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I. INTRODUCTION

It has long been recognized that a state, if its citizens so chose, may "serve as a laboratory" for economic and social legislation.[1] In an era of new federalism,[2] state courts have experimented by extending

1. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This metaphor can be extended to state courts as well as legislatures, and criminal law as well as social and economic policy. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1141 (1985).

2. The new federalism phenomenon is said te have begun in the state courts during the Burger Court (1969-1986). Faced with Supreme Court decisions limiting and contracting individual rights expanded during the Warren Court, state courts began te look te state constitutions for rights not afforded by the Burger Court's interpretations of the federal constitution. See Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L. J. 421 (1974); Donald E. Wilkes, Jr., *More on the New Federalism in*

individual rights under state constitutions that the United States Supreme Court, beginning with the Burger Court, refused to recognize under the federal constitution.[3] Although this approach has been criticized by the judiciary and academia,[4] it continues to be a driving force in the development of individual rights.

In *United States v. White*,[5] the Supreme Court held that the police practice of obtaining evidence with warrantless consensual electronic surveillance[6] is not an unlawful search and seizure under the Fourth Amendment. Several state courts, however, have experimented with the admissibility of evidence obtained by warrantless consensual electronic surveillance and have extended rights under their state constitutions.[7] Recently, states have abruptly halted this experimentation with warrantless electronic surveillance. Although the state supreme courts of Vermont, Alaska, and Massachusetts continue to hold that warrantless participant monitoring violates their respective state constitutions, Louisiana, Montana, Michigan, and Florida, states that once refused to validate warrantless electronic surveillance, have reversed prior decisions and have brought their state constitutional interpretation in line with federal criminal constitutional jurisprudence. This trend reflects a change in the nature of federalism and suggests a change in the role of state courts and constitutions in shaping individual rights.

Criminal Procedure, 63 Ky. L. J. 873 (1977); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977); Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rov. 1335, 1422.

3. Various Justices, in fact, encouraged state courts te take this approach. See, for example, *Crist v. Bretz*, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting); *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).

4. See, for example, *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 283-85 (1976) (Richardson, J., dissenting); Scott H. Bice, Anderson *and the Adequate State Ground*, 45 S. Cal. L. Rev. 750, 756 (1972); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 146 (1970).

5. 401 U.S. 745 (1971).

6. This Note uses the terms "consensual electronic surveillance" and "participant monitoring" to describe the scenario of an nndercover police officer, government official, or government informant consenting to wear concealed radio transmitting equipment to record or relay to a third party a conversation with a suspect who is unaware of the electronic monitoring of that conversation. See, for example, *United States v. White*, 401 U.S. 745 (1971); *United States v. Caceres*, 440 U.S. 741 (1979). Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits nonconsensual electronic surveillance, which is the monitering of communications te which none of the parties consents. 18 U.S.C. §§ 2510 et seq. (1988).

7. For a discussion of other areas of criminal constitutional law in which state courts have rejected federal interpretation of the United States Constitution, see Gormley, 1992 Wis. L. Rev. at 1425-27 (cited in note 2).

This Note explores and critically examines the decisions of several states to initially depart from the federal interpretation of the constitutionality of warrantless consensual electronic surveillance and then subsequently return to endorse the Supreme Court's interpretation under their own state constitutions. Part II traces the development of the federal jurisprudence of warrantless consensual electronic surveillance. Part III examines the state decisions that depart from federal censtitutional interpretation as well as those that subsequently have fallen into line with the Court's interpretation. Part IV identifies the factors that state courts have considered when evaluating the constitutionality of this type of search and develops a model of how these factors should be applied by a state to reach this decision. Part IV applies this model to discern what future actions, if any, the state courts that continue to reject *White* will take. Part V concludes by exploring the reasons why state courts have chosen this course of action and what implications this trend holds for other areas of state constitutional jurisprudence.

II. THE DEVELOPMENT OF FEDERAL PRECEDENT

The federal case law regarding warrantless participant monitoring has focused on whether this kind of surveillance constitutes a search or seizure subject to the Fourth Amendment's warrant requirement.[8] Justice Brandeis characterized the right granted by the Fourth Amendment as "the right to be let alone."[9] Nevertheless, the United States Supreme Court has held that the police practice of transmitting and recording a suspect's statements, by having an informant or undercover agent wear a body wire, is not a search under the Fourth Amendment and, therefore, does not require a warrant.[10]

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8. The Fourth Amendment reads:

> 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.

U.S. Const., Amend. IV.

9. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

10. *White*, 401 U.S. at 754.

The common law treated eavesdropping as a nuisance.[11] The advent of radio, telegraph, telephone, and other electronic technology, however, has called for a more complex constitutional analysis. In *Olmstead v. United States*,[12] the first electronic eavesdropping case decided by the Supreme Court, federal agents obtained evidence against the defendant by tapping the telephone wires outside his home without a warrant and without the consent of either party to the intercepted conversation.[13] The Court held that the Fourth Amendment was not violated because it protects citizens from searches for tangible things and because the agents had not physically trespassed into a constitutionally protected area.[14] The Court, however, did state that Congress could regulate the use of wiretap evidence in criminal trials.[15]

The Court considered the constitutionality of consensual electronic surveillance for the first time in *On Lee v. United States*.[16] The defendant was convicted on two counts involving the sale of narcotics[17] after a police informant transmitted several of his conversations with the defendant from a small hidden microphone to a narcotics agent, who listened with a receiving set.[18] The defendant sought to exclude from evidence the testimony of the listening agent[19] under the Fourth Amendment.[20] The Court held that the police action was not an unlawful search and seizure because the statements were not obtained through illegal means or trespass.[21] Foreshadowing what was to become the "expectation of privacy" standard of Fourth Amendment analysis, the Court also explained that the effect of the radio transmitter on the defendant's privacy was the same as if the

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11. William Blackstone, 4 *Commentaries* *168. Blackstone described eavesdropping as the practice of listening "under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales. . . ." Id.

