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THE CONFLICT BETWEEN STATE AND FEDERAL CONSTITUTIONALLY GUARANTEED RIGHTS: A PROBLEM OF THE INDEPENDENT INTERPRETATION OF STATE Constitutions

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This Comment categorizes the situations which may arise when state courts interpret their own constitutions more expansively than the Supreme Court has interpreted analogous provisions in the federal Constitution. After reviewing several possible solutions formulated to determine the "winner" in such conflicts, the author concludes that only a flexible, sliding scale approach is adequate to resolve the array of federalism problems likely to be presented. To support this conclusion, the author discusses the criticisms to which flexible balancing approaches are subject and defends the sliding scale approach against the hopelessly vague standard applied in obscenity cases.

INTRODUCTION

throughout the history of this country, the source of protection of personal liberties has been the bill of rights of each individual state. The state constitution was a citizen's only protection against overreaching by state government until the fourteenth amendment was adopted in 1868.1 Historically, however, the Supreme Court construed the fourteenth amendment so narrowly as to render the federal Constitution ineffective in deterring state infringement of individual liberties.2 During the 1960's, the War-

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The 1970's evidenced another distinct trend in the development of the relationship between state and federal constitutional protection of individual liberties. Early in that decade, the Burger Court demonstrated that it would not follow in the "activist" foot-


5. See Project Report, supra note 1, at 281 n.53; Note, supra note 1, at 913.

6. See Project Report, supra note 1, at 283-84.

7. See, e.g., Brennan, supra note 4, at 770; Countryman, Why a State Bill of Rights?, 45 Wash. L. Rev. 454, 455-56 (1970); Cramton, The Supreme Court and State Power to Deal with Subversion and Loyalty, 43 Minn. L. Rev. 1025, 1029 (1959); Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 Vand. L. Rev. 620, 642 (1951).

The Burger Court not only abandoned the trend of the 1960's to expand the federal Bill of Rights guarantees to cover more state action, but also specifically limited many of the expansive Warren Court decisions so as to diminish their effectiveness as protectors of individual rights. Many states were uncomfortable with the prospect of diminished federal constitutional protection for the individual liberties of their citizens. The Burger Court also openly encouraged a revival of concern for the federalist structure of the federal government and specifically urged the states to assume greater responsibility in the protection of their citizens' liberties.

State courts were troubled by the Burger Court's "cramped" interpretation of many Warren Court decisions and the prospect of reduced federal protection of individual liberties, but they were encouraged by the "new federalism" apparent in courts and commentaries throughout the country. Many state courts, therefore, began to interpret their own constitutions to provide greater protection of personal freedoms than that available under the federal


10. In the area of criminal procedural rights, see, e.g., Williams v. Florida, 424 U.S. 507 (1976) (approving a requirement to reveal alibi witnesses); Michigan v. Mosley, 423 U.S. 96 (1975) (statements made after suspect indicated he did not want to answer any more questions admissible); Oregon v. Hass, 420 U.S. 714 (1975) (statements made after suspect expressed desire to consult with attorney admissible); United States v. Robinson, 414 U.S. 218 (1973) (full scale body search incident to custodial arrest upheld); Kirby v. Illinois, 406 U.S. 682 (1972) (counsel not required at station lineup occurring after arrest but before indictment); Harris v. New York, 401 U.S. 222 (1971) (statements made without Miranda warnings admissible to impeach accused's credibility).


Bill of Rights. Although no state court may use its state constitution to reduce protection of individual rights below the minimum required under the federal Constitution, states legally may enlarge their protection of individual liberties beyond the federally required minimum, based on an independent, expansive interpretation of their own state bill of rights. The Supreme Court repeatedly has sanctioned this state court technique. Justice Marshall, and especially Justice Brennan, have actively encouraged state courts to construe their state constitutions independently. The list of states which have rediscovered and independently interpreted their own bills of rights grows longer each year. The field of criminal rights has been an especially fertile ground for the growth and development of this doctrine.


17. The enumeration of cases which have employed this technique is too long to delineate. For a sampling only, see supra note 12 and infra notes 18-19.

but protection of other individual liberties has been expanded as well. Although some commentators have serious problems with state court construction of state constitutions to expand protection of personal liberties beyond that required under the federal Constitution, most authors hail the trend as a healthy infusion of federalism into America's decidedly anemic federalist system of government. The commentators believe the previous system has promoted an imbalance of federal/state power and responsibility which has favored the federal government. These commentators welcome this brand of state court activism as a means of furthering the Warren Court's concern for strong, vibrant protection of constitutional rights.

Since this technique is still the exception rather than the rule, the extent of its strengths, weaknesses, and boundaries have yet to be discovered and analyzed fully. The Supreme Court recently...
illustrated one of the most interesting potential problems of the technique in *PruneYard Shopping Center v. Robins.*

In certain situations, the Supreme Court has been faced with direct conflicts between two federal constitutionally guaranteed liberties and has been forced to strike a balance between them. To strike this balance, the Court must weigh the various rights and interests at stake in the particular conflict and enforce one protected liberty at the "expense" of the other. As more states independently interpret their constitutions, it seems inevitable that state court cases will arise presenting the same conflicts between constitutionally protected liberties that the Supreme Court already has addressed. In the state court cases, however, one of the conflicting liberties may be provided broader protection under the *state* constitution than it was provided under the federal Constitution. Thus, there are several issues which must be considered, including: whether state courts may reweigh the same conflicting liberties on the basis of a state constitution interpreted to provide greater protection for one of those liberties than the federal Constitution; whether a state court may strike a different balance, finding the opposite right to be the weightier, in light of an expansive interpretation of its own state constitution; whether such a reweighing would infringe automatically a federal constitutional provision; and, whether the conflict between a state guaranteed liberty and a federal guaranteed liberty is inherently different than a conflict between two analogous federally protected liberties, thereby requiring the application of a different standard.

