1988

When Constitutions Collide: A Study in Federalism in the Criminal Law Context

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Available at: http://scholarworks.law.ubalt.edu/ublr/vol18/iss1/3
I. INTRODUCTION

Most of the provisions of the Constitution of the United States that apply to criminal cases have cognate provisions in the constitutions of the various states — provisions that create the same right or restriction. Often the language of the state provisions is quite similar to that of the parallel federal provision. When the Supreme Court of the United States interprets a provision of the federal charter in a manner that conflicts with state precedent, and a subsequent similar case in a state court brings into question the proper construction of the cognate provision of the state's constitution, the state court will be confronted with a choice between following the holding of the Supreme Court or construing the state constitution independently. This article explores how the Court of Appeals of Maryland has resolved this dilemma, and compares its approach with that taken by courts in other states.

The following chart sets forth important provisions of the Bill of Rights of the United States Constitution and the Declaration of Rights of the Maryland Constitution as they relate to criminal cases:

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<th>Substantive Right or Restriction</th>
<th>Provision of Maryland Declaration of Rights</th>
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<td>Right to Counsel</td>
<td>Article 21: That in all criminal prosecutions, every man hath a right . . . to be allowed counsel . . .</td>
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The opinions expressed in this article are those of the author, and do not necessarily reflect the opinions of the Office of the Public Defender of Maryland, or any of its employees.
Due Process

| Article 24: That no man ought to be taken or imprisoned or dispossessed of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.¹ |
|---|---|---|
| Amendment V: No person shall be deprived of life, liberty, or property, without due process of law; ... |

Searches and Seizures

| Article 26: That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted. |
|---|---|---|
| Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized. |

¹. Article 24 of the Maryland Declaration of Rights is captioned “Due Process,” and the due process concept has long been equated with “the law of the land” under that article. See Wright v. Wright, 2 Md. 429, 452 (1852).
The Maryland Declaration of Rights predates the Federal Bill of Rights by 15 years, and there are obvious differences in the language of the various cognate provisions. It is therefore not surprising that the Maryland Court of Appeals has repeatedly recognized that the Maryland provisions, however intertwined with their federal counterparts, are "independent and separate" from the federal provisions and are "capable of divergent effect." The question to be explored in this article is the extent to which this theoretical potential has actually been realized when the Maryland courts have been called upon to decide constitutional criminal matters.

II. RIGHT TO COUNSEL, PRIVILEGE AGAINST SELF-INCRIMINATION, AND DUE PROCESS

Perhaps the most inviting opportunity ever to come before the court of appeals to give independent effect to the Maryland Constitution arose in Lodowski v. State. In Lodowski, two men robbed and murdered an assistant manager of a convenience store and an off-duty police officer who was working at the store as a security guard.

Several days after the murders, Lodowski became a suspect and was taken into custody by police officers, who questioned him at length. At first he professed his innocence, but ultimately, he orally confessed his guilt. During this phase of the interrogation, Lodowski's mother was

2. U.S. CONST. amend. IV, V, VI; MD. DECL. RTS. art. 21, 22, 24, 26. This article will not discuss the Cruel and Unusual Punishment provisions of the Maryland and United States Constitutions.
6. Id. at 698, 490 A.2d at 1231. The victims were killed in the course of transporting store receipts to a bank, and over $20,000 was taken. Id.
7. Id. at 712-15, 490 A.2d at 1239-40.
present at the police station. She was continually assured by police officers, including a colonel, that her son was being questioned only as a witness and not as a suspect.\(^8\) After the oral confession was obtained, the police apparently concluded that the subterfuge was no longer necessary, and Lodowski's mother was told that her son was now a suspect.\(^9\)

At this point, Lodowski's mother moved quickly to obtain counsel for her son. Within an hour after learning that Lodowski was a suspect she retained two attorneys; within another hour the attorneys were at the police station demanding to see their client.\(^10\)

The police refused to permit the lawyers to see Lodowski, who at that point was in the process of reducing his oral statement to writing.\(^11\) The officers took the position that Lodowski had been informed of and had waived his right to counsel under *Miranda v. Arizona*.\(^12\) The attorneys sought the intercession of the local district public defender and of a district court judge, but the police stood firm and refused to permit the lawyers to see their client.\(^13\) Lodowski finished writing his highly incriminatory statement and was convicted of a host of offenses including murder and robbery with a deadly weapon, and sentenced to death.\(^14\)

A unanimous court of appeals, in strong language, ruled that the trial judge had erred in refusing to suppress the written statement.\(^15\) Applying the Fifth Amendment to the United States Constitution, the court reasoned that a suspect's waiver of counsel cannot be knowing and voluntary if he is not told that attorneys have been retained on his behalf, are physically present, and are available for immediate consultation.\(^16\) In essence, the court found that knowledge of an abstract right to counsel is much different from being informed of the concrete presence of a specific attorney. The court thus held "that a suspect must be fully informed of the actual presence and availability of counsel who seeks to confer with him, in order that any waiver of a right to counsel, as established by *Miranda*, can be knowing and intelligent."\(^17\)

Shortly after *Lodowski I* was decided, the Supreme Court reached

\(^9\) *Lodowski I*, 302 Md. at 714, 490 A.2d at 1239.
\(^10\) *Id.*
\(^11\) *Id.*
\(^12\) 384 U.S. 436 (1966).
\(^13\) *Lodowski I*, 302 Md. at 714, 490 A.2d at 1240.
\(^14\) *Id.* at 698-700, 490 A.2d 1231-32.
\(^15\) *Id.* at 720-21, 490 A.2d at 1243. Two justices concurred, but discussed only the victim impact statement portion of the opinion. See *id.* at 752-53, 490 A.2d at 1259 (Eldridge, J., concurring); *id.* at 753-86, 490 A.2d at 1259-77 (Cole, J., concurring).
\(^17\) *Lodowski I*, 302 Md. at 721, 490 A.2d at 1243.
the opposite conclusion in Moran v. Burbine. In Burbine, the defendant was interrogated by Rhode Island police officers who suspected him of murder. Burbine's sister contacted the public defender's office, and an assistant public defender telephoned the police and told them that she would be representing Burbine if the officers intended to interrogate him. She was told that no interrogation would take place; however, the opposite turned out to be true. Burbine waived his Miranda rights, confessed, and was convicted of murder.

The Supreme Court found the conduct of the police "distasteful," but analyzed the waiver of counsel issue in different terms from the Court of Appeals of Maryland. Over a strong dissent, the Supreme Court held that a waiver is valid if the will of the suspect is not overborne. The Court focused upon matters that are brought to the defendant's attention, and discounted matters of which he is kept in ignorance. Burbine was told that he had a right to a lawyer and he freely declined; the fact that his family had already been in contact with an attorney was, in the Court's opinion, irrelevant. Significantly, however, the Court expressly permitted the states to reach a different result: "Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."

