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First Things Last: Amendomania and State Bills of Rights

Donald E. Wilkes Jr.
University of Georgia School of Law, wilkes@uga.edu

FIRST THINGS LAST: AMENDOMANIA AND STATE BILLS OF RIGHTS

*Donald E. Wilkes, Jr.**

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.
>
> —*Winston S. Churchill*[1]

> [T]he natural progress of things is for liberty to yield and government to gain ground.
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> —*Thomas Jefferson*[2]

I. First Things First

State bills of rights preceded the federal Bill of Rights. From June 1776, when the Virginia Declaration of Rights (the first state bill of rights) was adopted, until December 1791, when the federal Bill of Rights was ratified, eight states each adopted a bill of rights as a separate part of their state constitution.[3]

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* Professor of Law, University of Georgia School of Law. B.A. 1965, J.D. 1969, University of Florida. Member of the Georgia Bar.

This article is dedicated to Robert J. Farley, Dean Emeritus of the University of Mississippi School of Law.

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[1] W.S. Churchill, Remarks on Prison Administration, Report of Supply (Home Office) in 19 Hansard, col. 1354 (July 20, 1910).

[2] Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), in 7 Writings of Thomas Jefferson 37 (A. Lipscomb ed. 1904).

[3] For the text of and commentary on these early state declarations of rights, see 1 B. Schwartz, The Bill of Rights: A Documentary History 231-379 (1971). *See also* Bravenec, *The New Hampshire Bill of Rights in the Constitution of 1784 and the Treatment of Dissenters During the American Revolution*, 8 N.H.B.J. 244, 246 (1966); Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 Conn. L. Rev. 87, 95 (1982).

The states adopting bills of rights before 1791 were: (1) Virginia (1776); (2) Pennsylvania (1776); (3)Delaware (1776); (4) Maryland (1776); (5) North Carolina (1776); (6)Ver-

State constitutional rights existed even before there was a United States Constitution. Furthermore, the federal Bill of Rights contains provisions derived from earlier state bills of rights. Indeed, virtually every guarantee in the federal Bill of Rights can be traced to a similar guarantee in one of the bills of rights adopted in the states during the War of Independence or shortly thereafter.[4] It is likely that the framers of the Constitution thought that the first bulwark of defense for the protection of the rights of citizens would be state bills of rights.[5] One reason given at the 1787 Convention for not adding a bill of rights to the completed Constitution was that the state bills of rights remained undisturbed and were "sufficient" to protect against oppression by government.[6]

Until the ratification of the fourteenth amendment in 1868, parties to state court proceedings enjoyed almost no federally protected rights. Few provisions of the federal Constitution protected individuals from state (as opposed to federal) action, and

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mont (1777); (7) Massachusetts (1780); (8) New Hampshire (1784). *See generally* Wright, *The Early History of Written Constitutions in America*, in ESSAYS IN HISTORY AND POLITICAL THOUGHT IN HONOR OF CHARLES HOWARD MCILWAIN 344 (1936); Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311, 311 (1968); Black, *The Formation of the First State Constitutions*, 7 CONST. REV. 22, 33 (1923); Graham, *The Early State Constitutions*, 9 CONST. REV. 222, 229 (1925); Morey, *The First State Constitutions*, 4 ANNALS 201, 219 (1893); Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 347, 371-79 (1945); Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS 380, 385-86 (1897).

[4] *See* 2 B. SCHWARTZ, *supra* note 3, at 1204 (table giving state antecedents of clauses in Bill of Rights); Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323, 323-44 (1958)(discussing effect of state bills of rights on formulation of federal Bill of Rights).

To be precise, the federal Bill of Rights, as originally proposed by Madison, was based on amendments suggested by the state conventions which had ratified the Constitution in 1788, which recommendations in turn were based on the provisions of the pre-1789 state bills of rights. *See id.* at 323.

See also People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975)(describing as fiction the idea that state bills of rights were patterned after the federal Bill of Rights).

[5] *See generally* Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125, 126-27 (1969); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 275-76 (1973).

[6] *Project Report: Toward an Activist Role for State Bills of Rights*, *supra* note 5, at 275-76. *But see id.* at 276-77 (Madison's argument that state bills of rights were inadequate).

the rights secured by those provisions (basically the ex post facto, bills of attainder, and impairment of contracts clauses of article I, section 10, and the commerce clause of article I, section 8) were narrow in scope. Prior to the Civil War era, therefore, the only constitutional rights, practically speaking, that could be asserted by criminal defendants in a state court were those guaranteed under state constitutions.[7] Thus, state bills of rights were the first American bills of rights; they created our very first constitutional rights; and they secured the first — and, until 1868 at least, the only — effective constitutional rights against state action.

Today there is renewed interest in the bills of rights of the fifty states.[8] The origin of this new concern with state bills of rights is easily understood. Beginning in the early 1970's and continuing to the present, the Supreme Court of the United States, under the leadership of Chief Justice Warren E. Burger, has been leading this country through a counterrevolution in criminal procedure.[9] The scope of various federal constitutional rights for criminal suspects has been markedly narrowed;[10] the

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[7] "The state constitution was a citizen's *only* protection against overreaching by state government until the fourteenth amendment was adopted in 1868." Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 158 (1981)(footnote omitted)(emphasis in original).

[8] *See, e.g.*, Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123 (1978); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353 (1984); *The Role of a Bill of Rights in a Modern State Constitution*, 45 WASH. L. REV. 453 (1970).

[9] *See* Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985). *But see* Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62-91 (V. Blasi ed. 1983)(fears that Burger Court would dismantle work of Warren Court have been considerably exaggerated).

[10] *See, e.g.*, New York v. Quarles, 104 S.Ct. 2626, 2632 (1984)(adopting public safety exception to *Miranda* requirements); Michigan v. Long, 103 S. Ct. 3469, 3480-81 (1983)(in investigatory stop of automobile, officers may conduct area search of passenger compartment to uncover weapons if they have articulable and objectively reasonable belief the suspect is dangerous; fourth amendment does not require suppression of contraband found in such a search); Oregon v. Bradshaw, 103 S. Ct. 2830, 2835 (1983)(suppression not required where defendant initiates generalized conversation with police and

selective incorporation principle has come under attack;[11] the doctrine of harmless constitutional error has been exalted to new heights;[12] and both postconviction remedies and civil rights remedies for redressing violations of the federal Bill of Rights and of the fourteenth amendment have been severely limited.[13] While

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later makes knowing waiver of rights to counsel and silence); Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983)(adopting a "totality of circumstances" test for evaluating whether informant's tip establishes probable cause for issuance of warrant); United States v. Ross, 456 U.S. 798, 820-23 (1982)(probable cause supporting search of automobile also validates warrantless search of containers found therein); Michigan v. Summers, 452 U.S. 692, 705 (1981)(detention of occupants of premises while search of premises is conducted pursuant to a warrant is not illegal seizure under fourth amendment); Smith v. Maryland, 442 U.S. 735, 745-46 (1979)(the installation and use of device to record phone numbers dialed not a search within fourth amendment); Manson v. Brathwaite, 432 U.S. 98, 114-17 (1977)(where facts indicated eyewitness's identification of defendant was reliable, identification was admissible even though method was suggestive); Michigan v. Mosley, 423 U.S. 96, 104-07 (1975)(where officers halted interrogation when suspect refused to answer further questions and two hours later other officers asked him about different crime after again advising suspect of his rights, incriminating statement in second interrogation admissible under *Miranda*); Gustafson v. Florida, 414 U.S. 260, 266 (1973)(custodial arrest of person for driving without a license allows officer to make full search of arrestee's person); Kirby v. Illinois, 406 U.S. 682, 690 (1972)(plurality opinion)(rule excluding identifications based on lineup without counsel present does not apply to preindictment identification).

[11] *See* Crist v. Bretz, 437 U.S. 28, 52-53 (1978)(Powell, J., dissenting)(federal rule that jeopardy attaches when jurors are sworn should not be incorporated in fourteenth amendment); Ballew v. Georgia, 435 U.S. 223, 246 (1978)(Powell, J., concurring)(sixth amendment jury trial clause should not be fully incorporated in fourteenth); Apodaca v. Oregon, 406 U.S. 404, 369 (1972)(Powell, J., concurring)(all elements of jury trial embodied in sixth amendment should not be fully incorporated into fourteenth).

[12] *See, e.g.*, United States v. Hasting, 461 U.S. 499, 510-12 (1983)(prosecutor's allusion to defendant's failure to rebut government evidence harmless error in light of other evidence); Connecticut v. Johnson, 460 U.S. 73, 93-99 (1983)(Powell, J., dissenting and joined by Burger, C.J., and Rehnquist and O'Connor, JJ.)(suggesting that there are instances where erroneous instruction embodying conclusive presumption as to intent may be harmless error); Parker v. Randolph, 442 U.S. 62, 74-75 (1979)(admission with limiting instructions of confession made by non-testifying co-defendant not fatal to case of defendant who had himself confessed); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (any error in admitting incriminating statements made to police officer posing as prisoner rendered harmless error by three corroborative confessions); Schneble v. Florida, 405 U.S. 427, 432 (1972)(admission of statements made by non-testifying co-defendant harmless error in light of other evidence).

[13] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105-09 (1983)(plaintiff who had been subjected to chokehold by police not entitled to injunction against future use of chokeholds because did not show he was likely to suffer future injury); Engle v. Isaac, 456 U.S. 107, 135 (1982)(habeas relief barred by noncompliance with state procedure); Rose v. Lundy, 455 U.S. 509, 522 (1982)(habeas petition dismissed where unexhausted as

the Burger Court has been finding new limits to federal constitutional protection, appellate courts in a number of states have, since about 1970, increasingly engaged in the practice of construing their own state bills of rights in criminal cases to provide more protections than are provided under applicable provisions of the Bill of Rights or the fourteenth amendment.[14] This trend among state judiciaries toward granting state constitutional rights that are broader than federal constitutional rights has

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well as exhausted claims were presented); Wainwright v. Sykes, 433 U.S. 72, 86-91 (1977)(habeas relief barred by failure to comply with state procedure); Stone v. Powell, 428 U.S. 465, 481-82 (1976)(habeas relief barred where defendant was afforded opportunity for full and fair litigation of fourth amendment claim in state court); Francis v. Henderson, 425 U.S. 536, 542 (1976)(procedural default bars habeas relief for state prisoner absent cause and prejudice); Rizzo v. Goode, 423 U.S. 362, 371-73 (1976)(civil rights remedies unavailable without requisite showing of case or controversy by plaintiffs); Tollett v. Henderson, 411 U.S. 258, 266 (1973)(habeas relief barred for prisoner who pleaded guilty, despite unconstitutional selection of grand jury); Younger v. Harris, 401 U.S. 37, 45-49 (1971)(federal injunction of pending state criminal proceeding unavailable without showing of irreparable injury).

