme Court recognized the importance and strength of utilizing the Florida Constitution as the primary protector of rights in the late 1980s and early 1990s, but failed to develop a detailed primacy analysis.[158] In 1992, the Florida Supreme Court finally laid the foundation for a meaningful independent analysis of the state constitution;[159] however, the court has yet to apply its own methodology in a significant fashion.[160]

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150. See, e.g., People v. Corr, 682 P.2d 20, 33 (Colo. 1984) (Erickson, J., dissenting) (stating that police officers should be able to rely on decisions of the United States Supreme Court); State v. Ringer, 674 P.2d 1240, 1250 (Wash. 1983) (Dimmick, J., dissenting) (stressing the need for uniform application of laws); Benn, supra note 112, at 508 (stating that uniformity of the law is often a worthwhile goal).

151. Aton, supra note 26, at 762.

152. Id.

153. See id.

154. See id.

155. See WHITEBREAD & SLOBOGIN, supra note 5, at 957.

156. Id.

157. See id.

158. See discussion infra Part V.A.

159. See discussion infra Part V.B.

160. See discussion infra Part V.C.

A. Origins of Primacy in Florida

The emergence of the primacy doctrine in Florida occurred in the context of privacy rights. In In re T.W.,[161] the Florida Supreme Court considered the constitutionality of a state statute requiring parental consent for a minor to obtain an abortion.[162] The court struck down the statute, finding that it violated the privacy provision of Florida's Constitution.[163] The court stated that if the Florida Constitution failed to protect a minor's right to choose an abortion without parental consent, only then would it consider whether that right was protected under the federal Constitution.[164]

In In re Guardianship of Browning ,[165] the Florida Supreme Court upheld the right of the guardian of an incompetent patient suffering from an incurable terminal disease to order life-prolonging medical procedures to be withheld from the patient.[166] The court relied on its finding in In re T.W. that Florida's privacy provision was more expansive than any implicit right of privacy contained in the federal Constitution.[167]

These two cases used the Florida Constitution as the primary basis for protecting individual rights. However, neither provided an in-depth analysis of the primacy approach, and neither truly relied on a state-based legal analysis, which is the essence of an independent determination of a state constitutional provision.[168] Both cases relied on federal constitutional law, national legal policy, and an external, common law style legal analysis.[169]

B. A True Independent Determination

In Traylor v. State,[170] a convicted murderer challenged the admissibility of his confessions at trial, claiming the police violated his right to counsel and his right against self-incrimination.[171] Although the court did not find for the defendant, it thoroughly analyzed the state constitution and explicitly adopted a primacy analysis.[172]

Previously, the court's primacy decisions involved the state constitution's privacy provision. Comparatively, the federal Constitution

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161. 551 So. 2d 1186 (Fla. 1989).
162. See id. at 1189.
163. See id. at 1196.
164. See id.
165. 568 So. 2d 4 (Fla. 1990).
166. See id. at 7-8.
167. See id. at 8.
168. See Daniel Gordon, Good Intentions—Questionable Results: Florida Tries the Primacy Model, 18 NOVA L. REV. 759, 764-66 (1994).
169. See id.
170. 596 So. 2d 957 (Fla. 1992).
171. See id. at 960-61.
172. See id. at 961-66.

does not contain an explicit protection of privacy. However, Traylor involved article 1, section 9 of the Florida Constitution, which contains the same wording as the Fifth Amendment of the United States Constitution.[173] The decision reflects the court's recognition that primacy applies to more than just state constitutional provisions that differ from the federal Constitution; the analysis applies even when state constitutional provisions are similar or identical to their federal counterparts.[174]

The Traylor court stated that every phrase and every clause of the state constitution is to be given an independent interpretation.[175] The court developed an explicit methodology for construing Florida's Bill of Rights, requiring state courts to focus on factors unique to the experience of the state.[176] When utilizing a primacy analysis, courts should rely on the "express language of the [state] constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law."[177]

The methodology set out in Traylor is important because it provides the lower courts with a step-by-step guide to using a state-based legal analysis. State courts can avoid many of the criticisms that accompany independent state constitutional interpretation if the analysis is scrupulously followed.[178] Traylor also gives lawyers a guide for raising state constitutional issues in state court, a practice that all but vanished in the Warren era.