The State of Maryland appealed the judgment in Lodowski I to the Supreme Court, which vacated the judgment and remanded the case to

19. Id. at 415, 416-17.
20. Id. at 416-18.
21. Id. at 424.
22. Id. at 434 (Stevens, Brennan & Marshall, JJ., dissenting). The dissent cited several reasons for concluding that a suspect's waiver of his right to counsel is invalid when police refuse to allow the suspect's attorney to communicate with him. First, the dissent noted the presumption against the validity of constitutional waivers. Id. at 450-51 (Stevens, Brennan & Marshall, JJ., dissenting); see, e.g., Brewer v. Williams, 430 U.S. 387, 404 (1977); Miranda v. Arizona, 384 U.S. 436, 475 (1966). Second, the dissent argued that the inherently coercive nature of police interrogation increased the need for a strict presumption against waivers in the custodial interrogation context. Burbine, 475 U.S. at 451 (Stevens, Brennan & Marshall, JJ., dissenting); see, e.g., Taue v. Louisiana, 444 U.S. 469, 470 (1980) (per curiam); Miranda, 384 U.S. at 455; United States v. Carignan, 342 U.S. 36, 46 (1951) (Douglas, J., concurring). Finally, the dissent relied upon state court interpretations which found that misleading police conduct vitiated constitutional waivers. Burbine, 475 U.S. at 454-56; see, e.g., Weber v. State, 457 A.2d 674, 685 (Del. 1983); Haliburton v. Florida, 476 So. 2d 192, 193-94 (Fla. 1985), vacated and remanded, 475 U.S. 1078 (1986), aff'd on remand, 514 So. 2d 1088 (Fla. 1987); People v. Smith, 93 Ill. 2d 179, 189, 422 N.E.2d 1325, 1329 (1982), cert. denied, 461 U.S. 937 (1983); Commonwealth v. Sherman, 389 Mass. 287, 296, 450 N.E.2d 566, 571 (1983); Lewis v. State, 695 P.2d 528, 529 (Okla. Crim. App. 1984); see also infra notes 42-65 and accompanying text. But see Blanks v. State, 254 Ga. 420, 423, 330 S.E.2d 575, 579 (1985), cert. denied, 475 U.S. 1090 (1986); State v. Beck, 687 S.W.2d 155, 159 (Mo. 1985) (en banc), cert. denied, 476 U.S. 1140 (1986).
24. Id. at 422-23.
25. Id. at 428.
the court of appeals for reconsideration in light of Burbine.\textsuperscript{26} The court of appeals, in turn, directed the parties to address themselves to the admissibility of Lodowski’s confession under the United States Constitution, the Maryland Constitution, and the non-constitutional law of Maryland.\textsuperscript{27}

The federal contentions were controlled by Burbine, and no convincing non-constitutional state law arguments could be mustered.\textsuperscript{28} There were three considerations, however, which created a reasonable hope that the defense could prevail under the state constitution. First, the court of appeals was already on record in \textit{Lodowski I} as finding the police conduct in the case improper.\textsuperscript{29} Second, the Supreme Court, finding such tactics distasteful, had all but invited the states to reach a result different from Burbine.\textsuperscript{30} Finally and most important, the court of appeals was not at all convinced by Burbine: “[W]e do not find the [Burbine] Court’s reasoning in arriving at these conclusions to be persuasive. . . .”\textsuperscript{31}

Nevertheless, the court unanimously rejected the argument that the conduct of the police was improper under article 21 of the Maryland Declaration of Rights as denying the assistance of counsel, under article 22 as compelled self-incrimination, or under article 24 as denying due process of law.\textsuperscript{32} The court reasoned that however independent the Maryland charter may be from its federal counterpart in theory, in practice decisions of the Supreme Court are virtually direct authority:

It is true that similar provisions within the Maryland and United States Constitutions are independent and separate from each other. Generally, however, comparable provisions of the two constitutions are deemed to be \textit{in pari materia} . . . . Here the relevant comparable provisions of the State and Federal Constitutions were adopted in times not far removed from each other. The first ten amendments to the Constitution of the United States, commonly known as the Bill of Rights, were all proposed by Congress on 25 September, 1789, and declared ratified on 15 December 1791. Provisions comparable to the Fifth Amendment clauses concerning self-incrimination and due process of law and the Sixth Amendment clause concerning assistance of counsel appeared in the Declaration of Rights, Constitution of Maryland (1776) and in each Constitution thereafter. Thus, the concern with self-incrimination, assistance of counsel and due process of law was shared by those

\begin{itemize}
\item \textsuperscript{26} Maryland v. Lodowski, 475 U.S. 1078 (1986).
\item \textsuperscript{27} Order of the Maryland Court of Appeals, April 4, 1986, \textit{Lodowski II} (No. 154, 1983 Term; No. 1, 1984 Term).
\item \textsuperscript{29} See supra notes 15-17 and accompanying text.
\item \textsuperscript{30} Burbine, 475 U.S. at 428; see also supra text accompanying note 25.
\item \textsuperscript{31} Lodowski II, 307 Md. at 242, 513 A.2d at 304.
\item \textsuperscript{32} Id. at 246-49, 513 A.2d 306-08.
\end{itemize}
who framed the Federal Constitution and those who framed the Maryland constitution. This concern on the part of the drafters of each constitution was implanted in the same climate and nurtured by the same hopes and fears. The provisions, so alike in aim and content, were proposed and accepted by those anxious to preserve the freedom and rights they had so arduously won. As stated in the preamble to the Declaration of Rights, the provisions were prompted by the People 'grateful to Almighty God for [their] civil and religious liberty, and taking into [their] serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof. . . .' We cannot say, in the frame of reference here, that the Federal provisions and the State provisions are to be construed and applied differently. This view is amply supported by what we have said in the past.33

The court then proceeded to reject each of Lodowski's state constitutional theories on the basis of similar reasoning. With respect to compelled self-incrimination, the court concluded that under its previous holdings the Fifth Amendment to the United States Constitution and article 22 of the Maryland Declaration of Rights will be construed to confer equivalent rights.34 The court acknowledged that it had previously found article 22 to be "an inhibition upon the government of the State of Maryland,"35 but found no reason to conclude that its protections of the accused "were any greater or different than the rights guaranteed by the Fifth Amendment."36

The court next considered Lodowski's right to counsel under article 21, and dismissed the matter in a single paragraph:

Article 21 of the Maryland Declaration of Rights declares '[t]hat in all criminal prosecutions, every man hath a right . . . to be allowed counsel. . . .' We stated flatly in State v. Tichnell:

33. Id. at 245-46, 513 A.2d at 306 (citations and footnote omitted). In support of the proposition that comparable provisions of the two constitutions are deemed to be in pari materia, the court cited the following cases: Crawford v. State, 285 Md. 431, 404 A.2d 244 (1979); Richardson v. State, 285 Md. 261, 401 A.2d 1021 (1979); State v. Panagoulis, 253 Md. 699, 253 A.2d 877 (1969); Brown v. State, 233 Md. 288, 196 A.2d 614 (1964); Bass v. State, 182 Md. 496, 35 A.2d 155 (1943); Blum v. State, 94 Md. 375, 51 A. 26 (1902). See also Northampton Corp. v. Washington Suburban Sanitary Comm'n, 278 Md. 677, 686, 366 A.2d 377, 382 (1976) (article 23 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the United States Constitution have the same effect with regard to the exaction of property); Rafferty v. Comptroller, 228 Md. 153, 161, 178 A.2d 896, 900 (1962) (article 23 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the United States Constitution have the same effect with regard to State income tax).
34. Lodowski II, 307 Md. at 246-47, 513 A.2d at 306-07.
35. Id. at 247, 513 A.2d at 307 (quoting Marshall v. State, 182 Md. 370, 383, 35 A.2d 115, 117 (1943)).
36. Id.
'There is no distinction between the right to counsel guaranteed by the Sixth Amendment and Article 21 of the Maryland Declaration of Rights. . . . .' We again set out this view in Clark v. State. . . . Accordingly, with regard to the allowance of counsel provision of Article 21 of the Declaration of Rights, we adhere to the construction the Supreme Court has placed on the like provision of the Sixth Amendment.37