[14] *See, e.g.*, Stringer v. State, No. 54,805, slip op. at 1-2 (Miss. Feb. 27, 1985)(refusing to relax state exclusionary rule to follow United States v. Leon, 104 S.Ct. 3430 (1984)). *Compare* State v. Sarmiento, 397 So. 2d 643, 644-45 (Fla. 1981)(warrantless electronic interception by officers of conversation between undercover officer and defendant in his home violates state constitution) *with* United States v. White, 401 U.S. 745, 749-53 (1971)(plurality opinion)(no fourth amendment violation for police to monitor defendant's conversation with agent). *See also Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368-84 (1982)(discussing the trend and giving examples).

Leading writings on this trend in criminal procedure cases include: Friedelbaum, *Independent State Grounds: Contemporary Invitations to Judicial Activisim*, in STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM 23 (M. Porter & G. Tarr ed. 1982); Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, in STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM 3 (M. Porter & G. Tarr ed. 1982); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Galie, *The Other Supreme Courts: Judicial Activism Among State Courts*, 33 SYRACUSE L. REV. 731 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

Bibliographies of the writings on this trend in criminal procedure may be found in STATE SUPREME COURTS, POLICYMAKERS IN THE FEDERAL SYSTEM 206-08 (M. Porter & G. Tarr ed. 1982); Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328-29 n.20 (1982); Collins, *Rebirth of Reliance on State Charters: A Fresh Look at Old Issues*, Nat'l L.J., Mar. 12, 1984, at 31-32.

been given different appellations by different commentators. Some have called the trend "the New Federalism;"[15] others have described it as "the New States' Rights."[16] One of the nation's leading jurists and apostles of the New Federalism, Justice Stanley Mosk of the California Supreme Court, speaks of a "phoenix-like resurrection"[17] of the state courts that has occurred over the past several years.

Although it is axiomatic that state constitutional protections may exceed federal constitutional rights,[18] in this century prior to 1970, state courts rarely (except perhaps in substantive economic due process cases[19]) exercised their power to expand state-based rights beyond federal rights.[20] In some states it was a "doctrine of state constitutional construction" to interpret state constitutional provisions by following federal cases which

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[15] *E.g.*, Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221, 221 (1982-83); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977); Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166 (B. MCGRAW ED. 1985); MARGOLICK, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1.

[16] *E.g.*, Mosk, *The New States' Rights*, 10 CAL. J.L. ENFORCEMENT 81, 81 (1976).

[17] Time, April 4, 1977, at 46, col. 3; *see also* Collins, *supra* note 14, at 25-26.

[18] *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 80-81 (1980)(state constitution may provide more expansive protection for individual liberties than federal Constitution); Oregon v. Hass, 420 U.S. 714, 719 (1975)(state, through its own laws, may impose restrictions on police operations that are greater than restrictions imposed by federal Constitution); Cooper v. California, 386 U.S. 58, 62 (1967)(state has power to effect greater restrictions on searches and seizures than necessary under federal Constitution). *See generally* Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951)(discussion of freedom of expression protections under state constitutions); Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318 (1968)(same).

[19] *See, e.g.*, Cleere v. Bullock, 146 Colo. 284, 361 P.2d 616, 621 (1961)(statute requiring that funeral directors have skill and knowledge equal to embalmers deemed arbitrary and capricious and a violation of due process under state constitution); Grocers Dairy Co. v. McIntyre, 377 Mich. 71, 138 N.W.2d 767, 771 (1966)(statute limiting size of containers used in sale of milk violation of due process clause of state constitution). *See generally* Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 252-61 (1981)(discussion of state court activism in substantive economic due process area).

[20] *See generally* Note, *supra* note 15, at 299 n.13 (discussion of state courts' pre-1970 reluctance to interpret state constitutions beyond scope of the federal Constitution).

had interpreted similar federal constitutional provisions.[21] Even today, many state courts follow the practice of interpreting state bills of rights in accordance with the way the Supreme Court has interpreted the federal Bill of Rights.[22]

The New Federalism is under growing attack from all directions. The Burger Court, usually anxious to defer to state judiciaries out of considerations of comity and federalism,[23] has exercised more than any previous Supreme Court the power to review state judgments upholding claims of denial of constitutional rights,[24] and has modified the adequate state ground rule in a manner that expands the Court's jurisdiction to examine state court judgments vindicating claims of denial of rights.[25]

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[21] Paulsen, *supra* note 18, at 621-22.

[22] Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole,* 12 HARV. C.R.-C.L. L. REV. 63, 88 n.121 (1977); *see also* Linde, *supra* note 14, at 382-83 (to interpret state constitutions, most state courts follow interpretations of the federal Constitution).

[23] *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 52A (1983).

[24] *See* Oregon v. Hass, 420 U.S. 714, 726 (Marshall, J., dissenting)(criticizing the Court's increasing willingness to review state court opinions "upholding constitutional claims in criminal cases"); State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1319 (1983)(referring to Burger Court's "current campaign not to let state . . . courts draw more protective constraints from the federal constitution's guarantees in matters of criminal law than the Court itself is prepared to recognize"). *See generally* Collins, *Plain Statements: The Supreme Court's New Requirement,* A.B.A.J., Mar. 1984, at 92 (discussion of Burger Court's trend of reviewing state court decisions which protect civil liberties); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms,* 91 HARV. L. REV. 1212, 1242-63 (1978)(criticism of Supreme Court's practice of reviewing state court decisions enforcing parts of the federal Constitution that are underenforced by Supreme Court); Welsh, *Whose Federalism? The Burger Court's Treatment of State Civil Liberties Judgments,* 10 HASTINGS CONST. L.Q. 819, 823-33 (1983)(discussion of Burger Court's review of state court decisions expanding protections for individuals).

Justice Stevens has become the Burger Court's most vocal opponent of the Court's penchant for reviewing, on the petition of state authorities, state court decisions upholding a defendant's claim that his basic rights had been violated. *See* Florida v. Myers, 104 S. Ct. 1852, 1854, 1855-56 (1984)(Stevens, J., dissenting); Michigan v. Long, 103 S. Ct. 3469, 3489, 3490-92 (1983)(Stevens, J., dissenting); South Dakota v. Neville, 459 U.S. 553, 566, 566-71 (1983)(Stevens, J., dissenting).

[25] In the first place, the Supreme Court has treated the adequate state ground rule in a manner that permits review of state judgments that hold a defendant's rights have been violated, even though the state court announced in its opinion one or more times that its decision rested on state as well as federal grounds. In other words, the Burger Court has enthroned the principle that it need not treat as dispositive statements by a state court that its decision vindicating a right rests in part on state law. *See* Michigan v. Long, 103 S. Ct. 3469, 3477 (1983)(Michigan Supreme Court's references to state consti-

Not surprisingly, therefore, the Supreme Court on several recent occasions has reversed or vacated state supreme court judgments in criminal cases, even though the state court had stated in its opinion that its decision rested on a construction of the state bill of rights.[26] Chief Justice Burger, ordinarily a leading exponent of notions of comity and federalism, has impliedly criticized New Federalism decisions by implying that it is irrational for state judges to extend state constitutional protections beyond the minimum level necessary to avoid infringing on federal constitutional rights.[27]

The most severe criticism of the New Federalism has been leveled by state judges, often in dissenting opinions.[28] The com-

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tution not controlling as to whether decision rested on adequate and independent state grounds); South Dakota v. Neville, 459 U.S. 553, 556 (1983)(although South Dakota Supreme Court held that the state statute violated state and federal constitutional guarantees against self-incrimination, United States Supreme Court determined that state court's decision rested on federal grounds); Delaware v. Prouse, 440 U.S. 648, 651-52 (1979)(even though Delaware Supreme Court made references to state constitution, United States Supreme Court determined that the state court "did not intend to rest its decision independently on the State Constitution"). *See also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977)(Ohio Supreme Court decision deemed to rest solely on federal grounds since decision did not mention state constitution but did mention cases interpreting federal constitution).

Secondly, the Court has created a presumption of jurisdiction in cases where the decision in favor of a claim of a rights violation arguably rests on state grounds, and has required state courts to make a "plain statement" of the state law basis of the decision if they then seek to avoid the effect of the presumption. Michigan v. Long, 103 S. Ct. 3469, 3476-77 (1983). *See* Collins, *supra* note 24, at 92 (in cases where state court does not make a plain statement of reliance on state grounds, Supreme Court will presume decision was based on federal grounds); Greenhalgh, *Independent and Adequate State Grounds: The* Long *and Short of It,* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 211, 211-38 (B. McGraw ed. 1985).

[26] *See, e.g.,* Michigan v. Long, 103 S. Ct. 3469, 3473-74, 3483 (1983)(reversing Michigan Supreme Court decision which held that search of passenger compartment of defendant's car was illegal, even though state supreme court referred to state constitution twice in its opinion); South Dakota v. Neville, 459 U.S. 553, 556, 564 (1983)(reversing South Dakota Supreme Court decision which held that state statute "violated the federal and state privilege against self-incrimination"). *See* Collins, *supra* note 24, at 92 (Supreme Court reviewing state court decisions upholding civil liberties even when based on state law).

[27] *See* Florida v. Casal, 103 S. Ct. 3100, 3101 (1983)(Burger, C.J., concurring in dismissal of certiorari). For discussion of the Chief Justice's comment, see *infra* text accompanying notes 111-16.