The dissenting opinion of the California Supreme Court in *Robins v. PruneYard Shopping Center* confronted these issues and concluded that state courts have no right to reweigh conflicting individual liberties which the Supreme Court previously has

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Report, supra note 1, at 312-15; Note, supra note 20. The desirability of various modes of state constitutional interpretations is discussed in Sunquist, supra note 8; Note, supra note 12.


determined in accordance with the federal Constitution. The United States Supreme Court, however, affirmed the California majority approach, which obviated the need to consider that problem. The resolutions which the Court would give to the foregoing issues, therefore, were not defined in its PruneYard opinion.

This Comment portrays the problem more graphically through the vehicle of the PruneYard case and discusses several alternative approaches the Supreme Court may adopt in reviewing these "rebalancing" cases. Finally, the Comment outlines the best approach.

I. THE PROBLEM: CONFLICTS BETWEEN STATE AND FEDERAL CONSTITUTIONAL RIGHTS

In March of 1976, the Supreme Court decided Hudgeons v. NLRB which seemingly resolved the uncertainty generated by a recent line of cases concerning conflicts between the constitutionally protected private property rights of large shopping mall owners and the free speech rights of the general public. Hudgeons presented a dispute between union-member employees, who peacefully attempted to picket a retail store located on the premises of a large, privately owned shopping mall, and the owner of the mall, who threatened to have the picketers arrested. One of the issues the Supreme Court considered in Hudgeons was whether the picketers had first amendment free speech rights to herald their dispute on the private property of the shopping center owner. In concluding that the picketers lacked such rights, the Court emphasized that the earlier cases in this series, holding that a speaker's first amendment rights outweighed the right of the owner to exclude that speaker, were either strictly limited to their facts or were overruled. The more recent case of Lloyd v. Tan-
ner, however, was strongly reaffirmed in *Hudgeons* as good law and binding precedent. *Lloyd* upheld the right of the owner of a large shopping center to forbid, under threat of arrest, the distribution of handbills on shopping mall property by a group of individuals opposing the draft and the United States’ military involvement in Vietnam.

In light of *Lloyd* and *Hudgeons*, the 1979 California Supreme Court decision in *Robins v. Prune Yard Shopping Center* was surprising. The court in *Robins* confronted a factual scenario almost identical to that faced by the United States Supreme Court seven years earlier in *Lloyd*. In *Robins*, several high school students had attempted to gather signatures for a petition expressing opposition to a United Nations’ resolution against Zionism on the Prune Yard Mall premises and were asked to leave under threat of arrest. Although the United States Supreme Court had held for the private property owner on similar facts, the California Supreme Court held for the students. The unexpected result was based on an expansive application of the California Constitution.

California has been a leader in the independent use of its state constitution to protect the individual liberties of its citizens and has unequivocal precedent holding that its constitution protects free speech more than the federal Constitution. It is undisputed that California has a right, on the basis of its own constitution, to afford its citizens greater protection of free speech rights than is afforded under the United States Constitution. It also is equally clear that California may not abridge its citizens’ rights under the

38. 424 U.S. at 517-18.
40. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.
43. *See supra* notes 14-15 and accompanying text.
federal Constitution. In Robins, the shopping center owner argued that Lloyd recognized federally protected private property rights which outweighed the free speech rights of the handbillers and that Lloyd established, under those facts, a federal minimum level of protection for private property rights. Thus, the owner maintained that the federal supremacy clause compelled a ruling in his favor. To hold otherwise would be to infringe federally protected private property rights by falling below the minimum level of protection required by Lloyd.

The dissenters in the 4-3 California Supreme Court opinion agreed. This group noted language in the Lloyd opinion which strongly suggested that the Court had recognized federally protected private property rights and had weighed those property rights against the handbillers’ free speech rights with the balance tipping in favor of the former. It was considered irrelevant, therefore, that the California Constitution provided broader free speech guarantees than the federal Constitution.

The controlling import of the supremacy clause on the issue before us is readily apparent. The United States Supreme Court, interpreting the United States Constitution, has declared that an owner of a private shopping center . . . has a property right protected by the Fifth and Fourteenth Amendments which is superior to the First Amendment right of those who come upon the shopping center premises for purposes unrelated to the center. In such cases, no state court, interpreting a state Constitution, including this court interpreting the California Constitution, can contravene such a federal constitutionally protected right. Thus, in this case, the majority is prevented from relying on the California Constitution to impair or interfere with those property rights. We are bound by the United States Supreme Court interpretations of the United States Constitution. More specifically, in a confrontation between federal and state constitutional interests, federally protected property rights recognized by the United States Supreme Court will prevail against state protected free speech interests.

The Robins dissent noted that the majority avoided the troublesome supremacy clause problem by relying on a wholly different

44. See supra note 13 and accompanying text.
46. 23 Cal. 3d at 911-16, 592 P.2d at 348-51, 153 Cal. Rptr. at 861-64 (Richardson, J., dissenting).
47. Id. at 913-14, 592 P.2d at 349-50, 153 Cal. Rptr. at 862-63.
48. Id. at 914-15, 592 P.2d at 350, 153 Cal. Rptr. at 863.
interpretation of the *Lloyd* opinion. The majority thought that *Lloyd* did not identify special property rights protected by the federal Constitution and that the "court in *Lloyd* examined the functions performed by Lloyd's center but did not purport to define the nature or scope of Fifth and Fourteenth Amendment rights of shopping center owners generally." According to the majority, *Lloyd* was "primarily a First Amendment case," holding only that speech on the property of a privately owned shopping center was simply not covered by the federal first amendment free speech guarantee. In that situation, California was free to find that its more expansive constitutional free speech guarantee protected the signature gatherers' activities on the privately owned shopping mall property even though similar activity under only the federal Constitution would be unprotected.

If the majority were correct in its reading of *Lloyd*, then its holding in *Robins* would be proper, based on the broader protections provided under the California constitution. If the dissent's reading of *Lloyd* were correct, and *Lloyd* in fact represented a recognition by the United States Supreme Court of federally protected property rights which outweighed the *Lloyd* handbillers' federal free speech rights, state courts might be compelled by the supremacy clause to hold for the property owner in a *Robins/Lloyd* fact situation. There is arguably a third approach: the dissent's reading of *Lloyd* does not compel an automatic defense for the shopping center owners.