Finally, the court rejected Lodowski's due process contention under article 24. While recognizing that due process may provide a source for an entitlement to counsel that would not otherwise exist, the court nevertheless found that under Burbine, any right that existed had been waived.38 The court reasoned that:

Under Burbine the due process clause of the Fourteenth Amendment did not operate to vitiate Burbine's waiver, and we see nothing in Sites39 or Rutherford40 to compel a broader construction of the Law of the land clauses of Maryland's Declaration of Rights so as to vitiate a waiver otherwise proper.41

In sum, the court concluded that the Maryland Constitution afforded no relief to Lowodski because the Supreme Court had found that the cognate provisions of the United States Constitution afforded the defendant no relief.

Appellate courts in other states have viewed the matter differently. Even before Burbine was decided, a number of state courts found that actions by the police which prevented attorneys from consulting with suspects in custody were repugnant to state constitutions as well as to the federal charter. For example, in Lewis v. State,42 the Oklahoma court found that where a defendant was not told that his attorney had arrived at the police station, the admission of his confession violated his right to

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37. Id. (citations omitted).
38. Id. at 248-49, 513 A.2d at 307-08. The court recognized that both article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution provide a right to counsel independent of the right provided under the Sixth Amendment. Id. at 248, 513 A.2d at 307. The court also expressly stated that "Lodowski was entitled to counsel during his custodial interrogation resulting in his third statement." Id. at 249, 513 A.2d at 308; see also text accompanying notes 11-14. The court, however, concluded that the relevant issue was not whether Lodowski was entitled to counsel, but rather, whether his right had been effectively waived. Lodowski II, 307 Md. at 249, 513 A.2d at 308.
39. In Sites v. State, 300 Md. 702, 481 A.2d 192 (1984), the court found that as a matter of due process an individual arrested on suspicion of driving while intoxicated is entitled to counsel prior to deciding whether to submit to a breathalyzer test. [footnote by Author—Ed.]
40. In Rutherford v. Rutherford, 296 Md. 347, 464 A.2d 228 (1983), the court concluded that due process required a right to counsel before a defendant in a civil contempt proceeding could be sentenced to actual incarceration. [footnote by Author—Ed.]
41. Lodowski II, 307 Md. at 249, 513 A.2d at 308.
counsel and privilege against self-incrimination under the Oklahoma Constitution. 43 Similarly, in State v. Haynes, 44 the Supreme Court of Oregon ruled that where a suspect was removed from jail to prevent contact with his soon-to-arrive attorney, the admission of his statement violated, *inter alia*, the provisions of the Oregon Constitution condemning involuntarily-obtained statements. 45 Finally, in State v. Matthews, 46 it was held that the Louisiana Constitution was violated where the police ignored a telephone request from an attorney to cease interviewing her client until she could confer with him. 47

While *Burbine* was pending before the Supreme Court, an interesting instance of "anticipatory federalism" confronted the Court of Criminal Appeals of Texas. In *Dunn v. State*, 48 the court was faced with an issue identical to the issue in *Burbine* — whether a suspect in custody can knowingly waive the right to counsel when, unknown to him, his wife has arranged for an attorney to represent him but the police refuse to permit consultation. 49 The court anticipated the possibility that it would be called upon to "depart from the path laid down by the Supreme Court," 50 yet it proceeded to find that under the facts there could be no knowing and intelligent waiver. 51 In reaching this conclusion, the court expressly relied upon both the Fifth Amendment to the United States Constitution and article I, section 10 of the Texas Constitution. 52

After *Burbine* was decided, the departure anticipated by the *Dunn* court was made by the Supreme Court of California in *People v. Houston*. 53 In *Houston*, the suspect was taken into custody and questioned about certain narcotics offenses. During the interrogation, friends of the suspect retained an attorney. The lawyer telephoned the police station and subsequently arrived there in an effort to consult with the suspect before his client confessed, but was rebuffed by the officers. The suspect confessed and was convicted. 54

Relying upon Justice Stevens' "searing and scholarly dissent" in *Burbine* as well as a number of state court cases (ironically, including

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43. *Id.* at 529-31 (citing with approval *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), cert. denied, 446 U.S. 945 (1980)); see also OKLA. CONST. art. II §§ 7, 20, 21.
44. 288 Or. 59, 602 P.2d 272 (1979), cert. denied, 446 U.S. 945 (1980).
45. *Id.* at 71-75, 602 P.2d 278-80; see also OR. CONST. art. I, § 12. The court also found that the police conduct violated the defendant's federal Fifth, Sixth and Fourteenth Amendment rights. *Id.* at 74, 602 P.2d at 279.
46. 408 So. 2d 1274 (La. 1982).
47. *Id.* at 1276-78; see also LA. CONST. art. 1, § 13; LA. C. CR. P. art. 230, 511.
49. *Id.* at 567; see also supra text accompanying notes 18-20.
50. *Dunn*, 696 S.W.2d at 567; see also *id.* at 568 n.2.
51. *Id.* at 569-70.
52. *Id.* at 570; see also TEX. CONST. art. 1, § 10.
54. *Id.* at 599-600, 724 P.2d at 1167-68, 230 Cal. Rptr. at 142-43.
56. *See, e.g.*, Weber v. State, 457 A.2d 674, 685-87 (Del. 1983); Haliburton v. State, 476...
Lodowski I), the court found the conduct of the officers indefensible.\textsuperscript{57} Like the court of appeals in Lodowski II, the California court noted that the Supreme Court had expressly permitted the states to decide the matter for themselves, and found the reasoning of Burbine unpersuasive.\textsuperscript{58} Where the Houston court differed from the Maryland Court of Appeals was in its approach to federalism and to the persuasiveness of Supreme Court holdings:

By its terms, Burbine leaves the states free to ‘[adopt] different requirements for the conduct of [their] employees and officials as a matter of state law...’. It is settled beyond debate, of course, that our state Constitution is ‘a document of independent force’...; unless a contrary intent is apparent, its guarantees ‘are not dependent on those [provided] by the United States Constitution’...

We sit as a court of last resort on the meaning of California’s Declaration of Rights. Our decisions cannot limit federal guarantees, but restrictive federal interpretations of the United States Constitution do not preclude a finding that the Constitution of our state accords its citizens greater individual rights... Indeed, in the federal system, state charters offer important local protection against the ebbs and flows of federal constitutional interpretation...