12. 277 U.S. 438 (1928). In his dissent, Judge Brandeis characterized the Fourth Amendment privacy right as "the most comprehensive of rights and the right most valued by civilized men." Id. at 478 (Brandeis, J., dissenting).

13. Id. at 456-57.

14. Id. at 465-66.

15. Id. at 465. Congress in fact did regulate the use of electronically obtained evidence. See note 5.

16. 343 U.S. 747 (1952).

17. Id. at 748. The defendant was convicted of selling opium and conspiracy to sell opium.

18. Id. at 749.

19. For reasons not specified, the prosecution did not call the police informant to testify. Id.

20. Id. at 750-51.

21. The police informant entered the defendant's business with his consent, if not his "implied invitation," on one occasion and spoke with the defendant on a public sidewalk on another. Id. at 749, 751-52.

listening agent had overheard the defendant through an open window.[22]

The Court essentially used the same reasoning in *Lopez v. United States*,[23] in which the prosecutors charged the defendant with attempting to bribe an agent of the Internal Revenue Service.[24] At trial, the prosecutor introduced incriminating wiretap evidence against the defendant.[25] The agent obtained the evidence by using a concealed recording device to record a conversation between the two in the defendant's office.[26] Again, the Court held that the agent did not violate the Amendment because he had not trespassed.[27] The Court stated that the agent could have testified about the conversation if he had not taped it.[28] The Court further noted that when the defendant offered a bribe to the agent, he risked having the agent reproduce that offer in court whether by "faultless memory or mechanical recording."[29]

Hoffa v. United States,[30] although not an electronic surveillance case, influenced the Supreme Court's analysis of the constitutionality of warrantless participant monitoring. In that case, the defendant was convicted for attempting to bribe jury members after a government informant testified at trial to several incriminating statements that the defendant made in his presence.[31] The defendant sought to suppress the informant's testimony by arguing that the means by which the evidence was obtained violated his Fourth Amendment rights.[32] The Court held that this case did not involve a Fourth Amendment issue because when the defendant made his incriminating statements, he relied not on the security of the hotel room where he made the statements, but on the belief that the informant would not reveal his confidence.[33]

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22. Id. at 754.
23. 373 U.S. 427 (1963).
24. Id. at 428.
25. Id. at 429-32.
26. Id.
27. The defendant invited the agent into his office. Id. at 439.
28. Id.
29. Id.
30. 385 U.S. 293 (1966).
31. Id. at 295.
32. Id.
33. Id. at 302. Citing Justice Brennan's dissent in *Lopez*, the Court stated, "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." Id. at 303 (citing *Lopez*, 373 U.S. at 465 (Brennan, J., dissenting)).

The Fourth Amendment privacy right that Justice Brandeis foresaw in 1928 became law[34] with the Court's holding in *Katz v. United States*.[35] Specifically recognizing that the Fourth Amendment protects people not places, the Court rejected the "trespass" doctrine relied on in *Olmstead*, *On Lee*, and *Lopez* and found that the government's activity of attaching an electronic listening and recording device to a public telephone booth for the purpose of monitoring a defendant's conversations, without his knowledge or consent, constituted a Fourth Amendment search and seizure.[36] Because this activity did not meet any of the exceptions to the warrant requirement,[37] the Court found it unconstitutional.[38]

Justice Harlan articulated the legal test of *Katz* in his concurring opinion. The Fourth Amendment protects an individual if two requirements are met: first the individual must exhibit a subjective expectation of privacy, and second, the expectation must be reasonable.[39] Although Justice White suggested in his concurrence that statements overheard or recorded with the use of surveillance equipment would not receive Fourth Amendment protection under this new analysis,[40] the Court did not answer that question definitively until *United States v. White*.[41]

In *White*, the Court again considered the admissibility of statements overheard by agents monitoring a radio transmitter concealed by a government informant.[42] By applying the *Katz* test, the Court held that the respondent did not have a reasonable expectation that a party in a conversation would not reveal the conversation to the police.[43] Justice White, writing for the plurality,[44] extended the

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34. Gormley, 1992 Wis. L. Rev. at 1362 (cited in note 2).

35. 389 U.S. 347 (1967).

36. Id. at 353.

37. Id. at 357-58 nn. 20-22. The search was not conducted incident to arrest (*Agnello v. United States*, 269 U.S. 20 (1925)), while in "hot pursuit" (*Warden v. Hayden*, 387 U.S. 294 (1967)), or with the suspect's consent (*Zap v. United States*, 328 U.S. 624 (1946)). *Katz*, 389 U.S. at 357-58 nn.20-22.

38. *Katz*, 389 U.S. at 354-59.

39. Id. at 361 (Harlan, J., concurring). An individual's general right to privacy, however, remains a consideration for the states. Id. at 350-51. Several states that have considered warrantless consensual electronic surveillance have done so under privacy amendments to the state constitution. See notes 74 and 89 and accompanying text. See also note 141.

40. Id. at 363 n. * (White, J., concurring).

41. 401 U.S. 745 (1971).

42. On four occasions, an agent overheard conversations transmitted by radio receiver to the agent hidden in government informant Jackson's kitchen closet with Jackson's consent. The use of radio equipment provided access te four other conversations with the defendant—one in White's home, one in a restaurant, and two in Jackson's car. Id. at 747.