[28] *See, e.g.,* People v. Disbrow, 16 Cal. 3d 101, 117-21, 545 P.2d 272, 282-83, 127 Cal. Rptr. 360, 370-73 (1976)(Richardson, J., dissenting)(criticizing majority for not interpret-

mentary in scholarly journals has on the whole been warmly favorable,[29] but a few scholars have criticized the New Federalism to the extent that state court use of state law has been motivated by disagreement with results reached in Burger Court decisions which take a narrower view of individual rights.[30] Surely the most unusual scholarly criticism of the New Federalism is to be found in Professor Willing's ninety-nine page law review article, published in 1982.[31] Professor Willing believes that there is a federal right to effective law enforcement protection, a right secured by the privileges and immunities clause of article IV of the Constitution[32] or the privileges or immunities clause[33] or the due process clause of the fourteenth amendment.[34] It is his thesis

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ing the self-incrimination clause of the California Constitution as the United States Supreme Court interprets the fifth amendment); People v. Norman, 14 Cal. 3d 929, 940-42, 538 P.2d 237, 245-47, 123 Cal. Rptr. 109, 117-19 (1975)(Clark, J., dissenting)(criticism of majority's decision not to follow the United States Supreme Court's interpretation of the fourth amendment when construing the California constitution's search and seizure clause); *see also* Note, *supra* note 15, at 297 n.7 (collecting cases).

[29] *See, e.g.*, Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596 (1979); Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165 (1980).

[30] Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 189-90 (1983); Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 741-42 (1976).

[31] Willing, *Protection by Law Enforcement: The Emerging Constitutional Right*, 35 RUTGERS L. REV. 1 (1982).

[32] *Id.* at 54-57. Professor Willing argues that the privileges and immunities clause of article IV, which traditionally has been construed to forbid state discrimination against non-residents, can be interpreted to provide certain fundamental rights for the citizens of each state. *Id.* at 55, 56. Professor Willing notes, however, that such an interpretation is highly unlikely. *Id.* at 57.

[33] *Id.* at 54-65. According to Professor Willing, effective law enforcement is a privilege or immunity guaranteed through United States citizenship. *Id.* at 65. Under Professor Willing's theory, if a state fails to provide effective law enforcement, the Constitution obligates the federal government to intervene and provide adequate law enforcement for the citizens. *Id.* at 59, 65.

[34] *Id.* at 65-68. Professor Willing notes that the Supreme Court has recognized that certain fundamental rights are inherent in the Constitution and must be protected under the fifth and fourteenth amendment due process clauses. *Id.* at 65. Professor Willing points out that commentators have defined "fundamental rights" as those rights which are traditional or which are a necessary part of the concept of ordered liberty. *Id.* at 66, 67. Accordingly, since effective law enforcement is inherent to the Anglo-American scheme of justice, it should be deemed a fundamental right protected through the due

that New Federalism decisions involving "truly extreme state-created rights of criminal defendants" may be unconstitutional[35] (and reversible by the United States Supreme Court) if they interfere with the right to protection from crime he believes to be guaranteed by the federal Constitution. Thus, according to Professor Willing, section 1 of the fourteenth amendment does not merely secure the rights of individuals against the exercise of governmental power; it may also constitute a conferral of power on the states to enforce their criminal laws effectively.[36] According to this view, the fourteenth amendment is as much an authorization for the states to exert coercive powers against the individual as it is for protecting individuals from abuses by government agents. In effect, the government now is to have constitutional "rights" to investigate and punish violations of the criminal law.

The New Federalism has also fallen under political and electoral attack.[37] These attacks have included attempts by the political right and exponents of "law and order" to politicize the judicial decision-making process by electing governors who appoint judges committed to narrowing the rights of "criminals,"[38] by sending out communications that threaten judges with ad-

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process clause of the fourteenth amendment. *See id.* at 67-68.

[35] *Id.* at 85. Professor Willing does not adequately explain what rights he would regard as "truly extreme," but apparently he believes that a state search and seizure exclusionary rule without a standing requirement (a "vicarious exclusionary rule") would be one of these "truly extreme" rights. *See id.* at 78.

[36] *See id.* at 58, 65-79.

[37] *See* Egelko, *The Bittersweet Aftermath of Confirming 'Jerry's Judges'*, CAL. J., Dec. 1982, at 445-46 (three California Supreme Court justices retained by voters despite strong opposition from political groups); *Ore. Court Seat Fight Gets Bitter*, Nat'l L.J., May 14, 1984, at 3, col. 4 (Justice Hans Linde of the Oregon Supreme Court opposed for re-election by law and order groups and candidate who claim Linde is soft on criminals); Turner, *Law-and-Order Groups Oppose an Oregon Justice*, N.Y. Times, Apr. 2, 1984, at A17, col. 1 (same). For an example of the nature of the current debate, with particular regard to the role of the judiciary in American society, see *Politicization of the Courts: Balancing the Need for Judicial Independence Against the Need for Judicial Accountability*, 6 HARV. J.L. & PUB. POL'Y 295 (1983).

[38] In states where judgeships are filled by gubernatorial appointment, one may find gubernatorial candidates promising to appoint judges who will be "strict constructionists." *See* Baker, *Deukmejian: Fighting Crime No. 1 Priority*, Sacramento Bee, Apr. 22, 1982, at AA5, col. 1 (Republican candidate for governor promises "to appoint judges who are more concerned with the rights of victims than the rights of criminals").

verse political consequences if they rule in favor of "criminals" in pending cases,[39] and by seeking recall or defeat at the polls of state judges deemed "soft" on "criminals."[40] Unquestionably, however, the most important recent political or electoral assault on the power of state courts to find in state law rights broader than rights secured under federal law has been the trend in a number of states over the past decade and a half to amend state bills of rights to deprive individuals of criminal procedure rights they previously enjoyed.

The "voter backlash"[41] that produced these constitutional amendments taking away constitutional rights was predictable. For half a century scholars have expressed concern about what has been termed "amendomania,"[42] the tendency to amend state constitutions frequently and to constitutionalize provisions of law that are essentially statutory in character, often by an uninformed or uninterested electorate approving an initiative measure.[43] With the rise of crime as a political issue and the resurgence of the political right and "law and order" factions, it was certain that sooner or later liberal interpretations of state constitutional provisions would be subjected to pressures from conservative politicians and an increasingly conservative electorate.

Since 1970, at least nineteen important amendments to state bills of rights, designed to curtail criminal procedure rights, have been adopted in some fourteen states. Three of the amendments, all of which are set out in the margin,[44] restored

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[39] *See* Wilkes, *supra* note 15, at 168, 193 n.12.

[40] Chief Justice Rose Bird of the California Supreme Court has been the object of this kind of attack. For accounts of her difficulties, see B. MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS (1983) and P. STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981).

[41] Williams, *supra* note 30, at 192 n.100.

[42] *See* Note, *California's Constitutional Amendomania,* 1 STAN. L. REV. 279, 279 (1949).

[43] *See, e.g.,* McMurray, *Some Tendencies in Constitution Making,* 2 CALIF. L. REV. 203, 209-21 (1914)(recognizing tendency to treat constitutions as "codes" and predicting confusion from amendment by initiative); Note, *supra* note 42, at 279-81 (frequent amendment causes constitutions to grow in size, causes the content of constitutions to change so that they become more like statutes, and causes the purposes of constitutions to change).

[44] The amendments include:

the death penalty. One amendment, in Connecticut, reduced the size of juries in noncapital cases to six persons. Another, in Florida, altered the state constitutional provision corresponding to the fourth amendment. Twelve of the amendments, including a 1982 California amendment known as the Victims' Bill of Rights, permit some form of preventive detention of criminal suspects awaiting trial. The California Victims' Bill of Rights also contains other provisions affecting the state bill of rights, including a provision that with certain exceptions purports to create an anti-exclusionary rule requiring admission of all relevant evidence (even though it may have been obtained in violation of the state constitution).

State	Year of Adoption	Nature of Amendment	Section Amended or Added
Arizona	1970	Preventive detention	Article II, § 22
Utah	1972	Preventive detention	Article I, § 8
California	1972	Death penalty	Article I, § 27
Connecticut	1972	Jury trial	Article I, § 19
Texas	1977	Preventive detention	Article I, § 11a
Michigan	1978	Preventive detention	Article I, § 15
Nebraska	1978	Preventive detention	Article I, § 9
New Mexico	1980	Preventive detention	Article II, § 13
Wisconsin	1981	Preventive detention	Article I, § 8
Vermont	1982	Preventive detention	Chapter II, § 40
California	1982	Victims' Bill of Rights: Preventive detention; Admission of illegally seized evidence; miscellaneous provisions	Article I, § 28
California	1982	Proposition 4: Preventive detention	Article I, § 12
Florida	1982	Search and Seizure; admission of illegally seized evidence	Article I, § 12
Florida	1982	Preventive detention	Article I, § 14
Arizona	1982	Preventive detention	Article II, § 22
Massachusetts	1982	Death penalty	Part I, art. 26
Connecticut	1982	Eliminates right to grand jury indictment	Article 17
Pennsylvania	1984	Admissibility of suppressed evidence for impeachment	Article I, § 9
Oregon	1984	Death penalty	Article I, § 40

From the chart in the margin, it may be seen that 1977 appears to be the turning point. Between 1970 and 1976, only four amendments were adopted; from 1977 through 1984, some fifteen amendments were approved, including eight in 1982. It may also be noted that during the 1970-1984 period, four states—California, Connecticut, Arizona and Florida—approved more than one amendment. A statistical summary, however, does not adequately portray the trend. A fuller understanding requires exploration of the background and effect of several of these amendments.

II. Bringing Back the Death Penalty: A Different Role for State Bills of Rights

The first of the death penalty amendments was adopted in California in 1972. On February 18 of that year, in *People v. Anderson*,[45] the state's supreme court struck down capital punishment on the grounds it violated the provision of the state bill of rights analogous to the cruel and unusual punishments clause of the eighth amendment.[46] The *Anderson* decision provoked popular and political discontent. The decision was opposed by police and prosecutors, who within a month had begun a campaign to reinstate capital punishment, insofar as state law was concerned, by using the initiative process to amend the state constitution.[47] On November 7, 1972, by the overwhelming ma-

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[45] 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

[46] *Id.* at 651, 493 P.2d at 895, 100 Cal. Rptr. at 167. The *Anderson* court stated: "Measured by the 'evolving standards of decency that mark the progress of a maturing society,' capital punishment is, therefore, cruel within the meaning of article I, section 6, of the California Constitution." *Id.*, 493 P.2d at 895, 100 Cal. Rptr. at 167.

The constitutional section provides, in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. . . ." Cal. Const. art. I, § 6.

[47] *See* Barrett, Anderson *and the Judicial Function*, 45 S. Cal. L. Rev. 739, 743 & n.18 (1972).