We do not depart lightly from clear United States Supreme Court rulings. The high court’s decisions defining fundamental rights and liberties are entitled to ‘respectful consideration.’ But they are to be followed in California ‘only where they provide no less individual protection than is guaranteed by California law.’... In appropriate cases, we have forthrightly rejected adherence to United States Supreme Court precedent... even where it was necessary to overrule our own prior decision adopting the federal rule.\textsuperscript{59}

The court accordingly held that the conduct of the police violated article I, section 15 of the California Constitution, providing that “[p]ersons may not... be compelled in a criminal cause to be a witness against themselves...,” and the separate guarantee of the same provision

\textsuperscript{57} Houston, 42 Cal. 3d at 604-05, 607-10, 724 P.2d at 1170-71, 1173-74, 230 Cal. Rptr. at 145, 147-49.
\textsuperscript{58} Id. at 609-10, 724 P.2d at 1174, 230 Cal. Rptr. at 148-49.
\textsuperscript{59} Id. (footnotes and citations omitted).
that "[t]he defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . . ."60

The Supreme Court of Connecticut also rejected Burbine in State v. Stoddard.61 There, an attorney's telephone request to speak to a suspect in custody was met with the false response that the suspect in fact was not being held. Unaware that such efforts were being made on his behalf, the defendant waived his Miranda rights and made an inculpatory statement.62

The appellate court began its analysis by noting that Burbine permitted the states to reach their own conclusions, and observed that "[t]his recognition, no doubt mandated in part by well known principles of federalism; Michigan v. Long was also prompted by a reluctance to intrude into the administration of state criminal processes."63

Turning to its own constitution, the Stoddard court traced the history of the development of the right to counsel in Connecticut. Finding that the Connecticut courts have long taken great care to assure the representation of the criminally accused, the court held that the police are obligated to apprise a suspect promptly of efforts made by an attorney to render assistance.64 It predicated that conclusion upon the due process clause of article 1, section 8 of the Connecticut Constitution.65

In summary, the question of whether to follow the Supreme Court's holding in Burbine has confronted the appellate courts of a number of states. The divergent results in these cases cannot be traced to the language of the particular state constitutional provisions at issue, as each

60. Id. at 600 n.2, 724 P.2d at 1167 n.2, 230 Cal. Rptr. at 142 n.2; see also CAL. CONST. art. I, § 15.
62. Id. at 160-62, 537 A.2d at 449-50.
63. Id. at 164, 537 A.2d at 451 (citation omitted). In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court discussed at length its own lack of jurisdiction where the ruling of the state court below is predicated upon an adequate and independent ground of state law. Id. at 1037-44. The Court held that it is empowered to hear a case where the lower court clearly relied upon federal principles, or where the state court's analysis could reasonably be construed as relying upon federal principles. Id. at 1040-42. Conversely, where the lower court plainly relied upon rules of state law, its holding is not subject to Supreme Court review unless the state law contravenes the United States Constitution. Id. Michigan v. Long is relevant to the subject of this article because it implies that a holding predicated upon a state constitutional theory which confers greater protection upon a criminal defendant than does the cognate provision of the United States Constitution is not subject to review by the Supreme Court.
64. Stoddard, 206 Conn. at 166-67, 537 A.2d at 452.
65. Article 1, section 8 of the Connecticut Constitution provides: "No person shall be compelled to give evidence against himself, nor be deprived of life, liberty, or property without due process of law, nor shall excessive bail be required nor excessive fines imposed." CONN. CONST., art. I, § 8.

involved charter mandates in general terms that a defendant in a criminal case shall have a right to counsel and a privilege against compelled self-incrimination. Instead, the divergence must be traced to a difference in philosophy concerning the proper deference owed to the United States Supreme Court.

III. USE OF PROSECUTOR'S PEREMPTORY CHALLENGES TO STRIKE BLACK PROSPECTIVE JURORS

An important issue in federalism was created when the Supreme Court responded to the tactic employed by some prosecutors of using peremptory challenges to remove black prospective jurors, particularly in cases involving a black defendant and a white victim, by initially refusing to condemn that practice in any significant way. While some state courts, including the Court of Appeals of Maryland, followed the lead of the Supreme Court, others did not. The difference in approach is instructive.

At the height of a very active period in the history of the American civil rights movement, the Supreme Court decided *Swain v. Alabama*. In *Swain*, the prosecutor removed all six black potential jurors through a procedure equivalent to the peremptory challenge. The defendant challenged this practice as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court, however, rejected the challenge, reasoning that, historically, peremptory challenges had provided trial counsel with an unfettered right to remove prospective jurors without accounting for the motivations behind the removals. The Court went on to note that counsel may properly use a juror's group affiliation as a kind of shorthand for dividing the individual characteristics of persons who under ordinary circumstances must be total strangers to the attorneys. On the basis of this reasoning, the *Swain* Court concluded that a defendant cannot establish unconstitutional racial discrimination on the basis of a single case. Only when the prosecutor's office operated in a discriminatory manner in a series of cases could a cognizable claim be established.

Subsequent to the *Swain* decision, developments under a different constitutional theory began to cast doubt upon the continuing viability of its holding. Under these decisions, the principle was established that the Sixth Amendment right to trial by an impartial jury included a right to

67. See id. at 210. At the time of this case, Alabama employed a "struck-jury system" to impanel a petit jury. Under this system, the defense would strike two potential jurors and the prosecution one, in alternating turns, until a large venire was reduced to only twelve members. Id.
68. Id. at 212-22.
69. Id. at 220-21.
70. Id. at 222-28.
71. Id. at 227.
trial by a jury drawn from a "fair cross-section" of the community.\footnote{The cases held that under the fair cross-section requirement, the states were prohibited from systematically excluding any "cognizable group" from jury service.\footnote{Therefore, if a state's system of drawing individuals from the community for jury service had the effect of disproportionately excluding groups such as blacks and women from the process, it contravened the Sixth Amendment.}}

When the Supreme Court revisited the subject of racially discriminatory peremptory challenges in \textit{Batson v. Kentucky},\footnote{\textit{See Duren v. Missouri}, 439 U.S. 357 (1979); \textit{Taylor v. Louisiana}, 419 U.S. 522 (1975).} it was natural to expect that it would reconsider \textit{Swain} and possibly overrule it on fair cross-section grounds. Instead, the Court departed from the fair cross-section grounds upon which it had granted \textit{certiorari} and held in favor of the defendant on an equal protection theory.\footnote{The Court explained its decision by stating "that resolution of petitioner's claim properly turns on application of equal protection principles." \textit{Id.} at 84 n.4. This decision is particularly surprising in light of the fact that the petitioner neither raised nor briefed an equal protection argument. \textit{See id.} at 111-18 (Burger, C.J., dissenting).} The Court ruled that henceforth a defendant could establish an equal protection violation on the basis of a prosecutor's use of peremptory challenges in a single case.\footnote{\textit{Id.} at 93-100. To implement its holding, the Court placed the initial burden upon the defense to establish a \textit{prima facie} case of racial discrimination through an examination of, \textit{inter alia}, the pattern of strikes exercised by the prosecutor and the respective races of the major trial participants. \textit{Id.} at 96-98. In the event that a \textit{prima facie} case is established, the burden then shifts to the prosecutor to provide a specific, racially neutral explanation for his challenges. \textit{Id.} at 97. It is then the responsibility of the trial judge to determine where the truth lies, and if necessary to fashion an appropriate remedy. \textit{Id.} at 98 & n.21.} 