Even assuming *Lloyd* did weigh federally protected property rights against federally protected free speech rights and found that the property rights outweighed the free speech rights under the federal Constitution, it does not follow that the same balance necessarily will be struck when the free speech right being asserted is a *state* constitutional right. The state interest asserted in *Lloyd* was the protection of its citizens' *federal* free speech rights, but in the *Robins* situation, the state interest was in the protection of its citizens' more expansive *state* free speech rights. This distinction introduces several factors not present in *Lloyd*—factors which possibly could add new weight to the state's interests.

The determination, for example, that the California Constitution has been interpreted repeatedly and decisively to protect free

49. *Id.* at 911-16, 592 P.2d at 348-51, 153 Cal. Rptr. at 861-64.
50. *Id.* at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.
51. *Id.*
speech more than the federal Constitution is a significant consideration. The most important factor in considering conflicts between state and federal constitutions is the relative "importance" of the rights involved. A state or federal right that is highly cherished and strongly protected logically is "weightier" than a less fiercely guarded liberty. An expanded state constitutional right, therefore, would seem, prima facie, to be weightier than its less broad, less strongly protected federal counterpart. Furthermore, states' strong interest in interpreting and enforcing their own state constitutional law is a factor which favors allowing the states considerable deference in defining the limits of their own constitutional provisions. Finally, conditions peculiar to California could strengthen its argument that broader state free speech rights and interests outweigh the federally protected private property rights of large shopping center owners. California, for example, could note that its cities' central business districts—the public parks and streets which were once the traditional free speech forum of California citizens—have been replaced by large privately owned suburban shopping centers and that most California citizens satisfy most of their commercial needs by traveling from their homes to a privately owned shopping complex without ever touching public soil. California also could stress the important role citizen petitions play in the California constitutional scheme, and the state's initiative, referendum, and recall processes.

It is arguable that the supremacy clause would not be violated by a reweighing of the shopping center's federally protected private property rights and the California public's state protected free speech rights because, even under the Robins dissent, Lloyd did not decide that issue. Lloyd did not weigh those rights and interests or establish a federal minimum for the protection of property rights that conflict with a state's more broadly protected constitutional free speech rights.

On June 9, 1980, the United States Supreme Court affirmed the California Supreme Court's decision in PruneYard Shopping

52. See supra note 42 and accompanying text.
53. Consider, for example, the Supreme Court's self-imposed adequate state ground doctrine. See Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875); Note, supra note 20, at 739; infra note 73.
54. This argument was addressed by the court at 23 Cal. 3d at 907, 592 P.2d at 345, 153 Cal. Rptr. at 858.
55. See id. at 907-08, 592 P.2d at 345, 153 Cal. Rptr. at 858 for the court's discussion of this argument.
**Center v. Robins.** The Court's answer to the question of how, or indeed whether, state courts should reweigh directly conflicting state and federal constitutional rights—rights which under the federal Constitution alone have been balanced by the Supreme Court—was not resolved. The Supreme Court apparently agreed with the California majority's interpretation of the *Lloyd* decision as "primarily a First Amendment case." Justice Rehnquist, writing for the majority, stated that "*Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law." The Court treated *Lloyd* as holding only that the federal free speech guarantee does not extend to protect speech on private property. The Supreme Court, therefore, reaffirmed California's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," with the qualification that its restrictions on an owner's private property use "not amount to a taking without just compensation or contravene any other federal constitutional provision." The opinion concludes that the PruneYard owner's property had not been taken without just compensation nor had the owner's federal free speech rights been infringed by requiring him to allow speakers with whom he disagreed to express themselves on his private property.

The issue remains whether the result would have been different had *Lloyd* been a case which identified special property rights in the shopping center owner—rights that outweighed the free speech rights of the handbillers under the federal Constitution. Justice Rehnquist stated: "Our reasoning in *Lloyd* . . . does not *ex proprio vigore* limit the . . . sovereign right [of the State] to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Justice

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57. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.
58. 447 U.S. at 81.
59. Id.
60. Id.
61. Id. at 84-85.
62. Justice Rehnquist emphasized that "the shopping center by choice of its owners was not limited to the personal use" of the owners who were free to post signs disclaiming the handbiller's views. Id. at 87-88.
63. Id. at 81.
Rehnquist could make such a statement since *Lloyd* was "primarily a First Amendment case," and states may, in their discretion, *expand* first amendment protections. A more difficult problem would have been raised if the *Lloyd* case had balanced the shopping center owner's rights against the handbiller's rights of free speech. The Court then would have had to choose between ruling in favor of the PruneYard owner on the basis of the supremacy clause and balancing a federally protected right against a more expansive state right. The *Robins/Lloyd* situation allowed the Court to sidestep this perplexing issue, but it seems inevitable that future cases will arise presenting similar, unavoidable conflicts between federal and state constitutions.

A state court, for example, could interpret its own constitutional bill of rights as protecting the rights of an accused to a fair trial more than the federal Constitution and on that basis, uphold a judicial gag order imposed on the press in a criminal trial. Under the federal Constitution alone, this ruling would be unconstitutional. In *Nebraska v. Stuart*, the Supreme Court found that the press and the public's first amendment free press rights and interests outweighed the accused's sixth amendment rights and interests in being assured a fair trial. Whether that same result would follow when federal free press rights are weighed against a state's more expansive interests in assuring its accused citizens a fair trial is still unresolved. Another such issue is whether a state constitution can be interpreted as protecting its citizens' free exercise of religion to a greater extent than the federal Constitution, leading a state court to uphold legislation providing for direct state funding of teacher salaries in both public schools and religiously affiliated private schools. Under the federal Constitution, this interpretation would be unconstitutional. While the situation described presents a conflict between the free exercise clause and the establishment clause of the first amendment, the Supreme