Critics of the *Anderson* decision included then-Gov. Ronald Reagan, who, according to a newspaper account, described the *Anderson* court's action as having made " 'a mockery of the constitutional processes' " and reinforcing " 'the widespread concern of our people that some members of the judiciary inject their own philosophy into their decision rather than carrying out their constitutional duty to interpret and enforce the law.' " *Id.* at 743 (quoting San Francisco Chronicle, Feb. 19, 1972, § 1, at 1, col. 3). Immediately after the *Anderson* decision, Gov. George Deukmejian, then a state senator, an-

jority of sixty-eight percent, California voters approved the restoration of capital punishment through an initiative constitutional amendment that added a new section 27 to the state bill of rights.[48] This was unquestionably a huge victory for "law and order" advocates and a stunning setback for the California Supreme Court.

Section 27 provides:

> All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.
>
> The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.[49]

The California death penalty amendment is a curious hybrid; it has legislative as well as constitutional provisions. The first paragraph is essentially a statute reenacting the previous legislation involving the death penalty in effect on the day before the *Anderson* decision. It makes those reenacted statutes subject to amendment by statute. The second paragraph is not legislative but constitutional in nature. It overturns *Anderson* by declaring that death is not a cruel or unusual punishment, and it goes even further: it provides that death as punishment does not violate any other part of the state constitution.

Three weeks after the amendment was approved by the electorate, the California Supreme Court, in *People v. Murphy*,[50] cooly described the amendment only as "*purporting* to nullify *Anderson*'s holding of the invalidity of the death penalty. . . ."[51] The court also stated that ex post facto law principles barred "application of the amendment to cases arising

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nounced plans to sponsor a constitutional amendment to restore the death penalty. L.A. Times, Feb. 19, 1972, § I, at 1, col. 4, & 26, col. 1.

[48] *See* L.A. Times, Nov. 9, 1972, § I, at 20, col. 4 (discussing death penalty initiative); *id.* at 22, col. 1 (voting results).

[49] CAL. CONST. art. I, § 27.

[50] 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1972).

[51] *Id.* at 352 n.2, 503 P.2d at 596 n.2, 105 Cal. Rptr. at 140 n.2 (emphasis added).

before its effective date. . . ."[52]

In 1979, in *People v. Frierson*,[53] the California Supreme Court candidly acknowledged that "[t]he clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty *to the extent permitted by the federal Constitution.*"[54] The court rejected the argument that the amendment applies solely to statutes in effect in February 1972 (when *Anderson* was decided) and that all subsequently enacted death penalty legislation is still governed by the *Anderson* rule.[55] The *Frierson* court therefore concluded: "section 27 validates the death penalty as a permissible type of punishment under the *California* Constitution."[56] It is noteworthy that this conclusion was not drawn until seven years after the amendment was adopted.

Arguably, the most important California Supreme Court decision involving the 1972 amendment is *People v. Superior Court (Engert)*,[57] decided in 1982. There, the court declined to accept the state's argument that the amendment precluded courts from inquiring into the validity of "laws, substantive and procedural, relating to [the death penalty's] administration and imposition."[58] The court held instead:

> The 1972 initiative was intended simply to cancel the holding of *Anderson*, to clarify that the penalty of death does not violate any provision of the California Constitution: e.g., it is not cruel and unusual punishment; it does not, per se, violate the state due process clause; it does not, per se, deprive individuals of equal protection.[59]

Thus, the death penalty amendment did not "insulate . . . capital case[s] from the requirement of state constitutional due process."[60] Accordingly, the court struck down a death penalty ag-

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[52] *Id.*, 503 P.2d at 596 n.2, 105 Cal. Rptr. at 140 n.2.
[53] 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).
[54] *Id.* at 185, 599 P.2d at 612, 158 Cal. Rptr. at 306 (emphasis in original).
[55] *Id.* at 184-85, 599 P.2d at 612-13, 158 Cal. Rptr. at 306-07.
[56] *Id.* at 186, 599 P.2d at 613, 158 Cal. Rptr. at 307 (emphasis in original).
[57] 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).
[58] *Id.* at 807, 647 P.2d at 81, 183 Cal. Rptr. at 805.
[59] *Id.* at 808, 647 P.2d at 82, 183 Cal. Rptr. at 806.
[60] *Id.* at 809, 647 P.2d at 82, 183 Cal. Rptr. at 806.

gravating circumstance on the grounds it was vague and violative of due process.[61] It would further appear from *Engert* that the California Supreme Court believes, the 1972 amendment notwithstanding, that the court retains power to declare a sentence of death unconstitutional if it is disproportionate to the offense, as where capital punishment is imposed for a minor crime.[62]

The second death penalty amendment was adopted in Massachusetts in 1982. In 1975 the Massachusetts Supreme Judicial Court had decided *Commonwealth v. O'Neal*,[63] declaring a statute making capital punishment mandatory for rape-murder unconstitutional under a provision of the Massachusetts Declaration of Rights that is similar to the eighth amendment.[64] Two years later, in an advisory opinion, the judges of the same court advised the Massachusetts legislature that a proposed death penalty statute also would violate the state bill of rights.[65] Ultimately, a 1979 death penalty statute[66] was declared unconstitutional in *District Attorney v. Watson*,[67] with the state's highest court holding that under the Massachusetts Declaration of Rights, capital punishment was *per se* cruel.[68]

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[61] *Id.* at 806, 647 P.2d at 81, 183 Cal. Rptr. at 805.

[62] *See id.* at 809, 647 P.2d at 82, 183 Cal. Rptr. at 806. In rejecting the position that § 27 immunized death penalty statutes from judicial review under the state constitution, the court noted that the logical extension of this argument "would produce absurd results," including preventing review if the statute established death as the penalty for being a common drunk. *Id.*, 647 P.2d at 82, 183 Cal. Rptr. at 806.

[63] 369 Mass. 242, 339 N.E.2d 676 (1975).

[64] *O'Neal*, 339 N.E.2d at 688, 693, 694, 696 (separate opinions).

[65] Opinion of the Justices, 372 Mass. 912, 364 N.E.2d 184, 186-87 (1977). The court stated that article 26 of the Massachusetts Declaration of Rights (cruel or unusual punishments clause) "forbids the imposition of a death penalty in this Commonwealth in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose . . . than the availability in like cases of the penalty of life imprisonment." 364 N.E.2d at 186-87.

[66] Act of Aug. 14, 1979, ch. 488, 1979 Mass. Acts 502.

[67] 381 Mass. 648, 411 N.E.2d 1274, 1287 (1980).

[68] *Watson*, 411 N.E.2d at 1283. In *Watson*, in contrast to Opinion of the Justices, 372 Mass. 912, 364 N.E.2d 184 (1977), the court held that the death penalty was offensive to contemporary standards of decency, that it was arbitrarily inflicted, and that even a statute that met the federal constitutional demands of Furman v. Georgia, 408 U.S. 238 (1972), would offend art. 26 of the Massachusetts Declaration of Rights. *Watson*, 411 N.E. 2d at 1281, 1283, 1286.

The movement to amend the Massachusetts Constitution to reinstate capital punishment may be traced to 1976, shortly after the *O'Neal* decision was announced.[69] However, the movement did not begin to gain significant ground until 1978, when Edward King was elected Governor of Massachusetts. King, a strong backer of the death penalty, campaigned on a pro-capital punishment platform.[70] In the following year, Governor King signed into law a new death penalty statute.[71] In 1980, this statute was found unconstitutional by the state's highest court in *District Attorney v. Watson.*[72] On September 19, 1980, the movement mustered enough political clout to obtain passage in the state legislature (sitting as a constitutional convention) of a proposed amendment to the state bill of rights for restoring capital punishment.[73] The proposed amendment repassed the legislature (again sitting as a constitutional convention) on June 21, 1982.[74] Thereafter, it was placed on the ballot at the November 2, 1982, general election and adopted, with fifty-four percent of the electorate favoring the amendment, thirty-five percent voting against it, and eleven percent leaving their ballots blank.[75] The effort to adopt the amendment had been opposed at every step, inside the legislature as well as out. Opponents included a number of liberal, civil rights, church, humanitarian, and social justice organizations.[76]

The 1982 amendment added two sentences to part 1, article 26, of the Massachusetts Constitution. (Article 26 is the provision of the Massachusetts Declaration of Rights that corre-

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[69] *See* Sales, *Conte Ready to Fight Again for Death Penalty,* Boston Globe, June 6, 1976, at 46, col. 1.

[70] *See* N.Y. Times, Nov. 8, 1978, at A21, col. 1; *see also* Boston Herald American, Feb. 21, 1982, at 5.

[71] *See* Act of Aug. 14, 1979, ch. 488, 1979 Mass. Acts 502.

[72] 381 Mass. 648, 411 N.E.2d 1274, 1278 (1980). For the court's holding, see *supra* note 68 and accompanying text.

[73] *See* MASSACHUSETTS ELECTION STATISTICS 1982, at 472 (1982); *see also* Wilkes, *supra* note 15, at 181.

[74] *See* MASSACHUSETTS ELECTION STATISTICS 1982, at 472 (1982).

[75] *Id.*

[76] *See, e.g., Church Leaders to Fight Death Penalty,* Boston Herald American, Feb. 21, 1982, at 5. The Office of the Governor of Massachusetts compiled a list of some three dozen organizations that were opposing reinstatement of the death penalty. This document was made available to the author, and a copy is in his files.

sponds to the eighth amendment.) The added sentences provide:

> No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.[77]

The 1982 amendment apparently has not ended the matter in Massachusetts, however. In December 1982, shortly before he left office, Governor King signed new death penalty legislation into law.[78] The Supreme Judicial Court, almost two years later, struck down the portions of this legislation that authorized the death penalty as unduly burdening a defendant's state constitutional guarantees to a jury trial and against self-incrimination.[79] Construing the 1982 constitutional amendment as forbidding only a per se prohibition of capital punishment, the court held that the amendment had not insulated death penalty statutes from invalidation for other constitutional infirmities.[80]

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[77] MASS. CONST. pt. 1, art. 26.

[78] *See* MASS. GEN. LAWS ANN. ch. 265 § 2, ch. 279 §§ 57-71 (West Supp. 1985).

[79] Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E. 2d 116, 124 (1984). The court reasoned that since the statute provided for imposition of the death penalty only after a jury trial, defendants in capital cases could avoid the risk of being put to death by pleading guilty. Thus, the statute discouraged defendants from asserting their right to trial by jury, and, in violation of state law, penalized defendants for not pleading guilty. *Colon-Cruz,* 470 N.E. 2d at 124-29.