C. Application of Primacy After Traylor v. State

Less than one month after the decision in Traylor, the Florida Supreme Court reviewed Herrera v. State.[179] The court considered whether a Florida jury instruction unconstitutionally shifted the burden of proving the affirmative defense of entrapment to the defendant.[180] The court held that the allocation of this burden to the de-

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173. Compare U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."), with FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.").

174. See Traylor, 596 So. 2d at 962-63.

175. See id.

176. See id. at 962.

177. Id.

178. See supra Parts IV.C.1-2.

179. See 594 So. 2d 275 (Fla. 1992).

180. See id. at 276.

fendant was not unconstitutional.[181] However, in arriving at this decision, the court merely recited federal law and stated that earlier Florida cases recognized the principles set out in the federal precedent.[182]

In his concurring opinion, Justice Kogan expressed his concern that the court did not honor its own doctrine of primacy.[183] Under the Traylor doctrine, state courts are required to consider state constitutional issues first, and to address federal questions only if the issues are not resolved under the state constitution.[184] Justice Kogan stressed that "when state issues are properly raised and briefed, this Court has a duty and an obligation to honor its own doctrine of primacy."[185]

Two years later, in B.H. v. State,[186] the supreme court analyzed the role of an administrative agency in defining the elements of a crime.[187] Because the B.H. court disagreed with the federal law, it turned to the Florida law.[188] The court performed a thorough analysis of the Florida Constitution and Florida law[189] and found the statute unconstitutional because it delegated authority to the administrative agency.[190]

Critics of an independent state constitutional analysis could cite to Herrera and B.H. to support their criticism that the primacy model is result-oriented.[191] In Herrera, federal precedent supported the court's holding; there was no need to discuss the Florida Constitution.[192] In B.H., the court was not satisfied with the federal jurisprudence, so it analyzed the issue under the state constitution.[193]

Critics also claim that independent analysis breeds uncertainty.[194] In Herrera, state law issues were raised and briefed; however, they were not addressed.[195] In B.H., instead of employing the primacy model the court had earlier advanced, it used an interstitial analysis where the court first looks to federal law and then to state law.[196]

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181. See id. at 278.
182. See id. at 277-78.
183. See id. at 279-80 (Kogan, J., concurring) (stating that the question presented to the court is a far more serious issue of Florida constitutional law, which the court did not address).
184. See id. at 279.
185. Id.
186. 645 So. 2d 987 (Fla. 1994).
187. See id. at 990.
188. See id. at 991.
189. See id. at 991-94.
190. See id. at 994.
191. See supra Part IV.C.1.
192. See Herrera v. State, 594 So. 2d 275, 277-78 (Fla. 1992).
193. See B.H., 645 So. 2d at 991.
194. See supra Part IV.C.2.
195. See Herrera, 594 So. 2d at 279 (Kogan, J., concurring).
196. See B.H., 645 So. 2d at 991.

Therefore, it is not clear if, or when, the court will independently interpret the Florida Constitution.

These criticisms could be cured by consistently applying the primacy analysis set forth in Traylor. Consistency avoids the appearance that the court uses primacy only when it seeks to reach a desired result, and eliminates the uncertainties surrounding the law and the method of analysis that state courts should apply.[197]

VI. SELF-INCRIMINATION: A GUIDE TO THE FATE OF PRIMACY IN FLORIDA

The primacy model crafted by the Florida Supreme Court in Traylor was primed for examination and elucidation in the case of State v. Owen (Owen II).[198] Instead, after Owen II, the future of primacy is unclear.[199]

A. Background

During its initial review of the Owen case in 1990,[200] the Florida Supreme Court held that when a suspect in a custodial interrogation makes an equivocal assertion of the Miranda[201] right to terminate questioning or have a lawyer present for further questioning, police may only ask clarifying questions to determine the true intent of the statement.[202] Thus, the Owen I court reversed the conviction and remanded for a new trial because the defendant said "I'd rather not talk about it," an equivocal request to terminate the questioning.[203] At this point, under Miranda, the police were limited to asking clarifying questions.[204] However, they continued with the interrogation, rendering further statements inadmissible.[205]

In Traylor, the supreme court adopted a primacy model of constitutional analysis and applied it to the self-incrimination provision of the state constitution.[206] Based upon independent analysis of state constitutional law, the court found that if a suspect indicates in any manner, even equivocally or ambiguously, that he or she does not

197. See supra Parts IV.C.1-2.

198. 22 Fla. L. Weekly S246 (Fla. May 8, 1997) (answering the certified question of whether the principles announced by the United States Supreme Court in Davis applied to the admissibility of confessions in Florida in light of Traylor) (Owen II).