The question of federalism arose during the interim period between \textit{Swain} and \textit{Batson}, when some state courts were called upon to decide whether to afford greater protection to defendants than was provided by \textit{Swain}. \textit{People v. Wheeler},\footnote{22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).} is a particularly notable example of a state court's reliance on a state constitution to resolve this issue. In \textit{Wheeler}, two black men were on trial for the murder of a white grocery store owner. During the \textit{voir dire} process, the prosecutor used his peremptory challenges to remove all of the black prospective jurors. An all-white jury convicted both defendants.\footnote{Id. at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893.}

The defendants on appeal relied upon the right to an impartial jury secured by article I, section 16 of the California Constitution.\footnote{\textit{Id.} at 265-66, 583 P.2d at 754, 148 Cal. Rptr. at 895-96. Article I, section 16 of the California Constitution provides in relevant part: "Trial by jury is an inviolate right and shall be secured to all...." \textit{CAL. CONST.} art. I, § 16.} The court, in a well considered opinion, found error largely on the basis of fair cross-section cases, fashioned a remedy, and only then mentioned the
Supreme Court case directly on point, Swain. Its attitude toward Swain was revealed in the first sentence of its discussion of that precedent: "The People nevertheless contend that we are compelled to allow this pernicious practice to continue in our courts by the case of Swain v. Alabama . . . ."\(^{80}\) Rejecting that premise, the court went on to make clear that it would never be "compelled" to follow any Supreme Court precedent that provided less protection for state citizens than did California law:

Because a fundamental safeguard of the California Declaration of Rights is at issue, however, 'our first referent is California Law' and divergent decisions of the United State Supreme Court 'are to be followed by California courts only when they provide no less protection than is guaranteed by California law.' . . . It is apparent that Swain provides less protection to California residents than the rule we now adopt. Under Swain a defendant is barred from vindicating his right to an impartial jury unless he can provide that over a long period of time the same prosecutor has struck every black from every petit jury 'whatever the circumstances, whatever the crime and whoever the defendant or the victim may be.'\(^{81}\)

The Wheeler court expressly recognized that another path was open to it—to distinguish Swain as an equal protection case while granting relief on fair cross-section grounds, and thereby avoid a direct clash with Supreme Court precedent. The court, however, rejected this course in light of its belief that the contemporary Supreme Court would adhere to Swain even in the face of a challenge based upon the Sixth Amendment right to an impartial jury.\(^{82}\) Instead, it decided the case under its own constitution.\(^{83}\)

A few months later, the Supreme Judicial Court of Massachusetts reached the same result in Commonwealth v. Soares.\(^{84}\) The court relied upon substantial scholarly commentary in noting that "[s]ince its release in 1965, Swain has been the subject of extensive and biting criticism."\(^{85}\) Finding Swain's burden of proof requirement to be unrealistic and unfair, the court granted relief under article 12 of the Massachusetts Declaration of Rights. In language quite similar to article 24 of the Maryland Declaration of Rights, the Massachusetts article provides:

And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or

80. Wheeler, 22 Cal. 3d at 283, 583 P.2d at 766, 148 Cal. Rptr. at 907 (citation omitted).
81. Id. at 285, 583 P.2d at 767, 148 Cal. Rptr. at 908 (citations omitted).
82. Id. at 284-85, 583 P.2d at 767, 148 Cal. Rptr. at 908.
83. Id. at 285-87, 583 P.2d at 767-68, 148 Cal. Rptr. at 908-10.
85. Id. at 476-77 n.11, 387 N.E.2d 510 n.11.
estate, but by the judgment of his peers, or the law of the land.\textsuperscript{86}

The \textit{Soares} court showed greater deference to the Supreme Court than its California counterpart in \textit{Wheeler}, and its language was more temperate.\textsuperscript{87} The result, however, was the same — a state court refused to follow \textit{Swain} in interpreting its own constitution.

\textit{Wheeler} and \textit{Soares} had already been decided when the issue of racial discrimination in peremptory challenges first came before the Maryland Court of Appeals. In \textit{Lawrence v. State},\textsuperscript{88} all three black prospective jurors were peremptorily stricken by the prosecutor. Defense counsel objected, the trial court overruled the objection, and Lawrence was convicted of first-degree murder.\textsuperscript{89} In the court of appeals, the defense relied upon articles 21 and 24 of the Maryland Declaration of Rights, cited \textit{Wheeler} and \textit{Soares}, and asked that the court decline to follow \textit{Swain}. The court, however, rejected this position by reasoning that fair cross-section analysis antedated \textit{Swain} by twenty years, and that nothing in the cases requiring a representative jury involved the use of peremptory challenges or in any way repudiated that decision.\textsuperscript{90}

In support of its conclusion that \textit{Swain} remained the controlling precedent, the court of appeals proceeded to quote at length from its holding in \textit{Attorney General v. Waldron}\textsuperscript{91} concerning the relationship between the equal protection guarantees of the state and federal charters:

\begin{quote}
It is the fourteenth amendment of the United States Constitution which is here involved, where it provides in pertinent part: 'No State shall deny to any person within its jurisdiction the equal protection of the law.' . . . Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights . . . . It is, perhaps, because this State has no express equal protection clause that Article 24 has been interpreted to apply 'in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution,' . . . so that 'decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.' . . . While it is true, as our later discussion will show, that the equal protection guaranties of Article 24 and the fourteenth amendment are independent, capable of divergent effect, it is apparent that the two are so intertwined that they, in essence, form a double helix, each
\end{quote}

\textsuperscript{86} \textit{MASS. DECL. RTS.}, art. 12.
\textsuperscript{87} \textit{Compare Soares}, 377 Mass. at 477 n.12, 387 N.E.2d at 510 & n.12 \textit{with Wheeler}, 22 Cal. 3d at 283, 583 P.2d at 767, 148 Cal. Rptr. at 908.
\textsuperscript{88} 295 Md. 557, 457 A.2d 1127 (1983).
\textsuperscript{89} \textit{Id.} at 558-59, 457 A.2d at 1128.
\textsuperscript{90} \textit{Id.} at 566, 457 A.2d at 1131.
\textsuperscript{91} 289 Md. 683, 426 A.2d 929 (1981).
complementing the other. Because the decisions of the United States Supreme Court are not only controlling as to our interpretation and application of the equal protection clause of the fourteenth amendment but also persuasive as we undertake to interpret Article 24, we first examine the currents of the federal analysis prior to determining the impact of these Constitutional guaranties in this case.