64. 23 Cal. 3d at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.
65. 427 U.S. 539 (1976). The Supreme Court of Nebraska did not hold specifically the state right should prevail over the federal one, but that "[t]he constitutional guarantees of freedom of speech and of the press and of the right to trial by an impartial jury are, in our judgment, the same under both Constitutions . . . and there is no need to differentiate between the two." State v. Simants, 194 Neb. 783, 790, 236 N.W.2d 794, 799 (1975). The United States Supreme Court reversed this decision, which the *Stuart* court relied on, because it believed that the burden of showing a sufficient reason to institute prior restraint of the press had not been met at the trial.
66. Such funding arguably protects one's free religious exercise by making it as economical to attend a school affiliated with a religion, as to attend a secular public school.
Court, in *Lemon v. Kurtzman*, held that, under such facts, the establishment clause takes precedence. The question remains, however, as to the proper result where a state has chosen, via its state constitution, to protect its citizens' free religious exercise rights to a greater extent than the federal Constitution. The state's interests in enforcing its constitutional provision arguably could alter the balance struck by the Supreme Court between the conflicting federal rights.

As more states interpret their own constitutions to provide greater protection for individual liberties than is available under the federal Bill of Rights, it is more likely that state constitutionally guaranteed liberties will present serious conflicts with federal constitutionally guaranteed rights. May state courts reweigh rights and interests, previously weighed by the Supreme Court under the federal Constitution, in light of conflicting state constitutional provisions? Must the state show a compelling state interest in protecting its citizens' state constitutional rights to find that the state rights outweigh the conflicting federal constitutional right, or is some lesser standard appropriate? On review, how strictly should the Supreme Court scrutinize a state court's rebalancing of conflicting state and federal constitutional guarantees previously balanced only under the federal Constitution? Since it will be important to answer these questions, the development of a rational policy for resolving such future constitutional conflicts is in order.

**II. SOME POSSIBLE APPROACHES**

There are at least three possible approaches that could be used to handle the future constitutional conflicts discussed in this Com-

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68. There are other indications as well. Commentators have begun to urge state courts to expansively interpret their state constitutions to provide greater protection for those individual liberties which they feel the Burger Court has inadequately protected. One commentator, for example, urges state courts to provide expanded state constitutional protection for the press' and public's right to receive information about current criminal trials so as to constitutionally ensure that all state criminal trial proceedings be open, regardless of the Supreme Court's ruling in *Gannett v. DePasquale*, 433 U.S. 368 (1979) (finding no absolute sixth amendment right of the public to attend criminal trials and upholding the closure of a criminal pretrial suppression hearing), or any other subsequent Supreme Court treatment of that issue. Note, *The Right of the Press and Public to Attend Criminal Trial Proceedings in Iowa*, 66 Iowa L. Rev. 153 (1980). That author, however, fails to recognize that by so interpreting a state constitution, an accused's federal sixth amendment right to a fair trial is definitely implicated and possibly infringed.
The first approach is to allow the state courts to enforce a state constitutional guarantee over a conflicting federally guaranteed right with no provision for Supreme Court review. The second possibility is to mandate that the Supreme Court use either minimal scrutiny or strict scrutiny. Finally, the Supreme Court could use a sliding-scale approach—the solution recommended by this Comment.

A. No-Scrutiny

There are two different justifications for a state court's absolute right to decide, without Supreme Court review, that a state constitutional guarantee will be enforced over a conflicting federally guaranteed right. Neither justification is legally sound or persuasive. The first justification is rooted in the adequate state ground doctrine, which is a self-imposed Supreme Court jurisdictional limit. Since the Court generally has no power to review a state court interpretation of state law, and because, as a general policy, the Court declines to decide issues not necessary for the outcome of the case before it, the Supreme Court has refused to review any state court decision which is based on "adequate and independent" state grounds, even though the state decision may address a question of federal law. It could be argued, therefore, that a state decision balancing state constitutionally protected rights against conflicting federal constitutionally protected rights is based on state constitutional law, and under the adequate state ground doctrine, should not be reviewed by the Supreme Court.

This approach would be an inappropriate response to the problem of conflicting state and federal constitutional rights. The adequate state ground doctrine protects a state court decision from Supreme Court review when based on state law but not when the state court interpretation of state law infringes on federally guaranteed rights. The heart of the issue in these conflicts is whether federally guaranteed rights have been infringed. It is un-

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69. See supra notes 1-68 and accompanying text.
70. See infra notes 73-81 and accompanying text.
71. See infra notes 82-89 and accompanying text.
72. See infra notes 90-100 and accompanying text.
74. See supra note 13. See also supra note 40.
questionably the duty of the Supreme Court to ensure that such infringement does not occur.

There is a possible second justification for a no-scrutiny approach to this problem. States have been allowed to restrict their citizens' exercise of federally guaranteed liberties when there is a "compelling" state interest involved. Arguably, the protection and enforcement of a state's constitutional guarantees of individual liberty are always compelling, thereby justifying restrictions on federally guaranteed rights. This approach, however, also is inappropriate. Any state could pass legislation on the basis of its "compelling" state interest in protecting its state constitutionally guaranteed liberties, even if these state rights severely infringed on the federal constitutional rights of others. Taking the Robins scenario to its logical extreme, for example, California could constitutionally pass legislation requiring private homeowners to allow the general public to use their front yards as a forum for free expression. California's compelling state interest in protecting its citizens' expansive free speech rights under its state constitution could justify the severe restriction of the homeowner's federally guaranteed private property and free speech rights—an unacceptable result from the perspective of even the most ardent states' rights advocate.