43. Id. at 749.

reasoning in *Hoffa*[45] and concluded that a wrongdoer also has no constitutional protection when an informant has recorded or transmitted the conversation.[46] The plurality found insufficient differences between the wired informant and the unequipped informant to justify a different outcome under the *Katz* objective expectation-of-privacy analysis.[47]

Four Justices each writing separately,[48] however, expressed the contrary view that consensual electronic surveillance violates the Fourth Amendment. Justice Brennan, concurring in the result, stated that Fourth Amendment jurisprudence interposes a warrant requirement in both *On Lee* (third-party electronic monitoring) and *Lopez* (electronic recording of a face-to-face conversation with a government official) situations.[49]

Justice Douglas, in his dissent, deemed electronic surveillance "the greatest leveler of human privacy ever known" and cautioned that all citizens, not only criminals, are victims of this advanced technology.[50] Douglas also stated that *Katz* rather than *On Lee* and *Lopez* should be the controlling Fourth Amendment doctrine.[51] Lastly, Douglas stated that allowing warrantless participant monitoring would have a chilling effect on speech and free discourse.[52]

In a separate dissent, Justice Harlan focused on the significant distinction between the risk that a conversation might be repeated by the receiving party and the risk that an uninvited third party is monitoring and recording the conversation that could be disclosed verbatim, without the shortcomings of human error and memory lapse.[53] He explained that the plurality opinion mistakenly relied only on cases that did not involve third-party monitoring, unlike *White*.[54] He also emphasized that subjecting participant monitoring to Fourth

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44. Chief Justice Burger, Justice Stewart, and Justice Blackmun joined Justice White's opinion. Id. at 746. Justice Black concurred in the plurality's result on the ground that intangibles, such as conversations, are beyond the scope of the Fourth Amendment. Id. at 754 (Black, J., concurring). See also *Katz*, 389 U.S. at 364 (Black, J., dissenting).

45. See notes 30-33 and accompanying text.

46. *White*, 401 U.S. at 752.

47. Id. at 752-53.

48. The four Justices were Brennan, Marshall, Douglas, and Harlan.

49. Id. at 755 (Brennan, J., concurring).

50. Id. at 756-57 (Douglas, J., dissenting).

51. Id. at 758-61. Justice Douglas wrote that only a "retrogressive step of large dimensions" would bring a return to the rationale of *On Lee* and *Lopez*. Id. at 761.

52. Id. at 762-65. State courts later expressed this concern when rejecting the reasoning of *White*. See Part IV.D.3.

53. *White*, 401 U.S. at 787 (Harlan, J., dissenting).

54. Id. at 784-85.

Amendment scrutiny would not stop the practice but merely impose a warrant requirement.[55] He stated that this requirement would protect the privacy of the ordinary, innocent citizen who should be able to engage freely in conversation without fear of being surreptitiously monitored by an unknown listener.[56]

Although the sharp division of the Court in *White* left the status of consensual electronic surveillance unclear, the Court dispelled the confusion in *United States v. Caceres*.[57] In that case, the defendant was convicted of bribing an IRS agent who, without a warrant, had worn a concealed transmitter that allowed another agent to monitor and record conversations.[58] The Court held that the Constitution did not protect such defendants against this type of electronic monitoring, citing *Lopez* and *White* as support.[59]

III. STATE COURTS' RESPONSE TO *WHITE*

States have the right to depart from federal precedent when they have concurrent jurisdiction and clearly articulate adequate and independent state grounds.[60] The Supreme Court has held that with regard to a criminal defendant's individual rights, a state is free, as a matter of its own law, to impose greater restrictions on police activity.[61] Evidently, seven state courts were dissatisfied with the *White*

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55. Id. at 789-90.
56. Id.
57. 440 U.S. 741 (1979).
58. Id. at 743.
59. Id. at 750.
60. Christopher Sloboggin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 Fla. L. Rev. 653, 655 (1987); Abrahamson, 63 Tex. L. Rev. at 1141-43 (cited in note 1); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985).

Justice Brennan labeled federal protection of civil liberties a minimum that states may choose to surpass, barring a conflict with federal law. William J. Brennan, Jr., *The Bill of Rights and States*, 61 N.Y.U. L. Rev. 535, 543 (1986). In fact, he argues that without the protective force of state law, the full realization of our liberties cannot be guaranteed. Brennan, 90 Harv. L. Rev. at 491 (cited in note 3).

28 U.S.C. § 1257 authorizes Supreme Court review of state judgments involving federal questions. The Court, however, will not review a stato decision on a federal question if there is a state ground sufficient to uphold the judgment. For a complete discussion of what constitutos "adequacy" under this doctrine, see Wilkes, 62 Ky. L. J. at 426-31 (cited in note 2).

61. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Commentators have suggested that in light of the Burger Court's unwillinguess to protect the rights of criminal defendants under the federal constitution, state courts willing to guarantee additional protection systematically have used adequato state grounds to evade the Court intentionally. Wilkes, 62 Ky. L. J. at 435 (cited in note 2); Wilkes, 63 Ky. L. J. at 873-75 (cited in note 2).

decision and looked to their state constitutions to find adequate grounds for departing from the federal interpretation of the constitutionality of warrantless participant monitoring. Although the decisions of these state courts were not and could not be reversed by the Supreme Court, many of these same state courts subsequently have reversed their prior decisions and have interpreted their own state constitutions in a manner that is consistent with the Supreme Court's interpretation of the federal constitution.

A. Michigan

The Supreme Court of Michigan was the first state court to reject *White* and one of the last to reconsider the issue. In its 1974 decision, *People v. Beavers,*[62] the court discussed and then rejected *White*'s reasoning yet noted in passing that it based its decision on the Michigan Constitution's protection against unreasonable searches and seizures.[63] In *Beavers*, the defendant argued that the court denied his Fourth Amendment right to be free from unreasonable searches and seizures when it admitted an officer's testimony of a conversation between the defendant and a police informant who was equipped with a concealed transmittor that relayed their conservation to another officer without a warrant or the defendant's knowledge.[64] Although the state acknowledged that *White* was controlling, the court rejected Justice White's reasoning and adopted Justice Harlan's logic that the risk that communications directed to one party might be repeated to others was distinct from the simultaneous monitoring of communication by a third party in cooperation with one party yet unknown to the other.[65] To protect the right of all citizens to engage in private discourse freely, the court held that the technique of participant monitoring only could be used in full compliance with the warrant requirement.[66]

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62. 393 Mich. 554, 227 N.W.2d 511 (1975).