* * *

When evaluating an equal protection claim grounded on Article 24, we utilize in large measure the basic analysis provided by the United States Supreme Court in interpreting the like provision contained in the fourteenth amendment. Consequently, when under the auspices of federal equal protection, certain important private interests are vindicated by the High Court through an active scrutiny of legislative classifications, it is not surprising that most of the decisions of this Court reflect the same trend. Although the equal protection clause of the fourteenth amendment and the equal protection principle embodied in Article 24 are 'in pari materia,' and decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of one is not necessarily a violation of the other.92

The court went on to dispose of the article 21 right to jury trial contention in a similar fashion. Quoting from its decision in Stewart v. State,93 the court continued:

In Harris . . . we declared the Sixth Amendment to the United States Constitution and Article 21 of the Declaration of Rights of the Maryland Constitution to be self-executing. . . . In Smith v. State we discussed the interplay between the two constitutional provisions. We concluded 'that the opinions of the Supreme Court interpreting the Sixth Amendment right to a speedy trial are "very persuasive, although not necessarily controlling," as to the proper construction of Maryland's parallel Article 21 right.' . . . In Erbe . . . however, we pointed out that '[t]he language used in Art. 21 of our Declaration of Rights relative to speedy trial is virtually identical with that in the Sixth Amendment to the Constitution of the United States.'94


94. Lawrence, 295 Md. at 562, 457 A.2d at 1129 (quoting Stewart, 282 Md. at 570, 386 A.2d at 1206).
The court proceeded to find that prosecutors are presumed to exercise peremptory challenges in a constitutional manner, and that the use of strikes to remove all three black prospective jurors from the panel was insufficient to rebut the presumption. Lawrence's conviction was therefore affirmed.95

Two years later in Evans v. State,96 the defense contention received a more receptive hearing, but once again met with a negative result. In Evans, the state utilized most of its ten challenges to remove black jurors. The prosecutor, in response to defense counsel's objection, stated that “[w]e struck on background, age, occupation, what we learned during the voir dire at the bench and in open court. We did not strike on racial grounds.”97

The court on this occasion saw “considerable force” in Evans’ argument that Swain was no longer controlling, but declined to decide the question because it found the uncontroverted explanation by the prosecutor sufficient to rebut the defense contention.98 The court also gave full consideration to the Wheeler/Soares line of reasoning, and did so without apparent disapproval and without lengthy quotation from in pari materia cases.99 It is therefore possible to discern some evolution in the court’s thinking, and to speculate that had Batson not come along the court might eventually have distinguished Swain on fair cross-section grounds or departed from it under the Maryland Constitution. The end result, however, is that while some state courts were employing their own constitutions to reject a heavily-criticized federal precedent, the Maryland Court of Appeals declined to do so.

IV. THE LAW OF SEARCH AND SEIZURE

The law of search and seizure has proved in recent years to be a continuing source of friction between the state and federal courts. As Warren Court precedents have given way in many cases to more prosecution-oriented decisions under Chief Justices Burger and Rehnquist, state

95. Id. at 567-72, 457 A.2d at 1132-34. After Batson was decided, the court of appeals viewed the matter much differently. For example, in Stanley v. State, 313 Md. 50, 542 A.2d 1267 (1988), the court found that the appellant had demonstrated a prima facie case of discrimination where the prosecutor had used one peremptory challenge to strike a black juror and bring about an all-white jury.


97. Id. at 524, 499 A.2d at 1280. In Stanley, the court of appeals made clear that after Batson such an explanation would be insufficient, as the prosecutor is required to provide a specific explanation for each challenge. Stanley, 313 Md. at 80, 88, 542 A.2d at 1271, 1281.

98. Evans, 304 Md. at 525-26, 499 A.2d at 1282.

99. Id. at 526-28, 499 A.2d at 1281-82. As noted by the court, other authorities have also analyzed the issue in a manner inconsistent with Swain. See McCray v. Abrams, 750 F.2d 1113, 1131 (2d Cir. 1984) (Sixth Amendment forbids the prosecution from using peremptory challenges to exclude jurors solely on the basis of race); State v. Neil, 457 So. 2d 481 (Fla. 1984) (rejecting Swain under the Florida Constitution); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (N.M. App. 1980).
courts have adhered to prior law through application of their own statutes, court rules, and constitutions. 100

Among the most important issues in this area is the definition of "probable cause" — that is, when do police possess sufficient information to justify the intrusion of an arrest or a search and seizure? Prior to 1983, the sufficiency of probable cause to obtain a warrant was judged by the rules of Aguilar v. Texas 101 and Spinelli v. United States 102 ("Aguilar-Spinelli"). Under these cases, issuance of a warrant was justified only if the issuing magistrate was satisfied of both the veracity of the informant who provided the information to the police and the informant's basis of knowledge of the reported information. 103 If either "prong" of this test was unsatisfied, the warrant application failed to demonstrate sufficient probable cause.

In Illinois v. Gates, 104 the Supreme Court rejected the Aguilar-Spinelli test, finding it insufficiently flexible. The Court substituted a "totality of the circumstances" approach, under which an informant's veracity and basis of knowledge remained relevant criteria but were no longer essential to a finding of probable cause. 105

As the Aguilar-Spinelli approach is more restrictive than that of Gates, the states are free under their own laws to retain the older analysis. 106 As with the aftermath of Burbine and Swain, state courts have divided concerning their adherence to the federal precedent embodied in Gates when interpreting their own constitutions.

The issue came before the Maryland Court of Appeals in Potts v. State. 107 In Potts, a search of the defendant's residence was conducted pursuant to a warrant issued prior to the Gates decision, but the matter was not litigated until after the issuance of the opinion. Among the issues to be decided was whether the Maryland courts should reject Gates altogether and apply a stricter test of probable cause under article 26 of the Maryland Declaration of Rights. 108 The court of appeals disposed of that argument in familiar terms:

Article 26 and the Fourth Amendment to the Federal Constitution developed from the same historical background. . . . Accordingly, we have said on numerous occasions that Article 26 is in pari materia with its federal counterpart and decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect. Giving due regard to the reasoning in

100. See W. LaFave, Search and Seizure § 1.3 (2d Ed. 1987); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky. L.J. 873 (1975).
103. See Spinelli, 393 U.S. at 415-16; Aguilar, 378 U.S. at 110-15.
105. Id. at 230-39.
106. See Michigan v. Long, 463 U.S. 1032, 1037-44 (1983); see also supra note 63.
108. Id. at 576, 479 A.2d at 1340.
Gates and Upton, we decline to adopt a probable cause standard under Art. 26 which is different than that applied under the Fourth Amendment. Accordingly, the appropriate standard for reviewing a magistrate's probable cause determination under Art. 26 is the totality of the circumstances analysis as set forth in Gates and Upton. . . .

A completely different approach from that of the Maryland Court of Appeals in Potts was taken by the Supreme Judicial Court of Massachusetts in Commonwealth v. Upton. When Upton's case first reached

109. Id. (citations omitted). Unlike the unanimous decisions in the overwhelming majority of in pari materia cases, Gahan v. State, 290 Md. 310, 430 A.2d 49 (1981), upon which the court relied, is interesting because it contained a dissent. In United States v. Salvucci, 448 U.S. 83 (1980), the Supreme Court had recently overruled Jones v. United States, 362 U.S. 257 (1960), and abrogated the rule that an individual charged with possession of an illegal substance has "automatic standing" to challenge the seizure of the contraband. In Gahan, the court of appeals was urged to retain the automatic standing concept under article 26 of the Declaration of Rights. Discussing the in pari materia precedents at length, the court rejected this position. Gahan, 290 Md. at 319-22, 430 A.2d at 53-55.