In Robins, the Supreme Court implicitly rejected both of these approaches. The Court affirmed the California decision, but did not mechanically apply the adequate state ground doctrine. The Court did not find that California's interest in enforcing its expansive constitutional free speech provision was automatically compelling. On the contrary, the Court carefully considered whether the California Supreme Court infringed the PruneYard owner's fifth amendment rights by enforcing its own expansive free speech provision and taking his private property without just compensation. The Court also considered whether the owner's first

75. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973); Sherbert v. Verner, 374 U.S. 398, 403 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); NAACP v. Alabama, 357 U.S. 449, 463 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). Other terms also have been used to characterize this high level of governmental interest including "substantial, subordinating, paramount, cogent, strong." United States v. O'Brien, 391 U.S. 367, 376-77 (1968). The Court has stated that it considers these terms functionally equivalent. See In re Griffiths, 413 U.S. 717, 722 n.9 (1973). See generally Note, Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance, 57 B.U.L. Rev. 462 (1977) (discusses the compelling state interest which must be shown before a state may infringe on individual rights which the Supreme Court has found to be more important than other rights).

76. See supra note 61.
amendment free speech rights were infringed by requiring him to allow others to express themselves on his private property.\textsuperscript{77}

The Supreme Court will adopt neither of the two foregoing no-scrutiny rationales when confronted by a possible infringement of federally guaranteed rights. A very different no-scrutiny approach, however, could be employed by the Supreme Court in situations where the conflicting constitutional liberties were balanced previously by the Court under only the federal Constitution. \textit{Robins} did not present this situation. In \textit{Robins}, the Court found that \textit{Lloyd} did not balance federal free speech rights against federal property rights.\textsuperscript{78} If such balancing had occurred, the no-scrutiny approach of the California Supreme Court dissenters could have been adopted. The dissent found\textsuperscript{79} that \textit{Lloyd} defined specific federal property rights which had been balanced by the United States Supreme Court against federal free speech rights, and consequently, the supremacy clause of the United States Constitution \textit{compelled} a decision in favor of the PruneYard owner.\textsuperscript{80}

Using this analysis, the Supreme Court would, in all cases, prohibit state courts from reweighing constitutional rights previously balanced by the Court under the federal Constitution, even when the new balance would be between state and federal constitutional rights and not between the two corresponding federal rights.

In the recent case of \textit{Richmond Newspapers, Inc. v. Virginia},\textsuperscript{81} for example, the Supreme Court balanced two conflicting federal rights and determined, on the narrow facts of that case, that the press' and public's first amendment right to receive information about criminal trial proceedings outweighed the accused's sixth amendment right to be assured an impartial jury. On that basis, the Court declared that the press and public constitutionally could not be denied access to the criminal trial at issue in that case. Under the no-scrutiny approach discussed above, the minimum level of first amendment protection defined in \textit{Richmond} along with supremacy clause of the Constitution would indicate that no state constitution could serve as the basis for a scheme allowing for trial closures even slightly more often than would be allowed under the federal Constitution. This result would occur even

\textsuperscript{77} See supra note 62.

\textsuperscript{78} See supra notes 56-62 and accompanying text.

\textsuperscript{79} Robins v. PruneYard Shopping Center, 23 Cal. 3d at 911-16, 592 P.2d at 348-51, 153 Cal. Rptr. at 861-64.

\textsuperscript{80} See supra notes 46-48 and accompanying text.

\textsuperscript{81} 448 U.S. 555 (1980).
though the state-specific interests in expanding protections for its criminally accused citizens arguably may be weightier than the interests which support the less broad federal level of protection.

This third type of no-scrutiny seems to be an equally inappropriate approach to a state court's reweighing of conflicting state and federal constitutional provisions. "Minimums," by definition, exist only in relation to something else. A constitutional minimum usually is applied in relation to other competing rights and/or interests which are presented by the specific fact patterns confronting the court. The minimum established in Richmond, for example, is the minimum which governs conflict between federal first amendment rights and federal sixth amendment rights, not federal first amendment rights and broader state constitutional rights. The supremacy clause, therefore, would not be violated by a state court's rebalancing of that latter set of rights. The Supreme Court did not establish the law in that new situation. When the state's constitutional rights and the state's interests in enforcing its constitutional provisions are factored into the balance, the result may not weigh in favor of the state's constitutional rights.

B. Two-Tiered Scrutiny

The Supreme Court could characterize cases, in which state courts reweigh conflicting state and federal constitutional guarantees in favor of their own constitutional provisions, as requiring either minimal scrutiny, under which most such state decisions would survive, or strict scrutiny, under which few would survive. Following a minimal scrutiny approach, the Supreme Court would show deference to state court judgments and require only rationality in the state court's reasons, analysis, and process of balancing. 82 Strict scrutiny would require the state's interest in protecting its citizens' state constitutional rights to be compelling and to be furthered by the least restrictive means possible. 83

Arguing on the side of strict scrutiny, it must be noted that the


individual liberties protected by the federal Constitution usually occupy a "preferred position" in Supreme Court adjudication. A strict scrutiny approach, therefore, is appropriate when those expressly guaranteed individual liberties allegedly have been infringed by state action. Furthermore, state infringement of a federally guaranteed individual liberty arguably should be treated the same, regardless of whether the alleged infringement is based on a state interest in health, safety, or enforcing its citizens' state constitutional rights. In all of these cases, the scrutiny should be strict. An important argument for strict scrutiny is that the application of minimal scrutiny could cause serious erosions in the effectiveness of federal protection of Bill of Rights freedoms. The federal minimum levels of protection established by the Supreme Court could be circumvented too easily by rebalancing the federal right against a more expansive state constitutional right and by reciting rational reasons for weighing the state's own constitutional provision more heavily than the federal counterpart.

There are also numerous and weighty considerations which support using minimal scrutiny instead of strict scrutiny. First, there are historical arguments. Only within the last twenty years has the federal Constitution been employed significantly to protect individual liberties from state infringement. Previously, the states bore that responsibility. It is arguable that the trend toward independent, expansive interpretations of state constitutions is a healthy shift toward restoring the states' historic responsibility in this area, and that minimal scrutiny in cases reweighing conflicting federal and state constitutional rights is a proper extension of that trend.