63. Id. at 514-16. The Michigan Constitution provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Mich. Const. of 1963, Art. 1, § 11.

64. *Beavers*, 227 N.W.2d at 513.

65. Id. at 515.

66. Id. at 516.

In 1991, however, the Supreme Court of Michigan overruled *Beavers* in *People v. Collins*,[67] stating that since *Beavers* the courts had interpreted the state constitution to provide the same protection as that secured by the Fourth Amendment absent a compelling reason to impose a different interpretation.[68] The court stated that because it had adopted the reasoning expressed in *Hoffa* and relied on in *White*,[69] because the textual differences in the federal and state constitutions were minimal,[70] and because there would be no "chilling effect" on free speech,[71] it found no compelling reason to depart from the federal interpretation and adopted the *White* holding.[72]

B. Montana

In *State v. Brackman*,[73] the Supreme Court of Montana found that the right-to-privacy section of its state constitution afforded individual protection from warrantless participant monitoring.[74] The court found that *White* applied to the facts of the case[75] and that no Fourth Amendment violation had occurred.[76] After examining whether the defendant had a right to privacy, whether that right was infringed, and whether any compelling state interest justified the infringement,[77] the court held that to withstand scrutiny under the state constitution, agents must conduct face-to-face consensual electronic surveillance pursuant to a warrant.[78] Accepting the *Katz* analysis as the proper means to determine the defendant's right to privacy under the Montana Constitution, the court also adopted Justice Harlan's distinction between merely conversing with an

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67 438 Mich. 8, 475 N.W.2d 684 (1991).

68. Id. at 691. See *People v. Perlos*, 436 Mich. 305, 462 N.W.2d 310 (1990); *People v. Chapman*, 425 Mich. 245, 387 N.W.2d 835 (1986); *People v. Catania*, 427 Mich. 447, 398 N.W.2d 343 (1986); *People v. Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984); *People v. Nash*, 418 Mich. 196, 341 N.W.2d 439 (1983).

69. *Collins*, 475 N.W.2d at 693-94.

70. Id. at 694-95.

71. Id. at 695. The court based this finding on the fact that in other states that do not require a warrant te conduct this form of surveillance, there is no chilling effect on speech.

72. Id. at 698.

73. 178 Mont. 105, 582 P.2d 1216 (1978).

74. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const., Art. II, § 10.

75. The defendant was charged with the felony of "intimidation" after threats he made to a police informant were recerded and transmitted by a concealed electronic transmitting device worn by the informant. The defendant and the informant spoke in a shopping center parking lot while police monitered the conversation from an unmarked car. *Brackman*, 582 P.2d at 1217.

76. Id. at 1220.

77. Id. at 1221.

78. Id. at 1222.

informant and conversing with an informant wired to transmit the conversation simultaneously to a third party.[79] The court concluded that the defendant did have a reasonable expectation of privacy and, therefore, a privacy right.[80] Weighing the effect of a warrant requirement would have on the use of this method of surveillance and the effect that warrantless participant monitoring could have on the freedom of speech, the court found no compelling justification for invading those individual privacy interests guaranteed by the state constitution.[81]

The Montana court re-evaluated its position, however, in *State v. Brown*[82] and overruled *Brackman*. The court first established that the police activity at issue did not violate the Fourth Amendment or the search and seizure clause of the state constitution.[83] Although the court did not overrule *Brackman* to this extent, it reversed the holding in *Brackman* that warrantless participant monitering violates the privacy clause.[84] Because the analysis under the privacy clause requires more than the *Katz* expectation-of-privacy analysis,[85] the court examined whether the defendant had a possessory interest in the statements seized and whether the government activity was excessively intrusive.[86] Finding that both parties to the conversation had the same interest in the conversation, that either could consent to it being monitored, and that the warrantless consensual electronic surveillance at issue was not excessively intrusive, the court held that the state's actions were constitutional.[87]

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79. Id. at 1221.
80. Id.
81. Id. at 1221-22.
82. 232 Mont. 1, 755 P.2d 1364 (1988). The defendant was convicted of selling a dangerous drug after police monitored and recorded several incriminating conversations using a body wire transmitting device attached to an undercever agent. Id. at 1366.
83. The Montana Constitution reads as follows:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Mont. Const., Art. II, § 11.
84. *Brown*, 755 P.2d at 1369.
85. Id. at 1370.
86. Id. at 1370-71.
87. Id.

C. Alaska

Although Alaska continues to afford protection against warrantless electronic surveillance under its state constitution, its state supreme court has limited the extent of that protection. In *State v. Glass*,[88] the defendant was convicted of possession and sale of heroin after a narcotics agent, equipped with a radio transmitting device, transmitted and recorded an illegal drug transaction. The Alaska Supreme Court considered the reasoning of *Katz* and *White* but recognized that it was not bound by federal precedent when interpreting its state constitution's search and seizure clause.[89] The court rejected the argument that talking to someone who later repeats the conversation is no different from someone who is broadcasting it simultaneously.[90] The court found an even better reason for requiring a warrant to conduct this type of police activity in the privacy clause of the Alaska Constitution,[91] which it had interpreted to afford broader protection than the "penumbral right" inferred from other constitutional provisions.[92] The court adopted Justice Harlan's two-part test in *Katz* as its measure of privacy and ultimately concluded that the expectation that one's conversations will not be recorded and broadcast secretly is objectively reasonable.[93] Under the Alaska Constitution, therefore, consensual electronic monitoring is lawful only if conducted pursuant to a warrant.