199. See infra Parts VI.D.1-3.

200. See Owen v. State, 560 So. 2d 207 (Fla. 1990) (Owen I).

201. See Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a suspect in custodial interrogation must be made aware of his right to assistance of counsel and to terminate questioning).

202. See Owen I, 560 So. 2d at 211.

203. See id. at 210-11.

204. See id.

205. See id.

206. See Traylor v. State, 596 So. 2d 957, 964-66 (Fla. 1992).

want to be questioned, the interrogation must stop.[207] However, the court found that the defendant never indicated a desire to consult with a lawyer or to stop the interrogation.[208] In other words, there was not even an equivocal invocation of Miranda rights; therefore, the right against self-incrimination was not violated.[209]

B. United States Supreme Court Self-Incrimination Jurisprudence

In Davis v. United States,[210] the Supreme Court held that unless a suspect unequivocally invokes Miranda rights, an interrogation may continue and the police do not have any obligation to ask clarifying questions.[211] The Court found that the defendant's statement in Davis, "maybe I should talk to a lawyer," was not an unequivocal request for counsel.[212] Thus, the Court stated, it was entirely appropriate for the police to continue the interrogation.[213] The Court observed that "a statement either is such an assertion of the right to counsel or it is not."[214]

Compelled by a need to facilitate law enforcement the Davis Court gave police officers an easily followed "bright line" rule: if the assertion is equivocal or ambiguous, the officer may continue the interrogation without clarification.[215] Although the court recognized that it is good police practice for the interviewing officers to seek clarification if the suspect makes an ambiguous statement, such clarification is not mandated.[216]

C. Florida's Reaction to Davis v. United States

Initially, the United States Supreme Court's holding in Davis caused confusion in Florida's state courts. Deck v. State[217] illustrates the confusion in the initial treatment of the Davis decision. In its first opinion, the Deck court reversed a conviction because the trial court admitted into evidence a confession made after the defendant unequivocally asserted a desire to terminate the questioning.[218] Two months later, the state brought a rehearing motion urging reconsideration in light of Davis. The district court substituted its earlier

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207. See id. at 966.
208. See id. at 971-72.
209. See id. at 972.
210. 512 U.S. 452 (1994).
211. See id. at 459.
212. Id. at 462.
213. See id.
214. Id. at 459 (quoting Smith v. Illinois, 469 U.S. 91, 97-98 (1984)).
215. See id. at 461.
216. See id.
217. 20 Fla. L. Weekly D37 (Fla. 5th DCA Dec. 22, 1994), withdrawn and substituted by 20 Fla. L. Weekly D399 (Fla. 5th DCA Feb. 10, 1995).
218. See Deck, 20 Fla. L. Weekly at D37.

opinion and merely parroted the opinion of the Supreme Court, finding that Davis precluded the earlier result.[219]

The defendant moved for yet another rehearing, arguing the Florida Supreme Court's opinion in Traylor, overlooked by the district court, directly addressed the issue and was dispositive.[220] In its third opinion, the court affirmed the suppression based on Traylor and stated that according to Florida's primacy doctrine, when a fundamental right is created by the state constitution it must be respected even if no similar right is recognized by the federal courts.[221]

Even though there was some initial confusion regarding the significance of Davis, all the district courts have followed the Florida Supreme Court's decisions in Owen I and Traylor. However, at least one district expressed concern over the impact that Davis has on state self-incrimination jurisprudence.[222]