Judge Davidson dissented. On the merits, she concluded that automatic standing was a sound rule that should be retained. The dissent's proposed solution was to so hold under article 26:

I agree with the majority that 'Art. 26 is in pari materia with the Fourth Amendment' and that in considering Art. 26, 'decisions of the Supreme Court on the kindred Fourth Amendment are entitled to great respect.' . . . Nevertheless, the Fourth Amendment and Art. 26 are independent and capable of divergent effect. Although decisions of the Supreme Court are controlling when we interpret the Federal Constitution, they are only persuasive when we interpret the Maryland Declaration of Rights. . . .

Under the circumstances here, I would adhere to this Court's rationale in [Duncan v. State, 276 Md. 715, 351 A.2d 144 (1976)] and I would hold that under Art. 26 of the Maryland Declaration of Rights in cases involving possessory offenses, an accused has 'automatic standing' and is not required to establish affirmatively either a possessory interest in the property seized or a legitimate expectation of privacy in the premises searched in order to have standing to challenge a search and seizure. Gahan, 290 Md. at 331, 430 A.2d at 60 (Davidson, J., dissenting) (citations omitted).

The Gates decision involved a search pursuant to a warrant. A related question is whether the "totality of the circumstances" approach should also replace the Aguilar-Spinelli analysis in the context of a warrantless search and seizure. In Malcolm v. State, 314 Md. 221, 550 A.2d 670 (1988), the court of appeals was urged to reject the totality approach under both the federal and state constitutions in the warrantless search and seizure context. The court held that Gates applies to warrantless searches as a matter of Fourth Amendment law, and brushed aside the state constitutional argument in a footnote: "Article 26 is in pari materia with the fourth amendment. . . . [citing Potts and Gahan]" Id. at 227 n.8, 550 A.2d at 673 n.8. The court, however, did acknowledge that other state courts had rejected the Gates approach in the warrantless search and seizure context under their own constitutions. Id. at 230-31 n.11, 550 A.2d at 674-75 n.11; see, e.g., State v. Kimbro, 197 Conn. 219, 496 A.2d 498 (1985); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985).

Massachusetts’ highest court, the tribunal found error in the denial of a motion to suppress certain evidence for lack of probable cause to search the mobile home where Upton had lived. The court reasoned that Gates had worked a relatively minor modification of the Aguilar-Spinelli analysis and had left it largely intact.111

The United States Supreme Court granted certiorari and reversed.112 The Court chastised the Massachusetts court for misunderstanding its opinion in Gates, which it characterized as having completely abolished the unrealistic and hypertechnical doctrine of Aguilar-Spinelli.113

The Massachusetts court struck back.114 Relying upon article 14 of the Massachusetts Declaration of Rights,115 the court concluded that the Gates standard was too imprecise and too permissive, and that it provided insufficient guidance to serve as a proper definition of probable cause.116 Accordingly, the Aguilar-Spinelli analysis was reinstated.117

In reaching this conclusion, the court described the relationship between the United States Constitution and the Massachusetts charter in the following terms:

The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth, and this has been thought to be particularly true of the relationship between the Fourth Amendment and art. 14. . . . In particular situations, on similar facts, we have reached different results under the State Constitution from those that were reached by the Supreme Court of the United States under the Federal Constitution. On occasion, the differences can be explained because of different language in the two Constitutions. . . . On the other hand, in deciding similar constitutional questions, the two courts have reached contrary results based on differences of opinion concerning the application of similar constitutional

111. Id. at 568, 458 N.E.2d at 720-21.
113. Id. at 732-33.
115. Article 14 of the Massachusetts Declaration of Rights provides:

Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. DECL. RTS. art. XIV.
117. Id. at 374-77, 476 N.E.2d at 556-58.
principles. . .118

In other contexts as well, Supreme Court decisions in the search and seizure area have been modified or rejected by jurisdictions other than Maryland in the interest of insulating older principles from the Supreme Court's conservatism.119 Moreover, those courts taking a more independent stance have at times done so notwithstanding the nearly identical language of the Fourth Amendment and the cognate state provision.120

V. EFFECTIVE ASSISTANCE OF COUNSEL

The most recent instance in which the Maryland Court of Appeals has been urged to deviate from Supreme Court precedent in construing the Maryland Declaration of Rights involved the proper standard for assessing the effective assistance of counsel in criminal cases. State v. Colvin121 arose out of a defendant's collateral attack upon his conviction and sentence of death in post-conviction proceedings. Among the issues presented was whether Colvin had been denied the effective assistance of counsel secured by the Sixth Amendment to the United States Constitu-


119. See, e.g., State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (right of privacy in records of long-distance telephone calls recognized under New Jersey Constitution despite lack of such right under Fourth Amendment); State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (inventory search found unreasonable under the South Dakota Constitution despite federal Supreme Court's ruling in the same case that search was proper); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (consent to a search found invalid under New Jersey Constitution despite Supreme Court precedent construing the Fourth Amendment to the contrary).

120. People v. Brisendine, 13 Cal.3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (concluding that the state court is the final arbiter of its own law and may freely interpret that law in a manner more restrictive of the government than has the Supreme Court despite nearly identical language between the Fourth Amendment to the United States Constitution and the cognate provision of the California Constitution).

In analyzing the issue, the court applied the two-part test announced by the Supreme Court in *Strickland v. Washington*. In *Strickland*, the Supreme Court approached the issue by granting great deference to trial counsel, with a concomitant refusal to use hindsight to conclude that tactical decisions that were unsuccessful demonstrated constitutionally inadequate performance. The *Strickland* Court proceeded from this premise to hold that a defendant asserting ineffective assistance must establish both a deficiency in counsel’s performance and resulting prejudice sufficient to demonstrate a reasonable probability that, absent counsel’s errors, the result of the case would have been different.

In *Colvin*, the defense urged the court of appeals to reject *Strickland* and to hold trial counsel in capital cases to a higher standard. The court, however, was not persuaded. Citing *Lodowski II*, it concluded that there is no distinction between the right to counsel provisions of the Sixth Amendment and article 21 and therefore, the *Strickland* standard applied to both.

When the Supreme Court of Hawaii considered the same issue, it arrived at a different conclusion. In *State v. Smith*, that court noted that the *Strickland* standard had been criticized because its prejudice component erected a nearly insuperable barrier to ineffective assistance claims. It therefore rejected the prejudice requirement and held that under article I, section 14 of the Hawaii Constitution it would continue to adhere to pre-*Strickland* Hawaii cases which focused upon counsel’s performance rather than upon prejudice to the defense case.