In *City and Borough of Juneau v. Quinto*,[94] the Alaska Supreme Court clarified and limited its holding in *Glass*. The court held that a tape recording made by a police officer carrying a concealed recorder during his initial encounter with the defendant, who was suspected of drunk driving, could be admitted into evidence against that defendant.[95] The court reasoned that surreptitious electronic monitoring's chilling effect on free expression is minimal

88. 583 P.2d 872 (Alaska 1978).

89. Id. at 876. Alaska's Constitution provides as follows:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supportod by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Alaska Const., Art. I, § 14.

90. *Glass*, 583 P.2d at 877-78.

91. Id. at 878. The Alaska Constitution reads in part: "The right of the people to privacy is recognized and shall not be infringed." Alaska Const., Art. 1, § 22.

92. *Glass*, 583 P.2d at 879.

93. Id. at 880.

94. 684 P.2d 127 (Alaska 1984).

95. Id. at 128.

when individuals know or should know they are speaking to police officers who are making lawful arrests or conducting lawful investigations.[96] Therefore, even if the defendant had a subjective expectation of privacy in that situation,[97] his expectation was not objectively reasonable because he was speaking to a uniformed officer who was performing his official duties.[98] Thus, the warrant requirement imposed by *Glass* under the privacy clause of the Alaska Constitution does not apply to face-to-face encounters with law enforcement officials whom defendants know to be police officers.

D. Florida

Although several state courts have considered the validity of this individual right, Florida is unique because its citizens eventually mandated a state constitutional amendment. In *State v. Sarmiento,*[99] the Florida Supreme Court interpreted its state constitution to protect individuals from the intrusion of warrantless consensual participant monitoring by a government agent.[100] The court defined the language "interception of private communications" as a function of the individual's reasonable expectation of privacy[101] and concluded that the interception of the defendant's conversations in his home was unreasonable.[102] Apparently dissatisfied with this interpretation, the people of Florida approved an amendment to the state constitution in 1983 that mandated conformity of the interpretation of that clause

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96. Id. at 129.

97. The court assumed that the defendant had a subjective expectation of privacy because he did not know or have reason to know the officer was recording the conversation. Id. at 128 n.3.

98. Id. at 129.

99. 397 S.2d 643 (Fla. 1981).

100. The Florida Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against . . . the unreasonable interception of privato communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, . . . the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

Fla. Const., Art. I, § 12.

101. *Sarmiento,* 397 S.2d at 644-45.

102. The court also held that Fla. Stat. § 934.03(2)(c) (1977) was unconstitutional to the extent it authorized the "warrantless interception of a private conversation *conducted in the home.*" *Sarmiento,* 397 S.2d at 645 (emphasis in original).

with the Supreme Court's interpretation of the federal constitution.[103] Thus, this amendment effectively overruled *Sarmiento*.[104]

E. Louisiana

The Louisiana Supreme Court simultaneously expanded and contracted the right of its citizens to be free from warrantless electronic monitoring in *State v. Reeves*.[105] In *Reeves*, the court interpreted a 1974 amendment to the search and seizure clause of the Louisiana Constitution[106] to require state agents to secure a warrant before conducting consensual electronic surveillance.[107] The court considered the legislative history and interpreted the clause to recognize the difference between the risk that a confidant might relay information to the police and the risk that one's conversation is being recorded and broadcast to a third party.[108] The court interpreted the amendment to prohibit the latter.[109]

On rehearing, however, the court adopted a two-part analysis. First, the court considered whether the defendant's conversations[110] were communications under the state constitution's search and seizure clause.[111] Next, the court determined whether the government's action was an invasion of privacy.[112] It held that the

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103. The new language of Article 1, § 12 reads, in part: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const., Art. 1, § 12. The United States Supreme Court itself may have instigated this result by reminding the Florida residents that if state court decisions rest solely on state constitutional grounds, they have the power to "amend state law te ensure rational law enforcement." *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

104. *State v. Lavazzoli*, 434 S.2d 321, 323 (Fla. 1983); *State v. Ridenour*, 453 S.2d 193, 194 (Fla. 1984); *State v. Hume*, 512 S.2d 185, 187 (Fla. 1987).

105. 427 S.2d 403 (La. 1982).

106. This amendment provides as follows:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

La. Const., Art. I, § 5.

107. *Reeves*, 427 S.2d at 404.

108. Id. at 405-09.

109. Id.

110. The police used a concealed transmitter to transmit and tape three conversations with the defendant's co-employee in which the defendant discussed raising campaign contributions by false expense vouchers. The defendant was convicted on two counts of perjury after denying these conversations before a grand jury. Id. at 404.

111. Id. at 412.

112. Id.

conversations were communications but that no invasion of privacy resulted because the defendant did not have a subjective expectation of privacy under the *Katz* test.[113] The court attributed the discrepancy in the two opinions to its initial failure to realize that the risk of disclosure that a defendant assumes in every conversation also includes the manner of disclosure.[114]

F. Massachusetts

Like Alaska, Massachusetts state law continues to impose a warrant requirement on consensual electronic surveillance. Unlike the Alaska court, which relied on the privacy amendment of its state constitution to depart from federal precedent, the Massachusetts Supreme Court, in *Commonwealth v. Blood*,[115] relied on Article 14 of the Massachusetts Declaration of Rights, which is similar to the Fourth Amendment.[116] In *Blood*, the defendants challenged the admission of three conversations regarding the planning of a break-in and larceny that a police informant recorded and transmitted.[117] The court agreed that participant monitoring poses no Fourth Amendment violation and then applied the *Katz* analysis to the relevant provision.[118] The court stated that citizens have both a subjective and a reasonable objective expectation of privacy when conversing in private homes and that electronic surveillance threatens citizens' freedom to express thoughts and ideas in the privacy of their own homes.[119] Next, the court held that one party's consenting to electronic surveillance of a conversation did not alter the analysis, particularly

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113. Id. at 416.