In Owen I the Florida Supreme Court reversed the conviction and remanded for a new trial, but before retrial the state moved for reconsideration in light of the intervening decision of the Supreme Court in Davis.[223] The Fourth District Court of Appeal denied the rehearing, but found, in Owen II, that the statements made during Owen's confessions would not make the confession inadmissible under Davis; the confession would only be inadmissible if Traylor was controlling.[224] The court opined that the significance of Davis was unclear because the Florida Supreme Court relied on federal law in its Traylor decision.[225] Therefore, the court certified the issue of admissibility to the Florida Supreme Court as one of great importance.[226]

At least one other state has rejected the Davis rule and opted for the clarification approach.[227] However, most states that have decided

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219. See Deck, 20 Fla. L. Weekly D399 (Fla. 5th DCA Feb. 10, 1995), withdrawn and substituted by 653 So. 2d 435, 436 (Fla. 5th DCA 1995).

220. See Deck v. State, 653 So. 2d 435, 436-37 (Fla. 5th DCA 1995).

221. See id. at 437.

222. See Almeida v. State, 687 So. 2d 37 (Fla. 4th DCA 1997) (certifying the question of whether Davis applied to the admissibility of confessions in Florida in light of the Florida Supreme Court's decision in Traylor).

223. See State v. Owen, 654 So. 2d 200 (Fla. 4th DCA 1995) (Owen II).

224. See id. at 202.

225. See id.

226. See id. ("[W]e certify the following question as one of great public importance: DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN DAVIS APPLY TO THE ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR?"). The Fourth District Court of Appeals certified the same question in Almeida v. State, 687 So. 2d 37, 39 (Fla. 4th DCA 1997) and Skyles v. State, 670 So. 2d 1084, 1085 (Fla. 4th DCA) rev. granted, 679 So. 2d 774 (Fla. 1996).

227. See State v. Hoey, 881 P.2d 504, 523 (Haw. 1994) (choosing to afford its citizens greater protection under the Hawaii Constitution than that recognized by the Davis majority under the United States Constitution).

the issue have adhered to the Court's decision in Davis,[228] although none of these did so through an independent determination of their state constitution.[229] Other state courts have gone to great lengths to distinguish Davis,[230] or have found the question not dispositive, thus never reaching the issue.[231]

D. Resolution by the Florida Supreme Court?

When the Florida Supreme Court considered the certified question presented by Owen II it had the opportunity to solidify the primacy model as Florida's method of choice in constitutional interpretation.[232] The court could have sent a clear message to the lower courts that the Florida Constitution truly is the first and foremost protector of individual liberties and rights. Instead, Owen II indicates that the Traylor primacy doctrine was merely the means to reach a desired outcome and was not as expansive as the court originally proclaimed.[233]

1. The Court's Decision in State v. Owen (Owen II)

In Owen II, the Florida Supreme Court adopted the Davis standard, holding that Florida's Constitution "does not place greater restrictions on law enforcement than those mandated under federal law."[234] The court changed the emphasis from its earlier opinion in Owen I, finding the result was based on federal law and now required a different result "post-Davis."' The court opined that even though its "analysis in Traylor was grounded in the Florida Constitution, [its] conclusions were no different than those set forth in prior holdings of the United States Supreme Court."[235]

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228. See, e.g., State v. Williams, 535 N.W.2d 277 (Minn. 1995); State v. Panetti, 891 S.W.2d 281 (Tex. Crim. App. 1994); State v. Bacon, 658 A.2d 54 (Vt. 1995); State v. Long, 526 N.W.2d 826 (Wis. Ct. App. 1994).

229. See Williams, 535 N.W.2d at 284-85; Long, 526 N.W.2d at 829-30; Bacon, 658 A.2d at 65. But see Panetti, 891 S.W.2d at 283-84 (acknowledging that the Texas Constitution could be read more expansively but, relying on federal law, adopting Davis).

230. See, e.g., Jackson v. State, 476 S.E.2d 615, 618-19 (Ga. Ct. App. 1996) (distinguishing Davis because the request for an attorney came while the defendant was waiving his Miranda rights).

231. See, e.g., Cargle v. State, 909 P.2d 806, 820 (Okla. Crim. App. 1995) (finding no violation of Miranda rights because after an equivocal assertion the police asked clarifying questions); see also Long, 526 N.W.2d at 830 n.3 (leaving the question of whether the Wisconsin Constitution grants more rights than Davis for another day).