[80] *Colon-Cruz,* 470 N.E. 2d at 121-23. The Court keyed its analysis to the use of the word "prohibit" in the 1982 amendment and stated: "We do not consider that our invalidation of this statute is equivalent to prohibiting the punishment of death." 470 N.E. 2d at 122. Conceding that the 1982 amendment prevented it from construing any part of the state constitution as forbidding the death penalty in every circumstance, 470 N.E.2d at 121 & n.10, the court determined that nothing in the amendment's legislative history suggested that the amendment was intended to "shield all death penalty legislation from review under the Massachusetts Constitution." 470 N.E. 2d at 123. This latter "radical construction" of the amendment "would mean that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution." *Id.*

Three of the court's seven members dissented, with two arguing that the 1982 amendment precluded review, under the state constitution, of death penalty legislation. *See Colon-Cruz,* 470 N.E. 2d at 135 (Nolan, J., dissenting).

III. AND THEN THERE WERE SIX: CONNECTICUT'S JURY TRIAL AMENDMENT

Prior to 1972, the generally accepted view was that the jury trial section of Connecticut's bill of rights secured the right to a jury of twelve persons.[81] Nonetheless, there was strong support for reducing jury size in criminal cases. In 1930 the Connecticut Judicial Council "proposed an amendment to the Constitution authorizing the Legislature to provide for a jury of less than twelve."[82] Two years later, the Council abandoned its proposal for amending the state constitution and suggested instead that a rule of court be promulgated under which "the jury should number nine in every case, unless a jury of twelve were specifically claimed."[83] In 1953, the Connecticut legislature enacted a statute[84] embodying the 1932 proposal but providing for a jury of six instead of nine.[85] Four years later, the Supreme Court of Errors of Connecticut held the 1953 statute to be constitutional in *State v. Perrella*,[86] but in so deciding, continued to assume that the right to jury trial included the right to a jury of twelve.[87]

In 1972, the Connecticut legislature approved a proposed amendment to the jury trial section of the state bill of rights,[88] a proposal worded similarly to an amendment that had been suggested by Judge Richard Phillips in an influential 1956 state bar journal article favoring jury size reduction.[89] The amendment, adopted at the November 7, 1972, general election, added to the state constitution the language emphasized here:

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[81] *See* State v. Perrella, 144 Conn. 228, 129 A.2d 226, 228-29 (1957)(essential feature of jury trial is that jury should contain 12 persons); *see also* Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354, 358 & n.7 (1956)(former Connecticut supreme court chief justice expressed opinion that Connecticut constitution required 12-member juries).

[82] Phillips, *supra* note 81, at 355.

[83] *Id.*

[84] CONN. GEN. STAT. ANN. § 54-82 (West Supp. 1984)(current version of the 1953 statute).

[85] Phillips, *supra* note 81, at 355.

[86] 144 Conn. 288, 129 A.2d 226, 229 (1957).

[87] *See Perrella*, 129 A.2d at 229 ("[s]o long as the statute does not cut off his right to a trial by jury of twelve altogether or impose unreasonable conditions upon the assertion of that constitutional right, the statue [sic] is valid on whatever theory it may be predicated").

[88] *See* 1971 Conn. Pub. Acts, H.J.R. 83.

[89] *See* Phillips, *supra* note 81, at 358.

> Sec. 19. The right of trial by jury shall remain inviolate, *the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent . . . .* [90]

Presumably, some impetus for the amendment came from the Burger Court's decision in *Williams v. Florida*[91] in 1970, which held that neither the sixth amendment jury trial clause nor the fourteenth amendment due process clause guaranteed the right to a twelve-person jury.[92] In 1976, in *State v. Olds*,[93] the Connecticut Supreme Court upheld the constitutionality of the 1972 amendment in a case involving a defendant convicted of robbery and other crimes by a jury of six persons.[94]

IV. FLORIDA'S SEARCH AND SEIZURE AMENDMENT: "RATIONAL LAW ENFORCEMENT"?

The Florida Supreme Court adopted a search and seizure exclusionary rule[95] long before the United States Supreme Court made the fourth amendment exclusionary rule binding on the states in *Mapp v. Ohio*.[96] When Florida adopted a new state

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[90] CONN. CONST. amend. IV (amending art. 1, § 19).

[91] 399 U.S. 78 (1970).

[92] *Id.* at 103. The Court stated, however:

> We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most States and in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group.

Id. (footnote omitted).

[93] 171 Conn. 395, 370 A.2d 969 (1976).

[94] *Olds*, 370 A.2d at 971, 976-77. In *Olds* the defendant's contention was that the 1972 amendment infringed impermissibly upon the powers of the judiciary, i.e., that it was a judicial, not a legislative, function to determine jury size. *Id.*

[95] *See, e.g.*, Gildrie v. State, 94 Fla. 134, 113 So. 704, 705 (1927)(evidence seized under an invalid search warrant is not admissible).

[96] 367 U.S. 643, 655 (1961). *See* Sing v. Wainwright, 148 So. 2d 19, 20 (Fla. 1962)(United States Supreme Court's application of exclusionary rule to the states added nothing new to Florida law). *Compare* Gildrie v. State, 94 Fla. 134, 113 So. 704, 706 (1927)(evidence obtained by illegal search in violation of Florida Constitution and ex-

constitution in 1968, section 12 of the state's bill of rights, the section analogous to the fourth amendment, included for the first time in any state charter, a specific exclusionary rule provision: "Articles or information obtained in violation of this right shall not be admissible in evidence."[97] The history of this exclusionary rule provision shows that it was added to protect the state's exclusionary rule against the possibility that in the future state judges might erode the rule.[98]

The Florida Supreme Court, on several occasions from 1979 through 1982, interpreted the 1968 exclusionary rule provision to mean that Florida judges were required to guarantee Floridians a greater degree of immunity from police search and seizure practices than that secured by the fourth amendment.[99] These New Federalism search and seizure cases apparently aroused the opposition of members of the law enforcement community. In 1980, a Miami policeman began a campaign to amend the state constitution to relax the higher Florida search and seizure protections, gradually obtaining support from certain politicians.[100] Then in 1982, the Governor of Florida, Bob Graham, asked the state legislature for an amendment to cut back on state search

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cludable when proper objection made) *with Mapp*, 367 U.S. at 655 ("all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

[97] FLA. CONST. art. I, § 12 (1968).

[98] *See generally* Comment, *The Exclusionary Rule: An Examination of the Case Law and the Present Posture of the Florida Supreme Court*, 10 FLA. ST. U.L. REV. 369, 381-83 (1982).

[99] *See, e.g.*, State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981)(Florida constitution's search and seizure section bars warrantless electronic monitoring by police of conversation in private home between resident and undercover officer even though permitted under federal Constitution); Norman v. State, 379 So. 2d 643, 646 (Fla. 1980)(state must prove by clear and convincing evidence that consent search was voluntary); Grubbs v. State, 373 So. 2d 905, 909-10 (Fla. 1979)(acknowledging that state constitution affords greater protection than fourth amendment and holding that probation condition that probationer submit to search at any time at the request of any law enforcement officer violates Florida constitution's search and seizure provision); *see also* State v. Dodd, 419 So. 2d 333, 335 (Fla. 1982)(state constitutional search and seizure section bars use of illegally seized evidence in probation revocation proceedings); State v. Casal, 410 So. 2d 152, 155-56 (Fla. 1982)(though marine patrol officers may stop vessels for such limited purposes as checking registration certificates, they may not search without probable cause), *cert. dismissed*, 103 S. Ct. 3100 (1983).

[100] Spring, *Cop Bulldogs Constitutional Change*, Miami Herald, Oct. 24, 1982, at 1B, col. 2.

and seizure rights not protected by the fourth amendment.[101] The Governor's position was that his state "should extend no more rights to those who would break our laws than the U.S. Constitution would require."[102] Governor Graham even went so far as to suggest that the granting of state-based rights broader than federal rights amounts to "allow[ing] . . . advantage to the criminal. . . ."[103]

In June 1982, the Florida legislature granted Governor Graham's request and passed a proposed constitutional amendment[104] designed to curtail both the Florida exclusionary rule and the higher level of protection from search and seizure practices that had existed under Florida law.[105] Between its passage by the Legislature in June and the November general election, the proposed amendment received strong support from Governor Graham and members of the law enforcement community. On November 2, 1982, the electorate approved the proposed amendment by some sixty-four percent of the votes.[106]

Here is the present text of section 12 of Florida's bill of rights, with the wording added by the 1982 amendment emphasized:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles or information obtained in violation of this right shall not be admissi-

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[101] *See* J. FLA. SEN. 1982 Reg. Sess., at 5 (Jan. 18, 1982); J. FLA. SEN. 1982 Spec. Sess., at 2-4 (June 21, 1982).

[102] J. FLA. SEN. 1982 Spec. Sess., at 3 (June 21, 1982).

[103] J. FLA. SEN. 1982 Reg. Sess., at 5 (Jan. 18, 1982).

[104] J. FLA. SEN. 1982 Spec. Sess., at 21 (June 22, 1982).

[105] J. FLA. SEN. 1982 Spec. Sess., at 3 (June 21, 1982).

[106] Miami Herald, Nov. 3, 1982, at 12A, col. 4.

> ble in evidence *if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*[107]

In 1983, in *State v. Lavazzoli,*[108] the Florida Supreme Court held that the 1982 search and seizure amendment is not retroactive.[109] In *Lavazzoli,* which at this writing is the only important Florida appellate opinion construing the 1982 amendment, the court described the intended effect of the amendment in this way:

> Prior to the amendment, the right of a citizen of the State of Florida to be free from unreasonable searches and seizures was guaranteed independently of the similar protection provided by the fourth amendment to the United States Constitution. Under article I, section 12 as it existed prior to the amendment, the courts of this state were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. . . .The new amendment, however, links Florida's exclusionary rule to the federal exclusionary rule, making it also nothing more than a creature of judicial decisional policy and removing the "independent protective force of state law."[110]

The 1982 Florida search and seizure amendment was hatched in the philosophy that it is wrong for a state constitution or court to protect individual rights to a greater degree than does the federal constitution. This philosophy is reflected in the portion of the amendment compelling Florida courts to interpret state constitutional search and seizure protections in accordance with United States Supreme Court interpretation of the fourth amendment. If the rule of construction applied to search and seizure in Florida by the 1982 amendment were extended to state constitutional rights generally, there would be no need or function whatever for state bills of rights. The maximum level of

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[107] FLA. CONST. art. I, § 12 (emphasis added).