114. Apparently, the court failed to realize that the evidence was obtained by participant monitoring. Id. at 417.

115. 400 Mass. 61, 507 N.E.2d 1029 (1987).

116. 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. Const., Pt. I, Art. 14.

117. *Blood*, 507 N.E.2d at 1030-31.

118. Id. at 1032-33.

119. Id. at 1033-34.

given the colonists' abhorrence of the abuses of writs of assistance and general warrants.[120]

G. Vermont

The Vermont court is the most recent state court to consider the holding of *White,* as seen in *State v. Blow*[121] and *State v. Brooks.*[122] In *Blow,* the defendant was convicted of drug charges after a police informant, wired with a radio transmitter, entered the defendant's home and purchased marijuana.[123] The court agreed with the defendant's argument that this activity was prohibited by the Vermont Constitution, which contains a clause similar te the Fourth Amendment.[124] The court used the *Katz* analysis to determine whether participant monitoring violated the state constitution and noted that the reasonableness of an individual's expectation of privacy depends on the underlying constitutional values at risk.[125] In *Blow,* the court determined that the deep-rooted principle that the privacy of the home should be afforded special protection was at risk.[126] Although the court concluded that the state constitution protectod the privacy of the home, it offered no support for this assertion.[127] Thus, the Vermont Constitution imposes a warrant requirement on nonconsensual electronic surveillance conducted inside the home.

Subsequent to *Blow,* the Vermont court confirmed, in *Brooks,* that the warrant requirement was limited to the home. In *Brooks,* the defendant was convicted of burglary and drug charges after a police informant, equipped with concealed recording devices, recorded a conversation with the defendant in a public parking lot.[128] The court

120. Id. at 1034-35.
121. 157 Vt. 513, 602 A.2d 552 (1991).
122. 157 Vt. 490, 601 A.2d 963 (1991).
123. *Blow,* 602 A.2d at 553.
124. Chapter I, Article 11 of the Vermont Constitution reads:
That the people have a right te hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required te search suspected places, or te seize any person or persons, his, her or their property, not particularly described, are contrary te that right and ought not to be granted.
Vt. Const., Ch. I, Art. 11.
125. *Blow,* 602 A.2d at 555.
126. Id.
127. Id.
128. *Brooks,* 601 A.2d at 963.

held that, unlike talking in a private home, conversing in a public parking lot does not give rise to a reasonable expectation of privacy.[129]

IV. FACTORS THAT INFLUENCE STATE COURTS

Scholars of the new federalism movement have identified several factors that state courts should and do examine when deciding whether to extend individual rights beyond those recognized by the United States Supreme Court. The first factor on most lists is the textual differences between the state and federal constitutions.[130] Other important factors that state courts should consider include the following: the existence of state precedent,[131] unique local conditions and history,[132] the position or lack of action taken by the Supreme Court,[133] legislative history,[134] the nature of the subject matter,[135] the role of the state constitution as a mirror of fundamental values,[136] and the states' tradition as "experimenters."[137]

Those courts that have departed from federal precedent on the issue of warrantless electronic surveillance and subsequently reversed their decisions have considered a variety of these factors as well as policy considerations unique to this issue. The factors that are most prevalent in these decisions are: textual differences, legislative history, consideration of federal and state precedent, the privacy of the home, the effect on freedom of speech, and the effect on law enforcement practices.[138] Some courts balanced these factors

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129. Id. at 964.

130. Johansen, Note, 29 Stan. L. Rev. at 306-09 (cited in note 2); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873, 935 (1976); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1385 (1982).

131. Johansen, Note, 29 Stan. L. Rev. at 318 (cited in note 2).

132. Id. at 319; Howard, 62 Va. L. Rev. at 936 (cited in note 130).

133. Johansen, Note, 29 Stan. L. Rev. at 319 (cited in note 2); Howard, 62 Va. L. Rev. at 938 (cited in note 130).

134. Howard, 62 Va. L. Rev. at 936 (cited in note 130).

135. The issue is whether a local matter is one that requires national uniformity. Howard, 62 Va. L. Rev. at 937 (cited in note 130).

136. Howard, 62 Va. L. Rev. at 938-39 (cited in note 130).

137. Id. at 940.

138. See notes 141-209 and accompanying text.

appropriately;[139] however, others merely acknowledged the presence of these factors but ruled contrary to them.[140]

A. Textual Differences

Explicit textual differences in the state and federal constitutions are some of the strongest justifications for departing from federal decisions regarding the constitutionality of warrantless consensual electronic surveillance. State constitutions may track the federal constitution very closely or may include provisions that are absent from the federal constitution.[141] Significant textual differences invite the state courts to analyze and interpret the text to protect rights not recognized under the federal constitution. Insignificant or slight differences may justify a different interpretation if supported by non-textual factors, such as state legal history, constitutional history, and local tradition.[142] Otherwise, slight textual differences are insufficient to justify broad protection of individual rights that are denied under the federal constitution.[143]

Excluding Michigan, those states that have ruled differently than the Supreme Court on this issue all have provisions in their state constitutions that significantly vary from the federal constitution.[144] The Michigan court correctly overruled *Beavers* in *Collins* because the text of the relevant provision of the Michigan Constitution closely tracks the federal constitution[145] and because the *Beavers* court cited no legislative history or other reason that justified a different interpretation.[146] Both the Florida and Louisiana Constitutions, however, contain language regarding communications and privacy that is absent from the Fourth Amendment.[147] The Montana

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139. See, for example, *Commonwealth v. Blood*, 400 Mass. 61, 507 N.E.2d 1029 (1987), in which the Massachusetts court relied on legislative history.