The strongest arguments in favor of minimal scrutiny of state court decisions which rebalance conflicting state and federal con-

85. See supra notes 1-2 and accompanying text. See also P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 (2d ed. 1973) (quoting Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARY. L. REV. 1362 (1953): "In the scheme of the Constitution, they [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." Id. at 1401). Brennan, supra note 18, at 501-02 (independently interpreted state bills of rights were primary restraint on state action before fourteenth amendment adopted); Project Report, supra note 1, at 303-04 (notes the Burger Court's return, after the aberrant Warren Court years, to the historical pattern of leaving matters of criminal procedure to the states); Note, supra note 20, at 737 (throughout most of the nation's history, the protection of defendant's rights was a state responsibility).
stitutional provisions are structural. Deference should be shown to state court resolution of these conflicts because it would encourage the revived "new federalism" trend recently apparent in court decisions and legal commentary. Several Supreme Court Justices have argued for a lively federalist approach to the protection of the individual liberties of United States citizens. These Justices contend that it would be better if the individual states were not bound by one federal standard of protection. These Justices recognize that states have different priorities, needs, and traditions which would be served better by allowing for some constitutional variations among the states. It also has been argued that state constitutional experimentation and innovation should be encouraged and that state court resolution of these conflicts could serve as "laboratory experiments" from which other states and the Supreme Court could gain understanding of the practical implications of upholding one constitutional right at the expense of another. State courts are particularly appropriate forums for trying innovative constitutional law because their constitutions are easier to amend than the federal Constitution. State courts thus can afford more boldness than the Supreme Court. Finally, state courts are more responsive to local values, priorities, and needs. Their

86. Most commentators take this position. See supra note 21. For discussion of "new federalism," see Younger v. Harris, 401 U.S. 37, 44 (1971) (defining "Our Federalism" not as blind deference to states' rights, but as a system sensitive to the legitimate interests of both the state and federal governments); People v. Brisendine, 13 Cal. 3d 528, 550-52, 531 P.2d 1099, 1113-15, 119 Cal. Rptr. 315, 329-31 (1975) ("federalism" defined as the notion that "the nation as a whole is comprised of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens").

87. See supra note 11.


determinations as to the weight of the state's rights and interests at stake in a given conflict are likely to be more accurate than a federal court's determination.

The argument also could be made that federalist concerns have been served sufficiently by allowing states, without any Supreme Court review, to use their own constitutions to expand protection of personal liberties beyond that required under the federal Constitution when such expansion does not conflict with express federal constitutional provisions. Strict scrutiny may be the proper standard to insure the prevention of further erosion of established federal minimum levels of protection.

III. SLIDING SCALE SCRUTINY: A RECOMMENDED APPROACH

There is no theory under which the Supreme Court could justifiably fail to scrutinize a state court's resolution of conflicting federal and state rights. Moreover, the strict scrutiny and minimal scrutiny approaches each present difficulties. Strict scrutiny ignores important historic and current federalist concerns, while minimal scrutiny presents the disturbing prospect of state courts easily diluting federal constitutional guarantees of individual liberty whenever such federal guarantees conflict with a state constitutional guarantee.

Perhaps a more appropriate approach would be a case-by-case determination of the proper level of scrutiny based on the specific facts, rights, and interests of the case. In state court cases that reweigh conflicting state and federal constitutional rights, the state court's determination of the proper result would be given minimal scrutiny. In other cases, state court decisions would be subject to a stricter, more critical scrutiny. This stricter scrutiny would require: 1) that the state articulate its interests in enforcing its own constitutional provision; 2) that the state demonstrate that those interests would be furthered significantly by a ruling in favor of the state constitution; and most importantly, 3) that the state's constitutionally protected rights and interests actually outweigh the federal rights and interests at stake.

Sliding down the scrutiny scale, state court decisions would be reviewed less critically, and their results would be given increasing deference. Sliding up the scale, state courts would be required to

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90. See supra notes 73-81 and accompanying text.
91. See supra notes 85-89 and accompanying text.
92. See supra notes 82-84 and accompanying text.
show more clearly that the state's rights and interests actually outweigh the federal rights and interests. Furthermore, it also must be shown that those clearly articulated interests would be furthered by a result in favor of the state constitutional provision. As a result, at the stricter scrutiny end of the scale, close calls always would be made in favor of the federal Constitution. At the minimal scrutiny end of the scale, state courts would be given some flexibility in deciding those cases with an eye toward the best interests of their particular state.

There are two major factors to consider in determining the appropriate level of scrutiny to apply in a given case. First, it should be determined which federal right has been outweighed under the state court's ruling. The Supreme Court, under the federal Constitution, traditionally has protected some guaranteed liberties more than others. State-imposed prior restraints on the press, for example, are given more scrutiny than state regulation of the use of private property. State regulation of political speech receives stricter scrutiny than state regulation of commercial speech. A state court decision which allegedly has infringed federal constitutional guarantees of free political speech or freedom of the press, therefore, should receive stricter scrutiny on review than one which allegedly has infringed on federally guaranteed free commercial speech rights.

Secondly, the strength of the state court's justification for an expansive interpretation of the state constitution in the particular case should be a factor influencing the level of scrutiny on review. If the state constitutional provision has language that is identical, or nearly identical, to that of the federal constitution, and if there is no state precedent for such a holding, then it would seem likely

93. Compare New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) ("system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity" and thus, the state "carries a heavy burden of showing justification for the enforcement of such a restraint") with Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) ("before the [zoning] ordinance can be declared unconstitutional, [it must be found] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). See also Powell, The Relationship Between Property Rights and Civil Rights, 15 Hastings L.J. 135 (1963), who notes that the history of the law of private ownership in the United States has witnessed a trend toward less concern as to absolute property rights and more concern as to the social and civil rights effects of property ownership.