[108] 434 So. 2d 321 (Fla. 1983).

[109] *Id.* at 323-24; *see also* State v. Williams, 443 So. 2d 952, 954 (Fla. 1983)(refusing to apply amendment retroactively).

[110] 434 So. 2d at 323-24 (footnote omitted).

protection to which persons would be entitled in state court would be determined solely by reference to the federal Bill of Rights, and the United States Supreme Court's construction of federal constitutional rights would be binding on state courts interpreting the scope of state bill of rights protections, if there were any. The first would become the last.

A remarkable comment about the 1982 Florida amendment has come from Chief Justice Burger. In 1982 in *State v. Casal*,[111] the Florida Supreme Court rejected the state's claims under the open fields doctrine and affirmed an order in a criminal case suppressing evidence that the lower court had found to have been seized illegally.[112] The State of Florida then petitioned for certiorari, which was granted.[113] The writ was later dismissed after the Supreme Court determined that the state court judgment rested on independent and adequate state grounds.[114] Chief Justice Burger filed a concurring opinion in which he quoted the 1982 amendment, commented on its effect, and observed: "[t]he people of Florida have . . . shown acute awareness of the means to prevent . . . inconsistent interpretations" of the state constitution and the fourth amendment.[115] The Chief Justice then described the power that the Florida electorate had exercised in 1982 — the power to amend a bill of rights provision so as to curb individual rights and thereby overturn or prevent state court decisions requiring more rights than the federal constitution requires — as the "power . . . to ensure rational law enforcement."[116] Can this mean that the Chief Justice believes the Florida Supreme Court, or any state court, engages in *irrational* behavior when it exercises its ancient and traditional power to extend state constitutional protections beyond those secured by federal law?

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[111] 410 So. 2d 152 (Fla. 1982).

[112] *Id.* at 156.

[113] Florida v. Casal, 459 U.S. 821 (1982).

[114] Florida v. Casal, 103 S. Ct. 3100, 3100 (1983).

[115] *Id.* at 3101 (Burger, C.J., concurring).

[116] *Id.* at 3101-02.

V. A Ton of Detention: The Rise of Preventive Justice in State Bills of Rights

The right to pretrial bail, a right not found in the federal Bill of Rights, has a long and distinguished history in the states.[117] Early in the nineteenth century, Connecticut became the first state to insert into its bill of rights a provision that in effect guaranteed criminal defendants the right to bail prior to trial, unless the charge was capital and the proof of guilt was evident or the presumption of guilt great.[118] Thereafter, other states followed suit,[119] and by 1970 the bills of rights in thirty-seven states guaranteed the right to bail.[120] By 1978, forty-two states provided a right to bail, thirty-five by bill of rights provisions, and seven by statute.[121] It is not surprising that when the Nixon administration first proposed enactment of a federal preventive detention statute,[122] the idea was met by opposition founded on the view that preventive detention was unconstitutional, not to mention inconsistent with the presumption of innocence.[123]

Texas was the first state to amend its constitution to permit preventive detention, adding a section 11a to the state bill of rights.[124] As originally adopted in 1956, the amendment provided for preventive detention for sixty days if the defendant had two previous felony convictions.[125] In 1970, the District of

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[117] *See generally* Hunt v. Roth, 648 F.2d 1148, 1159 (8th Cir. 1981)(discussion of the development of right to bail in colonial America), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982); Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives,* 82 Col. L. Rev. 328, 337-54 (1982)(discussion of right to bail from colonial America to present day).

[118] State v. Johnson, 61 N.J. 351, 354, 294 A.2d 245, 247 (1972); *see also* State v. Konigsberg, 33 N.J. 367, 371, 164 A.2d 740, 742 (1960).

[119] State v. Johnson, 61 N.J. 351, 354, 294 A.2d 245, 247 (1972).

[120] *Id.*, 294 A.2d at 247.

[121] *In re* Humphrey, 601 P.2d 103, 105, 108 apps. I & II (Okla. Crim. App. 1979).

[122] *See* Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 Va. L. Rev. 1223, 1223 (1969)(President Nixon called for legislation which would allow pretrial detention of dangerous criminal defendants).

[123] *See, e.g.,* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 376, 379 (1970).

[124] *See* 1955 Tex. Gen. Laws 1816.

[125] *Id.* Section 11a was itself amended in 1977. In addition to the two prior convictions provision, it now authorizes denial of bail to a person accused of committing a non-

Columbia became the first American jurisdiction to provide by statute for "pretrial detention of individuals found to be dangerous to the community."[126]

Since 1970, there has been a noticeable trend in the direction of preventive detention, evidenced by the fact that twelve amendments in ten states (Arizona, California, Florida, Michigan, Nebraska, New Mexico, Texas, Utah, Vermont and Wisconsin) have been adopted to permit preventive detention of one kind or another.[127] Two states, Arizona and California, have adopted more than one such amendment. Ten of these amendments have been adopted since 1976, with five approved in four states in 1982 alone. Thus, the number of states with a bill of rights bail provision similar to the 1818 Connecticut provision has dropped significantly since 1970. The state constitutional right to bail has been curtailed.

California adopted two preventive detention amendments on the same day. On June 8, 1982, that state's voters approved Proposition 4, an amendment that had been proposed by the legislature. Proposition 4 amends former section 12 of the Cali-

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capital felony while on bail for another felony for which he had been indicted, and to a person with one prior felony conviction who is accused of a non-capital felony involving the use of a deadly weapon. *See* TEX. CONST. § 11a.

[126] Comment, *Preventive Detention and* United States v. Edwards *: Burdening the Innocent,* 32 AM. U.L. REV. 191, 191 n.7 (1982). *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210, 84 Stat. 473, 642-50 (codified at D.C. CODE ANN. §§ 23-1321 to -1332 (1981 & Supp. 1984)). For discussion of the constitutionality of the District of Columbia preventive detention statute, see United States v. Edwards, 430 A.2d 1321 (D.C. 1981); Blunt v. United States, 322 A.2d 579 (D.C. 1974).

[127] The amended constitutional sections and commentary on the amendments include: *Arizona:* ARIZ. CONST. art. II, § 22 (amended twice). *California:* CAL. CONST. I, § 12 (Proposition 4); CAL. CONST. art. I, § 28 (Victims' Bill of Rights). *See generally* Comment, *Proposition 4: Preventive Detention v. Pretrial Liberty,* 14 PAC. L.J. 303 (1983). *Florida:* FLA. CONST. art. I, § 14. *Michigan:* MICH. CONST. art. I, § 15. *Nebraska:* NEB. CONST. art. I, § 9. *New Mexico:* N.M. CONST. art. II, § 13. *See generally* Norwood & Novins, *The Constitutionality of Pretrial Detention Without Bail in New Mexico,* 12 N.M.L. REV. 685 (1982); Comment, *The Constitution is Constitutional—A Reply to "The Constitutionality of Pretrial Detention Without Bail in New Mexico,"* 13 N.M.L. REV. 145 (1983). *Texas:* TEX. CONST. art. 1, § 11a. *See generally* Collins, *The Right to Bail in Texas,* 18 HOUS. L. REV. 495 (1981). *Utah:* UTAH CONST. art I, § 8. *Vermont:* VT. CONST. ch. II, § 40. *See generally* DeTora, *Restricting the Right to Bail: Vermont's New Constitutional Bail Amendment,* 8 VT. L. REV. 347 (1983). *Wisconsin:* WIS. CONST. art. I, § 8.

fornia state bill of rights, which was then a right to bail section similar to the 1818 Connecticut constitutional provision.[128] Under the amended section, bail may now be denied not only in capital cases, but also in certain noncapital felony cases where release could result in great bodily harm to others.[129]

On the same day, the California electorate approved another constitutional amendment, an initiative measure known as the Victims' Bill of Rights.[130] Section 2 of the Victims' Bill of Rights repeals former section 12 of the state bill of rights, and section 3 of the measure creates, inter alia, a new section 28(e) in the state bill of rights. The catchline title of section 28(e) is "Public Safety Bail." Under section 28(e), a judge entertaining a pretrial bail application must "take into consideration the protection of the public," and in granting or denying release "[p]ublic safety shall be the primary consideration."[131] Under California law, conflicts between the bail provisions of Proposition 4 and of the Victims' Bill of Rights, if any, are to be resolved in favor of the proposal that received the most votes.[132] Since Proposition 4 outpolled the Victims' Bill of Rights, it appears that section 12 of the state constitution, as amended by Proposition 4, would control conflicting bail provisions of the Victims' Bill of Rights.[133] Should Proposition 4 be declared invalid, the provisions of the Victims' Bill of Rights relating to bail apparently would come fully into effect.[134]

In some states, a preventive detention amendment was adopted not long after the state supreme court issued a decision holding that preventive detention was prohibited under the right-to-bail provision of the state bill of rights, but also observing that the state constitution was open to amendment by the

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[128] *See* CAL. CONST. art. I, § 12 (West Supp. 1985)(publisher's Commentary and Historical Note); *see also* Comment, *Proposition 4, supra* note 127, at 303.

[129] CAL. CONST. art. I, § 12 (b) & (c).

[130] Comment, *Proposition 4, supra* note 127, at 329.

[131] CAL. CONST. art. I, § 28(e).

[132] *See* CAL. CONST. art. XVIII, § 4.

[133] *See In re* Spitler, 204 Cal. Rptr. 443, 451-52 (Cal. Ct. App. 1984)(holding that § 12 controls conflicting provision of § 28(e)); *see also* Brosnahan v. Brown, 32 Cal. 3d 236, 255, 651 P.2d 274, 285, 186 Cal. Rptr. 30, 41 (1982)(noting in dictim that Proposition 8 bail provisions may not have taken effect).

[134] Comment, *Proposition 4, supra* note 127, at 329 & n.192.

voters to authorize preventive detention.[135] The other amendments appear to be explainable simply as part of the overall trend toward law and order and increased emphasis on crime control, even at the cost of individual rights.