232. See State v. Owen, 22 Fla. L. Weekly S246, S247 (Fla. May 8, 1997).

233. See id. at S247 ("Though our analysis in Traylor was grounded in the Florida Constitution, our conclusions were no different than those set forth in prior holdings of the United States Supreme Court.").

234. Id.

235. Id.

In turning first to federal law, the Owen II court ignored the primacy analysis promulgated in Traylor. The majority opinion does not even mention primacy. The singular importance of Traylor was that it "reminded" the court it could reaffirm Owen I regardless of federal law.[236] However, the court chose not to do so and did not attempt a primacy analysis.[237]

Justice Shaw's concurrence attempted to honor the court's opinion in Traylor by applying a primacy analysis.[238] He sought to clarify what constituted a clear invocation of Miranda rights in Florida.[239] In making that determination, Justice Shaw applied article I, section 9 of the Florida Constitution and looked to the unique characteristics of Florida, finding that a suspect invokes Miranda rights when a reasonable person would conclude that the suspect expressed a desire to stop the questioning.[240]

Chief Justice Kogan's dissent noted that the Davis standard does not adequately protect the rights of the accused.[241] He stressed that the original approach adopted in Owen I better protects individual rights.[242] Unlike the majority opinion, which stated that its earlier Owen I opinion was based on federal law, Chief Justice Kogan wrote that article I, section 9 of Florida's Constitution played a significant part in the earlier opinion.[243] Because the court's initial decision in Owen I better protected the rights of individuals, and because article I, section 9 of the Florida Constitution provided a basis for the continuation of this approach, Chief Justice Kogan would exercise the court's authority under Traylor and reaffirm Owen I.[244]

2. Analysis of Owen II

Traylor focused on the protection of individual rights.[245] While recognizing the importance of facilitating law enforcement, the court found the protection of individual rights to be paramount.[246] The court stated that it was "bound under [Florida's] Declaration of Rights to construe each provision freely in order to achieve the primary goal of individual freedom and autonomy."[247]

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236. See id.
237. See id. at S246-47 (basing its holding on federal law without first looking to the state constitution).
238. See id. at S248 (Shaw, J. concurring).
239. See id.
240. See id.
241. See id. at S249 (Kogan, C.J., dissenting).
242. See id.
243. See id. at S250.
244. See id.
245. See Traylor v. State, 596 So. 2d 957, 962-63 (Fla. 1992).
246. See id. at 964.
247. Id. at 963.

In contrast, in Davis, the Supreme Court explicitly chose to emphasize the other side of the equation—the need for effective law enforcement rather than the protection of individual rights.[248] The Davis Court refused to impose "difficult judgment calls" upon the police to determine whether a suspect actually wants a lawyer, even when one is not unequivocally requested.[249]

Historically, facilitating the tasks of law enforcement has not been the primary emphasis of Florida constitutional protection. As the supreme court noted in Traylor, "[w]here the rights of those suspected of wrongdoing are concerned, the framers drew a bright line and said to the government 'Thus far shalt thou come, but no farther.'"[250] The Traylor court clearly determined where that bright line was in regard to Florida's constitutional right against self-incrimination: if a suspect makes any invocation of his rights the interrogation must cease.[251]

However, in Owen II, the court retreated from its previously announced bright line.[252] In doing so, the court failed to give content to its own command in Traylor—that the state constitution is to be interpreted to give the fullest protections to individual freedoms.[253] Instead, the court accepted the federal standard, even though the Supreme Court's primary concern was effective law enforcement, not the protection of individual rights.[254]

The Davis rule adopted by the Florida Supreme Court guarantees that the constitutional rights of at least some citizens who unartfully demand them will be violated.[255] The Davis Court defended as tolerable the certainty that some poorly expressed requests for counsel will be disregarded.[256] Based on Traylor, this is not acceptable under Florida's Constitution. State courts must construe each provision of Florida's Bill of Rights freely in order to achieve the primary goal of individual freedom and autonomy.[257]

3. The Effect of the Decision on Primacy

The two criticisms of the primacy method of state constitutional interpretation are that it is result-oriented and that it fosters uncertainty.[258] In Owen II the court merely adhered to federal precedent