94. Compare Buckley v. Valeo, 424 U.S. 1 (1976) (invalidating on first amendment grounds both a statutory limitation on a political candidate's ability to spend his or her own personal funds and a ceiling on overall campaign expenditures) with Friedman v. Rogers, 440 U.S. 1 (1979) (state statute prohibiting use of trade names by optometrists upheld as a constitutionally permissible regulation).
that the state is attempting to avoid the federal constitutional minimum by finding it in conflict with the expanded state constitutional guarantee. Greater scrutiny would be appropriate in this situation. In contrast, the language of some state constitutions unequivocally indicates that the language was intended to provide expanded protection for certain personal liberty guarantees. Numerous cases support this interpretation of the constitutional language. This factor would seem to require lesser scrutiny on review, since the state's expanded interpretation of its own constitution is likely to have been made in good faith.

In addition to the two main factors discussed above, stricter scrutiny also should be applied whenever a good reason exists for suspecting that the state court's primary aim in reaching its result was to avoid a disapproved federal constitutional minimum. Cases which deal with highly controversial issues, such as abortion or school desegregation, for example, should be scrutinized more closely. Many states have strongly and openly criticized the Supreme Court's recent treatment of these highly charged issues, and such states, consequently, seem likely to attempt to avoid the decisions they disfavor.

The presence of the above factors should mandate an extremely strict review of state decisions reweighing conflicting state and federal constitutional guarantees. Deference is inappropriate when, based on an unprecedented interpretation of its own constitution, a state allegedly infringes a federal Bill of Rights guarantee and succeeds in diluting the effectiveness of a controversial Supreme Court decision. In such situations, it seems entirely proper to require that the state delineate clearly, and in good faith, its interests in the conflict and also demonstrate that those interests will be furthered by a decision in its favor. In addition, the state court should be required to properly balance and present in-

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96. Even when the texts of the state and federal constitutions are identical, the state may have strong precedent interpreting that language to guarantee greater protection than its federal counterpart. See, e.g., Roberts v. State, 458 P.2d 340 (Alaska 1969); State v. Kaluna, 520 P.2d 51 (Hawaii 1974). See generally Project Report, supra note 1, at 318-19. In these situations, since good faith again seems evident, something less than the strictest scrutiny probably would be appropriate.
terests which seem to outweigh the federal interests at stake in the controversy.

Alternatively, as these factors disappear or become weak, the argument for increased deference gains strength. The arguments for a strong federalist system to protect the individual liberties of United States citizens suggest that state courts should decide these cases from their own state viewpoint. When the support for a state's expanded interpretation of its own constitution is strong, the federal guarantee allegedly infringed traditionally has received something less than strict scrutiny. At the most, only rationality should be required in their analyses and judgments.

Sliding scale scrutiny has several advantages. Without unduly limiting a state's ability to expand protections of individual liberties beyond those embodied in the federal Constitution, it nonetheless allows the Supreme Court to control and monitor that process. Federal constitutional minimums thus remain well-protected, while the arguments for expanding the recent trend toward a more federalist system of protecting constitutional freedoms are not ignored. This approach allows the Court to give some deference to state court determinations when it is evident that the state constitution has been interpreted expansively in good faith, and when the federally protected right in question will not be rendered ineffective. The approach also allows the Court to examine critically the balancing process undertaken by a state court when the federal right at issue is a particularly cherished freedom or when the case presents a current controversial issue. The Court also can scrutinize carefully when the support for the state's expanded interpretation of its own constitution, considering both textual and interpretational differences between the two documents, is weak or when another solid reason exists for suspecting that the state court's primary aim in reaching its result was to avoid a federal minimum level of protection. A sliding scale approach also allows for the consideration of a state's particular factual situation, such as its local, geographic, social, and economic needs and the shared values, traditions, opinions, and history of its citizenry, in determining whether the state's interests outweigh the federal interests.97

97. Local conditions have been just as important in assigning weight to state rights and interests when state courts interpret the federal Constitution as they have been when state courts interpret their own constitutions. State courts, for example, generally are not permitted to interpret the federal Constitution to provide broader, more expansive federal constitutional protections for their citizens than are available throughout the rest of the
Any discussion of a sliding scale of scrutiny elicits the specter of the Supreme Court’s chaotic and still unresolved treatment of obscenity and the first amendment. Sliding scale systems are associated with the case-by-case approach to the definition of obscenity which has plagued the Court for approximately twenty-five years.98 There are significant differences, however, between the Supreme Court’s ad hoc approach to the definition of obscenity and the sliding scale system of scrutiny which has been proposed above—differences which largely eliminate the problems of uncertain standards, chilling effects, and obscured, confused reasoning which have haunted the obscenity area of adjudication.99

In an obscenity case, the factual case-by-case determination necessitates a determination of whether the particular materials in question are constitutionally “obscene.” The definitions of obscenity which the Supreme Court has employed in making this determination have been characterized by broad, generalized country. See Oregon v. Hass, 420 U.S. 714 (1975). When the decision is based on local conditions, however, such expansion has been upheld. See Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), aff’d, 387 U.S. 369 (1967). See generally Comment, Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole, 12 HARV. C.R.-C.L. L. REV. 63, 94-102 (1977) (arguing that generally state courts should be permitted to expand the federal Constitution’s protections). Local conditions also have been important in state constitutional interpretation. See, e.g., Ravin v. State, 537 P.2d 494, 504 (Alaska 1975); Carter v. University of Wash., 85 Wash. 2d 391, 399-400, 536 P.2d 618, 623-24 (1975). See generally Note, Of Laboratories and Liberties, supra note 12, at 558-59 (1976) (discussing influence of regional notions of individual freedom).


Justice Harlan warned against an approach requiring case-by-case obscenity determinations as early as 1957. See Roth v. United States, 354 U.S. 476, 497-98 (1957) (Harlan, J., dissenting). In 1973, the Court attempted to set up a definition which would eliminate the necessity of federal appellate level case-by-case review of obscenity cases. See Miller v. California, 413 U.S. 15 (1973), where the Court attempted to define obscenity: “A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” Id. at 24. The Miller definition, however, has fared no better in that respect than its predecessors. See Jenkins v. Georgia, 418 U.S. 153, 162-65 (1974) (Brennan, J., concurring); Hamling v. United States, 418 U.S. 87, 145-52 (1974) (Brennan, J., dissenting). See generally L. TRIBE, supra note 82, at 660-70 (Supreme Court obscenity tests discussed).

language—language requiring sensitive, value-laden interpretation.\textsuperscript{100} Moreover, a decision whether one particular book, for example, is obscene, provides minimal guidance for the next court considering the same issue with regard to a different book.