In overview, the procedures authorized by the twelve preventive detention amendments fall into three general patterns. First, some of the provisions of the amendments have expanded the capital crimes exception to the right to bail to include certain specified noncapital crimes, generally violent felonies.[136] Second, some of the amendments permit preventive detention if there is a specific showing that release of the defendant would result in physical harm to another or danger to the community.[137] Third, other provisions permit preventive detention when the defendant is charged with having committed a serious crime while on bail on another charge, or while on probation or parole.[138] Some of the amendments place a time limit on how long a defendant may be incarcerated prior to trial,[139] while others impose no time limits.[140]

No state appellate court has, thus far, held any of the preventive detention amendments invalid. At least one state supreme court has upheld the validity of a preventive detention amendment.[141] A federal appellate court in 1981 did hold the Nebraska amendment unconstitutional under the eighth amendment,[142] but its decision was vacated by the Burger Court on

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[135] For examples of such decisions, see *In re* Underwood, 9 Cal. 3d 345, 350, 508 P.2d 721, 724, 107 Cal. Rptr. 401, 404 (1973); State v. Pray, 133 Vt. 537, 346 A.2d 227, 230 (1975).

[136] *E.g.*, NEB. CONST. art. I, § 9; VT. CONST. ch. II, § 40.

[137] *E.g.*, FLA. CONST. art. I, § 14.

[138] *E.g.*, UTAH CONST. art. I, § 8.

[139] *E.g.*, MICH. CONST. art. I, § 15 (90 days).

[140] *E.g.*, ARIZ. CONST. art. II, § 22.

[141] *See* Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 109 (1979)(rejecting federal constitutional challenge to state constitutional amendment which added certain "sexual offenses" to those offenses for which bail could be denied), *cert. denied*, 444 U.S. 920 (1979); *see also Ex parte* Miles, 474 S.W.2d 224, 225 (Tex. Crim. App. 1971)(state constitutional provision allowing denial of bail to persons charged with a non-capital felony who had two prior felony convictions did not discriminate against a class).

[142] *See* Hunt v. Roth, 648 F.2d 1148, 1165 (8th Cir. 1981), *vacated sub nom.* Murphy v. Hunt, 455 U.S. 478, 481-82 (1982).

mootness grounds.[143]

VI. The California Victims' Bill of Rights: Justice Wearing a Black Armband?

On June 8, 1982, California voters, by a fifty-six percent majority, approved the Victims' Bill of Rights,[144] an initiative measure containing both constitutional amendments and statutory provisions. The Victims' Bill of Rights is divided into ten sections. Section 1 gives the measure its title.[145] Section 2 repeals the former section 12 of the California state bill of rights, relating to the right to bail, but appears to have been superseded, at least in part, by another amendment adopted on the same day.[146] Sections 4 through 9 are statutory and amend the Penal Code or other statutory provisions, while section 10 is a severability clause.[147]

Section 3 warrants discussion here. It adds a new section 28 to the state's bill of rights. Section 28 has seven subdivisions. Section 28(a) declares that the "rights of victims pervade the criminal justice system" and justify "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons . . . ."[148] A California appellate court has held that this "statement of principles" is "not self-executing."[149]

Section 28(b) requires restitution "from the convicted persons in every case . . . unless compelling and extraordinary reasons exist to the contrary."[150] Section 28(c) purports to guaran-

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[143] *See* Murphy v. Hunt, 455 U.S. 478, 481-82 (1982)(once defendant was convicted his claim to bail was moot "because even a favorable decision on it would not have entitled [him] to bail").

[144] *See* 1983-1984 Almanac of California Government and Politics 190 (1983).

[145] Office of the Secretary of State, California Ballot Pamphlet, Primary Election June 8, 1982, 33 [hereinafter cited as Ballot Pamphlet] *reprinted in* Wilson v. Superior Court, 134 Cal. App. 3d 1062, 185 Cal. Rptr. 678, 733-40 (1982), *vacated*, 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983), *cert. denied*, 104 S. Ct. 1929 (1984).

[146] *See supra* notes 128-34 and accompanying text.

[147] *See* Ballot Pamphlet, *supra* note 145, at 33, 56.

[148] Cal. Const. art. I, § 28(a).

[149] People v. Sweeney, 150 Cal. App. 3d 553, 198 Cal. Rptr. 182, 193 (1984).

[150] Cal. Const. art. I, § 28(b).

tee a "right to safe schools."[151]

Section 28(d) is the most controversial provision of the entire Victims' Bill of Rights. Section 28(d) purports to create a new "right"—the "right to truth-in-evidence." Under section 28(d), all "relevant evidence"—with certain specified exceptions—is admissible in criminal trials and proceedings.[152] Although on its face this language might seem to permit admission of evidence inadmissible under the federal Bill of Rights or the fourteenth amendment, the background of the initiative clearly shows no intention to attempt to interfere with federally protected rights.[153] Rather, section 28(d) was framed for the purpose of requiring the admission of relevant evidence obtained in violation of a *state* constitutional right or otherwise illegally under *state* law.[154] Section 28(d) excepts four types of evidence from its blanket rule of admissibility: (1) evidence rendered inadmissible by a statute passed — subsequent to adoption of section 28(d)—by a two-thirds vote of both houses of the legislature; (2) evidence inadmissible under any "existing statutory rule of evidence relating to privilege or hearsay"; (3) evidence inadmissible under the state's rape shield statutes[155] or within a court's statutory discretionary power to exclude because its probative value is outweighed by time considerations or by the likelihood of confusion or undue prejudice;[156] and (4) evidence inadmissible under "any existing statutory or constitutional right of the press."[157]

Section 28(e) provides for preventive detention, but, as discussed above, apparently has been superseded in part.[158] Section

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[151] *See id.* § 28(c).

[152] *Id.* § 28(d).

[153] *See* BALLOT PAMPHLET, *supra* note 145, at 32.

[154] *See id.; see also* CAL. CONST. art. I, § 28(d).

[155] CAL. CONST. art. I, § 28(d); *see* CAL. EVID. CODE § 782 (West Supp. 1985)(setting forth circumstances under which evidence of sexual conduct of an alleged victim of a sex crime may be admitted to attack the complainant's credibility); *id.* § 1103 (West Supp. 1985)(making admissible certain evidence regarding the character of the victim of a crime but excluding evidence of sexual conduct—other than with the defendant—of the victim of a sex offense to show consent).

[156] This discretionary power is recognized by CAL. EVID. CODE § 352 (WEST 1966).

[157] *See* CAL. CONST. art. I, § 28(d).

[158] *See supra* text accompanying notes 128-34.

28(f) makes it a part of the state constitution that "[a]ny prior felony conviction" may "be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."[159] It further provides that "[w]hen a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."[160] Finally, section 28(g) defines the term "serious felony," a term which had been used in section 28(e).[161]

A look at the origin and background of the Victims' Bill of Rights is useful in understanding the trend that is the concern of this article. According to one account, the proposal originated with a then-assistant state attorney general and a state senator, who enlisted the help of California conservative activist Paul Gann. Proponents prepared twenty-two drafts before emerging with the initiative proposal that was presented to Californians for their signatures.[162] The movement to place the Victims' Bill of Rights on the ballot was "led largely by political conservatives"[163] and obtained more than 663,000 signatures in favor of placing the proposal on the ballot.[164] In March 1982, the California legislature passed in one day a special act granting a temporary reduction in the showing that had to be made to the secretary of state to obtain certification that the required number of valid signatures had been gathered.[165] This assured that the amendment would be on the June 8 ballot. The amendment received "widespread support among law-and-order forces, includ-

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[159] CAL. CONST. art. I, § 28(f).

[160] *Id.*

[161] *See id.* § 28(e) & (g).

[162] San Jose Mercury, Apr. 29, 1982, at A1, col.2. Gann, a chief architect of the well-known 1978 California tax-cutting initiative called Proposition 13, *see* NEWSWEEK, June 14, 1982, at 64, had also sponsored other initiatives to limit state spending and cut the state income tax and had been an unsuccessful candidate for the United States Senate in 1980. *See* Schrag, *Crime on the Ballot*, THE NEW REPUBLIC, June 2, 1982, at 10; *see also* Hurley, *Confusion Reigns in Aftermath of Proposition 8*, 21 JUDGES' J., Summer 1982, at 1, 1-2 (1982)(quoting Gann views on the Victims' Bill of Rights).

[163] Hurley, *supra* note 162, at 1.

[164] *See* Brosnahan v. Eu, 31 Cal. 3d 1, 2, 641 P.2d 200, 200, 181 Cal. Rptr. 100, 100 (1982).

[165] *See* Act of Mar. 8, 1982, ch. 102, 1984 Cal. Leg. Serv. 481 (West); *see also* Brosnahan v. Eu, 31 Cal. 3d 1, 2-4, 641 P.2d 200, 200-01, 181 Cal. Rptr. 100, 100-01 (1982)(detailing controversy over number of signatures).

ing the California Sheriffs Association, the California District Attorneys Association, and more than 150 police chiefs."[166] Its proponents asserted that some 30,000 police officers on the line of duty supported the amendment.[167]

Support for the Victims' Bill of Rights was undoubtedly increased as a result of widespread dissatisfaction with the California Supreme Court. The court was perceived as being too lenient with criminals;[168] its image was further tarnished by the controversy and investigation resulting from suggestions that the court delayed, for political reasons, the filing of decisions in sensitive cases, particularly *People v. Tanner*;[169] and on top of all this, Chief Justice Rose E. Bird was the object of a politically motivated recall effort.[170]

The California Supreme Court denied a request to remove the amendment from the ballot prior to the June 8 election,[171] and even though a poll released three weeks before the election indicated that seventy-five percent of the voters had never heard of the amendment,[172] it was approved by fifty-six percent of those voting. After the election, the Court refused to hold that the amendment had been adopted improperly.[173]

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[166] Cochran, *Paul Gann's Proposition 8: A 'Victims' Bill of Rights' or a Lawyers' Employment Act?*, 13 CAL. J. 133, 133 (1982); *see also* San Francisco Chronicle, May 22, 1982, at 8, col.1 (reporting that law enforcement groups overwhelmingly supported the amendment).

[167] *See* BALLOT PAMPHLET, *supra* note 145, at 35 (statement of Paul Gann).

[168] *See* Beach, *No Longer Best or Brightest*, TIME, Nov. 29, 1982, at 57; Winter, *Victim Rights Bill Fuels Get-Tough Stand*, 68 A.B.A. J. 530, 530 (1982); *see also* BALLOT PAMPHLET, *supra* note 145, at 34 (statements by proponents of amendment that courts had been too concerned with rights of defendants).