248. See Davis v. United States, 512 U.S. 452, 461 (1994).
249. Id.
250. Id. at 964.
251. See Traylor, 596 So. 2d at 963.
252. See State v. Owen, 22 Fla. L. Weekly S246, S248 (Fla. May 8, 1997).
253. See Traylor, 596 So. 2d at 962-63.
254. See Owen II, 22 Fla. L. Weekly at S246-47.
255. See Davis, 512 U.S. at 472 (Souter, J., concurring).
256. See id.
257. See Traylor, 596 So. 2d at 962.
258. See id.

without looking to its own constitution.[259] The court found no need to apply a primacy analysis because a decision by the United States Supreme Court provided authority for an outcome it apparently desired to reach.[260] After Owen II it remains uncertain whether the court will apply a primacy approach when interpreting future constitutional issues. Based on an independent interpretation of Florida's Constitution, all district courts in the state adhered to the Florida Supreme Court's initial decision in Owen I.[261] However, because the court reversed its earlier decision based entirely on federal law without looking to its own constitution, there is now a climate of uncertainty as to which analysis state courts should use.

The sporadic application of primacy presents practical problems both for practitioners litigating constitutional issues and for lower courts resolving those questions. Does a practitioner present solely a primacy argument? Or does he or she present a lock-step analysis assuming the reviewing court will parrot the federal decision? Or should there be some combination of the two?

The confusion mounts for a lower court. What type of review is appropriate? Traylor commanded the courts to undertake a primacy analysis. Owen II did not overrule this command, it merely ignored it. A lower court must hope the end result comports with the desires of the supreme court if a primacy analysis is ignored. The usage of an independent analysis, while moribund after the court's decision in Owen II, is not yet dead because the court did not reverse Traylor's primacy approach.[262] In fact, the court reminded itself that under Traylor it could reaffirm Owen I despite contrary federal law.[263] Only time will tell the role primacy will play in molding an independent body of constitutional law in Florida.

E. The Fate of Primacy in Florida

With the thirtieth anniversary of the 1968 Florida Constitution approaching, the fate of primacy analysis is indeterminate. However, as one commentator noted, the status of Florida constitutional law may be threatened through the constitutional revision process.[264] Therefore, the future of primacy may not lie with the Florida Supreme Court, but with the citizens of the state.[265] The permanency

259. See Owen II, 22 Fla. L. Weekly at S247.
260. See id.
261. See supra Part VI.C.
262. See Owen II, 22 Fla. L. Weekly at S247.
263. See id.
264. See Daniel R. Gordon, Protecting Against the State Constitutional Law Junkyard: Proposals to Limit Popular Constitutional Revision in Florida, 20 NOVA L. REV. 413, 414-15 (1995).
265. See id.

and primacy of the Florida Constitution will always be in jeopardy because the constitution lends itself too easily to amendment.[266]

The purpose of a state bill of rights is defeated when a state constitution is forced into a lock-step analysis with Supreme Court interpretation of the federal Constitution. Applying federalist principles, the Florida Constitution should be the primary protector of individual rights, but if state courts must follow the United States Supreme Court lock-step, the Florida Constitution cannot offer its citizens additional protection. This is the reason many commentators have urged the 1998 Florida Constitution Revision Commission to take action to make Florida's constitutional amendment procedures more stringent.[267]

VII. CONCLUSION

The state constitutional law revolution has realigned the historical notions of federalism. States have renewed their role as protectors of individual rights and liberties. Initially, it appeared that the Florida Supreme Court was ready to join this revolution, but the Owen II decision indicates this may not be the case. It appears the expansive primacy analysis laid down in Traylor was merely the means to a desired end and the independence of Florida's Constitution simply an illusion.

This Article began with a quote by Justice Brennan; therefore, it seems appropriate to conclude with another.

> Federal courts remain an indispensable safeguard of individual rights against governmental abuse. The revitalization of state constitutional law is no excuse for the weakening of federal protections and prohibitions. Slashing away at federal rights and remedies undermines our federal system. The strength of our system is that "it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[268]

Hopefully, the Florida Supreme Court's decision in Owen II has not crippled the Florida Constitution as the champion of individual rights and liberties.

266. See id.
267. See, e.g., id.
268. Brennan, supra note 7, at 552.