140. See, for example, *People v. Collins*, 438 Mich. 8, 475 N.W.2d 684 (1991), overruling *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975), in which the Michigan court ignored the textual similarities between the stato and federal constitutions.

141. See, for example, noto 91 (citing the Alaska privacy amendment). See also the Hawaii privacy amendment, which reads, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated." Hawaii Const., Art. I, § 5.

142. Note, 95 Harv. L. Rev. at 1387 (cited in noto 130).

143. See Johansen, Note, 29 Stan. L. Rev. at 318 (cited in note 2). But see Note, 95 Harv. L. Rev. at 1497 (cited in note 130).

144. See notes 74, 100, and 106 for the text of the state constitutions.

145. See note 63.

146. See Part III.A.

147. See notes 100 and 106.

Constitution contains a separate clause guaranteeing its citizens the right to individual privacy.[148] Although these textual differences influenced the original decisions of the courts in these three states, each state subsequently has interpreted those textual differences consistently with the Fourth Amendment.

The language of the Florida Constitution, which prohibits the "unreasonable interception of private communications by any means," certainly justified the result in *Sarmiento*.[149] The Florida electorate, however, apparently disagreed and mandated a constitutional interpretation consistent with the federal constitution.[150] The Louisiana court also correctly interpreted its state constitution, which elevated communications to the level of person, property, houses, papers, and effects, with respect to the constitutional protection against unreasonable searches, seizures, or invasions of privacy.[151] The search and seizure amendment's legislative history, cited by the court in its first opinion, supported this result.[152] On rehearing, however, the court reconsidered the meaning of "invasion of privacy" and determined that consensual electronic surveillance was not such an invasion.[153] The Montana court, in *Brackman*, found that warrantless participant monitoring violated the privacy clause of the state constitution.[154] Although the court recognized this privacy right in *Brown* and engaged in an analysis that went beyond the *Katz* analysis to determine the extent of that protection,[155] the Montana court nonetheless reached a result consistent with the Supreme Court's Fourth Amendment analysis.

These cases suggest that the decisions of the remaining three states, which require electronic participant monitoring to be conducted pursuant to a warrant, are all subject to reversal. The Massachusetts and Vermont decisions are the most susceptible to reversal because they rely on provisions that are essentially identical to the Fourth Amendment.[156] The Massachusetts court, however, considered legislative and state history to reach its decision; thus, the decision may

148. See note 74.
149. *State v. Sarmiento*, 397 S.2d 643, 644-45 (Fla. 1981).
150. See note 103 and accompanying text.
151. See the Louisiana Constitution provision cited in note 106.
152. *State v. Reeves*, 427 S.2d 403, 405 n.2 (La. 1982). See the discussion of the legislative history in the text accompanying note 108.
153. *Reeves*, 427 S.2d at 413-18.
154. See note 74 and accompanying text.
155. See notes 82-87 and accompanying text.
156. See notes 116 and 124.

stand. Conversely, the Vermont court offered no independent justification for its departure from federal interpretation; therefore, *Blow* easily could be reversed. Even the right granted under Alaska's privacy clause, however, may not withstand further judicial scrutiny if the Alaska court adopts the Montana court's rationale in a future decision.

B. Legislative and State History

Legislative history and unique state history and traditions can buttress a state court's broad interpretation of its state constitution, especially when the state constitution does not differ significantly from the federal constitution.[157] Although the absence of legislative or state history is not conclusive, wise courts rarely will ignore histery that clearly suggests a particular result. The state courts that have considered participant monitoring under state constitutional provisions have relied on history both to condone and to condemn the practice.

The *Beavers* court offered no support for its conclusion that the Michigan search and seizure provision does not allow warrantless electronic surveillance.[158] The *Collins* court criticized the *Beavers* court for its decision and asserted that legislative history mandates interpretation of the search and seizure provision consistent with Fourth Amendment jurisprudence, absent a compelling reason to use another interpretation.[159] Thus, the *Collins* court correctly relied on this history to overrule the *Beavers* decision.

In *Brackman*, the Montana court recognized that the framers of the state constitution did not intend to prohibit all invasions of privacy but only those invasions that lacked a compelling state interest.[160] The court, however, did not follow this analysis in the *Brown* opinion.[161]

In Louisiana, the *Reeves* court relied on legislative history accompanying the search and seizure clause in the state constitution.[162] The court originally noted the proceedings of the constitutional convention to support its contention that the framers sought better

157. Note, 95 Harv. L. Rev. at 1386-87 (cited in note 130); Howard, 62 Va. L. Rev. at 936 (cited in note 130); Johansen, Note, 29 Stan. L. Rev. at 318-19 (cited in note 2).

158. *People v. Beavers*, 383 Mich. 554, 227 N.W.2d 511 (1975). See Part III.A.

159. *People v. Collins*, 438 Mich. 8, 475 N.W.2d 684 (1991).

160. *State v. Brackman*, 178 Mont. 105, 582 P.2d 1216 (1978).

161. *State v. Brown*, 232 Mont. 1, 755 P.2d 1364 (1988).

162. *Reeves*, 427 S.2d at 405-06.

safeguards against advanced technological surveillance methods than those offered by the Fourth Amendment.[163] On rehearing, however, the court used the legislative history to assert that the framers intended to allow judicial interpretation of which types of surveillance would constitute an invasion of privacy.[164] Because the legislative history supports both positions and can be adopted selectively to support two contrary rulings, the reliance on this history is questionable.