[169] 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978), *vacated*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979). For an account of this controversy, see P. STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981); *see also* Mosk, *"Chilling Judicial Independence"—The California Experience*, 3 W. NEW ENG. L. REV. 1, 1-2 & n.3 (1980)(commentary on the controversy by a member of the California Supreme Court).

[170] For discussion of the recall attempt as well as other aspects of the controversy surrounding the court, see B. MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS (1983); *see also GOP Leaders Give Up Drive to Oust Bird*, Sacramento Bee, Mar. 10, 1982, at A6, col. 1.

[171] *See* Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982).

[172] *See* San Francisco Chronicle, May 22, 1982, at 8, col. 1.

[173] *See* Brosnahan v. Brown, 32 Cal. 3d 236, 262, 651 P.2d 274, 289, 186 Cal. Rptr.

In the 1983 case of *People v. Smith*,[174] the California Supreme Court held the Victims' Bill of Rights to be prospective only,[175] and in early 1985, the court held that section 28(d), the "Truth in Evidence" provision, did not nullify doctrines immunizing certain statements of juvenile defendants from use as substantive evidence at trial.[176] More importantly, however, and only four days later, the court held that adoption of section 28(d) eliminated the exclusionary rule as a remedy for unlawful searches and seizures under California law.[177] Though the means by which particular evidence was obtained might still violate California law, the four-to-three majority held, the evidence could be excluded only if suppression were required by federal law[178] or if one of the statutory exceptions to section 28(d) applied.[179] The majority conceded that the California court had "long considered the exclusionary rule to be the only effective means of deterring police misconduct in violation of the search and seizure provisions of the federal or state Constitutions," but:

30, 45-46 (1982).

In dissent, Justice Stanley Mosk argued that the broad sweep of Proposition 8 caused the measure to violate California's constitutional requirement that amendments be limited to a single subject. Decrying a situation in which "initiative promoters may obtain signatures for any proposal, however radical in concept and effect, and if they can persuade 51 percent of those who vote at an ensuing election to say 'aye,' the measure becomes law regardless of how patently it may offend constitutional limitations," *id.* at 297-98, 651 P.2d at 312, 186 Cal. Rptr. at 68, he went on to conclude: "The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California." *Id.* at 99, 651 P.2d at 313, 186 Cal. Rptr. at 69 (Mosk, J., dissenting).

[174] 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983).

[175] *Id.* at 262, 667 P.2d at 154-55, 193 Cal. Rptr. at 697-98.

[176] *See* Ramona R. v. Superior Court, 37 Cal. 3d 802, 693 P.2d 789, 791-95, 210 Cal. Rptr. 204, 206-10 (1985). Prior to the passage of Proposition 8, statements made by an accused minor to his probation officer or at a hearing to determine whether the minor should stand trial as an adult or be turned over to juvenile authorities could not be used as substantive evidence at trial. The *Ramona R.* court held that Proposition 8's addition of § 28(d) to the California constitution did not eliminate this "use immunity." The court reasoned that state constitutional due process guarantees required such an immunity to protect the defendant's privilege against self-incrimination, and that since § 28(d) specifically exempted from its operation evidence covered by the statutory privilege against self-incrimination, the constitutional amendment did not nullify this immunity. *See id.* at ____, 693 P.2d at 791-95, 210 Cal. Rptr. at 206-10.

[177] *See In re* Lance W., 37 Cal. 3d 873, ____, 694 P.2d 744, 752, 210 Cal. Rptr. 631, 639 (1985).

[178] *See id.* at ____, 694 P.2d at 752, 210 Cal. Rptr. at 639.

[179] *See id.* at ____, 694 P.2d at 753, 210 Cal. Rptr. at 640.

> The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing those rights, except as required by the Constitution of the United States. Whether they are wise in that decision is not for our determination; it is enough that they have made their intent clear.[180]

The three dissenters, among other points, argued that the vagueness of the language of section 28(d), as well as the length and complexity of the initiative measure, made it impossible to determine that the voters had the clear intent to abrogate the California exclusionary rule.[181]

VII. FIRST THINGS LAST

In an influential article published in 1970, Justice Hans Linde of the Oregon Supreme Court, then a professor of law, argued that when a case in a state court involves constitutional claims, the court should first seek to resolve the question under the state constitution before determining whether there has been a violation of federal rights.[182] He further maintained that if the state constitutional right were vindicated, there was no need thereafter to reach the federal claim.[183] This position was summarized in maxim form in 1973: *First Things First.*[184] The Oregon Supreme Court, on which Justice Linde sits, and at least one other state supreme court has adopted the position that state constitutional rights should be inquired into before addressing whether federally protected rights also have been vio-

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[180] *Id.* at ____, 694 P.2d at 752, 210 Cal. Rptr. at 639.

[181] *See id.* at ____, 694 P.2d at 769, 210 Cal. Rptr. at 656 (Mosk, J., dissenting).

[182] *See* Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970). In Massachusetts v. Upton, 104 S. Ct. 2085, 2089-91 (1984)(Stevens, J., concurring), Justice Stevens advocated Justice Linde's view that state law is applicable before federal law. *See also* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L.J. 641, 647-51 (1983)(setting forth reasons why state constitution should be considered before the federal Constitution).

[183] *See* Linde, *supra* note 182, at 133-35.

Justice Linde has put forward this view in judicial opinions and in scholarly articles. *See, e.g.*, State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1318 (1983)(state law question determined before reaching federal law question); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *supra* note 14.

[184] *See Project Report, supra* note 5, at 286-90; *see also* Linde, *supra* note 14.

lated.[185] There is also agreement that if the state claim is sustained, addressing the federal claim is superfluous.[186]

Justice Linde's views envision a state judiciary that has not, by an importuning United States Supreme Court, by political interference, or by state constitutional amendment, been constrained to interpret the state bill of rights restrictively. However, developments since 1970 indicate a growing tendency on the part of the Supreme Court, the political right, and the electorate to curtail state court protection of individual rights. Plainly, the most alarming manifestation of this tendency has been the adoption, in only fifteen years, of at least nineteen criminal procedure amendments to state bills of rights in some fourteen states. If the tendency continues, first things may become last or nonexistent. The body of rights guaranteed by a state constitution might become only "a creature of [federal] judicial decisional policy . . . ."[187]

The history and development of amending state bills of rights to curtail criminal procedure rights needs investigation. Little has been written on the subject. Certainly, there were occasions prior to 1970 when state bills of rights were amended to restrict rights previously afforded to criminal defendants.[188] On

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[185] *See* State v. Ball, 471 A.2d 347, 350-51 (N.H. 1983)(when protection of state constitution has been invoked, state courts must consider state constitutional rights before considering federal constitutional rights); State v. Scarborough, 470 A.2d 909, 913 (N.H. 1983)(same); State v. Tapply, 470 A.2d 900, 902 (N.H. 1983)(same); State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1318 (1983)("all questions of state law [must] be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states"); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123, 126 (1981)(same).

[186] *See* State v. Ball, 471 A.2d 347, 351 (N.H. 1983)("we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution"); *cf.* Brown v. Multnomah County Dist. Court, 280 Or. 95, 570 P.2d 52, 55 n.1 (1977)(if state constitution does not provide claimed protections, then look to federal constitution).

[187] *See* State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983)(noting that constitutional amendment linking exclusionary rule found in state constitution to federal fourth amendment decisions made state rule dependent on federal judicial policy).

[188] For example, Texas in 1956 amended its bill of rights to authorize a form of preventive detention. *See supra* notes 124-25 and accompanying text.

Oregon abolished capital punishment by constitutional amendment in 1914 and then reinstated it by another constitutional amendment in 1920. *See Ex parte* Kerby, 103 Or. 612, 205 P. 279, 279 (1922). In 1964, a subsequent constitutional amendment repealed

the other hand, it seems likely that the trend since 1970 is unprecedented in our history. Moreover, this criminal procedure amendomania is occurring during a criminal procedure counterrevolution when the Supreme Court of the United States is cutting back on rights and remedies. The 1976 decision in *Stone v. Powell,*[189] in which the Burger Court put an end to federal habeas review of fourth amendment claims,[190] is perhaps the best-known example of these curtailments. *Stone* has come to symbolize an era—the day of the Burger Court.

It is likely that underlying the recent constitutional amendments, underlying the criminal procedure counterrevolution, underlying the overall movement to strengthen the law enforcement apparatus and to weaken individual rights, is the popular assumption that increased use of force and repression is the appropriate response to the crime problem. This widespread assumption may be tragically wrong. John Van de Kamp, the attorney general of California and one of the few prosecutors in that state to oppose publicly the Victims' Bill of Rights,[191] has noted:

> We must not go back to the dark ages of criminal justice . . . . More and more violent repression of criminals will produce only more violence on their part . . . . Violent repression of criminals can lead to social conditions like those in the Middle

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the 1920 amendment, once again abolishing capital punishment. *See* Bedau, *Capital Punishment in Oregon, 1903-64,* 45 OR. L. REV. 1, 1 & n.2 (1965); Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon,* 16 WILLAMETTE L. REV. 1 (1979). In 1984, Oregon voters changed their minds again, reinstating the death penalty by adopting a constitutional amendment that began as an initiative. *See* OR. CONST. art. I, § 40.

In 1936, the search and seizure section of Michigan's bill of rights was amended to require the courts to admit illegally seized evidence under certain circumstances. This amendment was designed to overturn prior state supreme court decisions which had held that the search and seizure section of the Michigan bill of rights barred use of illegally seized evidence. *See* Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights,* 27 WAYNE L. REV. 413, 433 n.84 (1981).

[189] 428 U.S. 465 (1976).

[190] *See id.* at 494.

[191] *See AG Hopeful Van de Kamp Against Proposition 8,* Sacramento Bee, June 3, 1982, at A15, col.1; *see also* Willens, *The Fierce Race for AG—Hard-Line Nick or Low-Key John?,* 13 CAL. J. 361 (1982)(quoting Van de Kamp's opposition to Proposition 8).

East and, eventually, genocidal destruction of the human race.[192]

Anyone familiar with human history will remember two facts about the *Dark Ages*. They were terrible. They came after the *Stone Age*.

[192] *Van de Kamp Decries "Dark Ages" Crime Mentality*, Sacramento Bee, Apr. 29, 1983, at A22, col. 1.