VI. CRITIQUE OF THE IN PARI MATERIA APPROACH

The foregoing discussion makes clear that state courts have divided on the question of whether their own constitutions should be applied so as to deviate from decisions of the Supreme Court with which they disagree. The Court of Appeals of Maryland has firmly taken the position that Supreme Court precedent construing a provision of the United States Constitution is virtually direct authority for interpretation of the

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122. Id. at 23-24, 548 A.2d at 517; see also text accompanying notes 1-2.
124. Id. at 689-91.
125. Id. at 687.
126. Lodowski v. State, 307 Md. 233, 513 A.2d 299 (1986); see also supra text accompanying notes 32-33, 37.
127. Colvin, 314 Md. at 24, 548 A.2d at 517.
129. Id. at 500 n.7.
130. Id. Similarly, the Supreme Judicial Court of Massachusetts has indicated that the Massachusetts Constitution may require a different standard than *Strickland*’s. The court, however, found counsel’s performance sufficiently competent that the matter could remain open. Commonwealth v. Callahan, 401 Mass. 627, 635, 519 N.E.2d 245, 250 n.10 (1988).
cognate provision of the Maryland Declaration of Rights. As a result, a court which has not hesitated to render controversial decisions in favor of criminal defendants in other contexts\(^{131}\) has declined to deviate from federal precedent even where it is not persuaded that the particular holding is correct. The question that must be addressed is whether the \textit{in pari materia} approach can be justified.

In the course of a thorough analysis of the proper relationship between the United States Constitution and the constitutions of the states, one commentator has written:

In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties. This role derives its character from the freedom of state courts to move beyond the protections provided by federal doctrine and from the distinctive character of state courts and state constitutions. But the state constitutional role is also shaped by the emergence of the federal Bill of Rights in recent decades as the primary constitutional shield against intrusions by all levels of government. The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law.\(^{132}\)

This commentator further provided and elaborated upon specific justifications for rendering decisions under state charters that are inconsistent with Supreme Court precedent. In broad terms, these justifications are: (1) perceived flaws in the Supreme Court's reasoning which cause the state court to disagree with the result; (2) institutional differences between the state and federal governments; and (3) distinctive


\(^{132}\) Comment, \textit{The Interpretation of State Constitutional Rights}, 95 \textit{Harv. L. Rev.} 1324, 1367 (1982) (footnotes omitted) [hereinafter Comment, \textit{Interpretation of Rights}]. This comment takes the position that state courts should show some deference to the Supreme Court in constitutional matters, should proceed carefully to fill in gaps left by Supreme Court decisions, and should carefully consider a number of factors before deviating from Supreme Court holdings. The commentators, however, reject the \textit{in pari materia} approach:

\textquote{The duty to protect individual rights, a duty that both our federal structure and their own constitutions impose on the states, requires that state courts not regard their constitutions as mere mirrors of federal protections.}

state-specific considerations such as the language of the state constitution, the state's history, established bodies of state law, and distinctive attitudes of the state's citizens.133

These factors weigh heavily in support of an interpretation of the Maryland Constitution which is independent of Supreme Court precedent. As noted above, the court of appeals has at times found Supreme Court holdings unconvincing. The court of appeals was expressly dissatisfied by the reasoning of Burbine,134 and perceived great force in the contention that the rule of Swain was outmoded.135 By nevertheless following these holdings, the court has seemingly abdicated its frequently reiterated authority to give independent effect to the Maryland Constitution.

Furthermore, the language of the relevant provisions of the Maryland Declaration of Rights differs significantly from that of the cognate federal provisions. For example, article 26 condemns improperly obtained warrants as "grievous and oppressive" and as "illegal;" however, such terms do not appear in the Fourth Amendment of the United States Constitution.136 Should the court of appeals desire to depart from the Supreme Court's view that a "good-faith" execution of an improper warrant is constitutionally valid,137 the difference in language between the cognate provisions could provide a justification.

More to the point, however, is the argument that the citizens of Maryland simply do not always share the prevailing views of the nation as a whole. For example, while the nation has elected conservative Republicans to the presidency in recent years, during the same period the governors, senators, and representatives elected by Maryland voters have overwhelmingly been affiliated with the Democratic Party. Any contention that the views of Supreme Court Justices appointed by Presidents Reagan and Bush more accurately reflect the views of Maryland citizens than do the ideas of court of appeals judges appointed by popularly-elected governors of Maryland is dubious at best. Yet the practical effect of the in pari materia approach is to delegate to a conservative United States Supreme Court the task of construing the Maryland Constitution.

An argument can be made, of course, that the in pari materia approach is appropriate. One possible benefit of the deference of a state court to Supreme Court precedent is the promotion of uniformity and predictability in the law. Given consistent deference, litigants or potential litigants can be confident that Supreme Court holdings will apply equally in the state courts and can govern themselves accordingly.

Uniformity and consistency in the basic philosophical choices that give life to a constitution, however, would not appear to be appropriate

133. Comment, Interpretation of Rights, supra note 132, at 1359-61.
134. See supra notes 18-25, 31 and accompanying text.
135. See supra notes 66-71, 96-98 and accompanying text.
136. See supra text accompanying notes 1-2.
attributes of a federal system of government. The basic idea of federalism is that local governments are to be motivated by local concerns, and are to enact, interpret, and enforce laws so as to best serve local needs. In contrast, the national government exists to discern a consensus or synthesis from the variety of interests that motivate local governments, and to enact and interpret laws for the common good. The concerns of some localities in a diverse nation will frequently differ from those of other localities as well as from those of the nation as a whole. A significant shortcoming of the *in pari materia* approach is that instead of construing a state constitution to reflect local conditions and traditions, the task of interpretation is delegated to an authority whose views and concerns may be entirely different. Such an approach raises the real question of why it is necessary to have a state constitution at all. 138

Another possible justification for the *in pari materia* idea is the one frequently expressed by the court of appeals — that the Federal Bill of Rights and Maryland Declaration of Rights emerged from the same historical setting in response to the same problems. If social and economic conditions were static in nature, that justification might carry a substantial amount of weight. It simply does not follow, however, that because two constitutional provisions were enacted in response to similar problems of the late eighteenth century, they should be construed in lockstep as courts face the very different concerns of the late twentieth century and beyond. While the drafters of the Fourth Amendment and article 26 may well have had similar views concerning the general warrants employed by the British government, for example, that surely does not bind their successors to think alike with regard to the propriety of such innovations as video surveillance within a suspect's home. 139

Finally, the *in pari materia* approach disserves the goal of a wide dissemination of conflicting ideas, to the end that superior ideas will displace outdated ones. The Supreme Court within its sphere may be supreme, but it is not infallible. In a system of checks and balances which provides few significant checks upon the nation's highest court,

138. Along the same lines, the doctrine of *stare decisis* is not appropriately invoked as a justification for the granting of near-total deference. The Supreme Court has itself noted that when dealing with an issue that is "substantially related to the constitutional sovereignty of the States," *stare decisis* plays a less important role than it does in other contexts. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977). Moreover, any actual reliance by a potential litigant upon the tendency of the court of appeals to follow Supreme Court precedent must be tempered by the former court's repeated pronouncement that the provisions of the State Constitution are "independent" and "capable of divergent effect." *See supra* note 4 and accompanying text.

139. More logical seems the view of the Supreme Judicial Court of Massachusetts which justified the independence of the state charter in part on the basis that it is older than the United States Constitution. *See Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985); see also supra* note 118 and accompanying text. When the Maryland Constitution was first enacted, the United States Constitution did not yet exist. *See supra* note 3.
the willingness of state courts to disagree under their own constitutions plays a vital role in the evolution of the rule of law in the United States.