A sliding scale system of review for state court decisions, however, which rebalances conflicting state and federal constitutional rights and interests bears little similarity to an obscure obscenity definition. The factors demanding more or less scrutiny are straightforward and do not require a sensitive interpretation of vague, generalized language. Those federally guaranteed rights traditionally requiring strict scrutiny are well-known since controversial issues are, by definition, easily identifiable. The strength of a state court's justification for interpreting its state constitution more expansively in regard to a particular individual liberty is determined easily by checking that state's constitutional language and its prior cases interpreting that language. Moreover, once the Supreme Court decides whether one federally guaranteed right is or is not outweighed by a conflicting expansive state constitutional guarantee, a precedent will have been established within that state which should not require repeated relitigation to establish its effectiveness. Such a decision should provide guidance for other states that will deduce that a similar case in their state will yield a

\textsuperscript{100} See, for example, the definitions from Miller v. California, 413 U.S. 15, 24 (1973) ("(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) ("three elements must coalesce [in order for the material to be constitutionally ‘obscene’]: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value"); Roth v. United States, 354 U.S. 476, 489 (1957) ("whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest").

Justice Brennan, in criticizing the above definitions, stated:

\textsuperscript{10} One of the available formulas . . . can reduce the vagueness to a tolerable level . . . . Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as “prurient interest,” “patent offensiveness,” “serious literary value,” and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them.

Paris Adult Theater I v. Slaton, 413 U.S. at 84 (Brennan, J., dissenting). See also Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part) ("the present constitutional standards . . . are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility").
similar result, unless their particular state's interests are markedly stronger or weaker than those balanced by the Supreme Court in the precedent case.

With the foregoing factors in mind—flexibility, the preservation of careful Supreme Court control over the minimum federal individual liberty guarantees, a healthy respect for a federalist system which protects personal freedoms, and an ability to provide strong decisions generating guidance for future conflicts—a sliding scale of Supreme Court scrutiny of state decisions which rebalances conflicting state and federal constitutional guarantees is highly recommendable. In addition, such a review system would provide a coherent, understandable approach to these conflicts and conform with the "new federalism" encouraged by the Burger Court.

IV. Conclusion

Over the past decade, the Burger Court has emphasized its intention not to continue the Warren Court's revolutionary expansion of the application of the federal Bill of Rights to the states by incorporation through the fourteenth amendment. The Burger Court also has shown a tendency to leave governing power and responsibility with a state rather than with the federal government.101 This recent divergence has resulted in a "new federalism" trend in the area of individual liberties which has manifested itself through a "rediscovery" of state constitutions. These state constitutions have been widely interpreted throughout the 1970's to provide greater protection of various personal liberties than that provided under the federal Constitution.102 The Supreme Court has expressly approved this application of state constitutional law to the protection of the personal freedoms of United States citizens.103 Under the adequate state ground doctrine, the Court has refused to review the state court decisions which have provided these expansive state constitutional interpretations.104 On the other hand, when federal constitutionally guaranteed liberties allegedly have been infringed by a state's application of its expansively interpreted state constitution, the adequate state ground doctrine does not apply, and such a decision is review-

101. See supra notes 9-10 and accompanying text.
102. See supra note 12.
103. See supra note 15.
104. See supra note 73.
able. PruneYard Shopping Center v. Robins was an example of this type of case. The California Supreme Court based its decision on California's expansive free speech guarantee, and the petitioner alleged that the California court had infringed his federal constitutionally protected fifth amendment private property rights and his first amendment free speech rights. The United States Supreme Court, in a straightforward manner, considered whether those federal rights had been infringed by the California court's ruling and determined no infringement had occurred.

A similar but more troublesome conflict also was suggested by the Robins case and is soon likely to present itself squarely before the Supreme Court. In the past, various direct conflicts between federal constitutionally guaranteed rights have been confronted by the Supreme Court and resolved through a balancing process which weighs the conflicting constitutional rights and interests involved and upholds the protection of one federal right at the expense of the other. If, however, in a subsequent state court case involving the same conflicting constitutional liberties, one of the rights being balanced is an expansive state constitutional guarantee (not its more limited federal counterpart), there are strong arguments that a new balancing process should be undertaken and that a different decision could result. Whether the Supreme Court will be persuaded by those arguments, or whether it instead will hold the prior corresponding federal constitutional case to be binding precedent on the state court, is unclear. Assuming the Court allows rebalancing by state courts in these situations, a coherent, understandable approach to the Supreme Court's review of these state court decisions should be developed.

The approach recommended in this Comment is a sliding scale type of Supreme Court scrutiny which provides for strict scrutiny in situations where there is reason to believe that the state court's primary purpose in engaging in the reweighing process was to avoid a disfavored federal minimum level of constitutional protection. This approach also provides minimal scrutiny to state court determinations of the proper balance between the conflicting

105. See supra note 74.
109. See supra notes 52-55 and accompanying text.
110. For an argument that it should, see supra notes 163-66 and accompanying text.
111. See supra notes 90-96 and accompanying text.
state and federal constitutional rights where the state court appar-
ently has interpreted its state constitution in good faith, without
intent to dilute the effectiveness of any federal minimum
guarantees.112

Finally, the sliding scale approach has the advantages of main-
taining close Supreme Court control over the federal Bill of
Rights minimum levels of protection, allowing the Court flex-
ibility in handling these situations, and providing guidance for
subsequent cases. Moreover, the “new federalist” system for the
protection of individual liberties,113 a system which embraces the
active participation of both federal and state constitutions and
which promises to be with us for many years to come, is extended
and encouraged.

112. See supra notes 90-96 and accompanying text.
113. See supra notes 97-99 and accompanying text.