Of the three states that require a warrant for electronic participant monitoring, both the Alaska and Massachusetts courts have based their decisions on legislative and state history.[165] The Alaska court acknowledged that the legislature did not record any history when it adopted its privacy provision.[166] The court, however, did examine the legislative history of similar provisions in the California and Hawaii Constitutions to determine the underlying intent of their clauses.[167] The Massachusetts court mostly relied on legislative and state history to reach its decision.[168] It examined three statutory provisions that support the legislature's intent that a citizen's expectation of privacy in private conversations be deemed reasonable.[169] A Massachusetts court in the future, however, could frame the legislative history differently and reach a contrary result. Finally, the third state, Vermont, did not explore the legislative history at all, yet it asserted that the goal of protecting the privacy of the home underlies its state search and seizure clause.[170] The lack of historical support for the court's decision, however, makes the *Blow* ruling subject to reversal.

C. State and Federal Precedent

In addition to recommending that state courts consider certain factors when deciding whether to extend individual rights under their state constitutions, commentators also have devised models that state

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163. Id. at 404 & n.2.
164. Id. at 414 & n.9.
165. See Part III.C and Part III.F.
166. *State v. Glass*, 583 P.2d 873, 878-79 (Alaska 1978).
167. Id. at 879.
168. *Commonwealth v. Blood*, 400 Mass. 61, 507 N.E.2d 1029, 1035 (1987).
169. Id. at 1033. Furthermore, the court detailed the Massachusetts colonists' experience of the abuse of general warrants and writs of assistance, which supports the notion that the framers of the Massachusetts Declaration of Rights intended to protect the state's citizens from the intolerable invasions of privacy they had suffered. Id. at 1035.
170. See Part III.G; *Blow*, 602 A.2d at 555.

courts can use to make these decisions. These models represent the interplay between state and federal law and the weight that courts should afford each.[171] Some commentators have suggested that state courts only turn to the state constitution if the federal constitution fails to afford protection in a particular case.[172] Other commentators have suggested that state courts examine state constitutional protection first and never address the federal issue even when the case could be decided on those grounds.[173] To fulfill their roles as laboratories for state constitutional jurisprudence and as guarantors of individual liberties, courts should consider state precedent and interpretation first. Many state courts find, however, that very few state cases, except those adopting federal precedent, are available when they render these decisions.[174] Therefore, although state courts are extending rights under their state constitutions, they continue to incorporate past federal law and federal interpretations.[175] With regard to the constitutionality of participant monitoring, all state courts considering this issue have intertwined state constitutional interpretation and federal precedent to reach a decision.

For example, in *Brackman*, the Montana court first undertook a Fourth Amendment analysis and then adopted the reasoning of *Katz* and Justice Harlan's dissent in *White* to interpret the meaning of its own state privacy clause.[176] When it later overruled *Brackman*, the court recognized that it had the authority to provide broader protection under its own constitution and that its own privacy clause required an analysis beyond the federal *Katz* analysis.[177] As a result of examining state law, the court decided to overturn *Brackman* and refused to require a warrant for participant monitoring.[178]

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171. See, for example, Professors Galie and Collins' five models of state judicial review: the Equivalence Model—United States Supreme Court decisions are presumed to establish state constitutional law; the Equivalence Plus Model—a state court generally grounds its decision in federal law except when it elects to expand protection; the Equivalence Minus Model—a state court can recognize less protection under the state constitution; the Nonequivalent Text Model—based on differences in the state and federal constitutions; and the Nonequivalent Analysis Model—systematic reliance on state law that allows for more or less protection. Ronald K.L. Collins and Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317, 323-38 (1986).

172. This methodology is true especially when there are few or no textual distinctions. Noto, 95 Harv. L. Rev. at 1398 (cited in note 130).

173. Johansen, Note, 29 Stan. L. Rov. at 317 (cited in note 2); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 Balt. L. Rev. 379 (1980).

174. Johansen, Note, 29 Stan. L. Rev. at 317 (cited in note 2).

175. Id.

176. *Brackman*, 582 P.2d at 1220-21.

177. *Brown*, 755 P.2d at 1370-71.

178. Id. at 1369-71.

In *Reeves*, the Louisiana court carefully considered federal precedent, identified the perceived shortcomings of *White*, and then adopted Justice Harlan's reasoning. Although the court examined other state courts' rationales for rejecting *White* in its first decision, on rehearing the court relied heavily on the Supreme Court's reasoning in *White* when it considered this question fully, ultimately agreeing with the *White* decision.

As another example, the Florida court in *Beavers* adopted the *Katz* Court's reasonable-expectation-of-privacy analysis and held that individuals have a reasonable expectation of privacy in conversations held inside the home. That federally oriented decision mentioned but did not analyze the state constitution. In overruling *Beavers*, the *Collins* court traced the federal precedent and developments since the *Beavers* decision to illustrate the newly established state of federal law and coupled this analysis with the legislative history of the state search and seizure provision.

In contrast, the three remaining states avoided the *Beavers* court's mistake of ignoring state constitutional jurisprudence and making a state decision based solely on federal interpretation. The Vermont court did not consider Fourth Amendment implications[179] but based its opinion on *Katz* and state precedent that adopted *Katz*.[180] That court held that the privacy of the home must be maintained, but it did not suggest a return to the *On Lee* and *Olmstead* trespass doctrine. Likewise, the Massachusetts court relied on *Katz* and state precedent that adopted *Katz* and did not engage in a Fourth Amendment analysis.[181] Finally, the Alaska court examined the federal precedent, noted that it was not bound by that precedent in interpreting its state constitution, and then adopted Justice Harlan's reasoning instead.

This examination indicates that the courts that have examined this issue have used a variety of methods. The Michigan court was correctly overruled when it followed the federal or equivalence model and ignored state law. Other courts, including those that continue to impose a warrant requirement on electronic surveillance, have relied on federal law, state law, and state law incorporating federal interpretation. By relying only on federal interpretation and state law incorporating federal law, state courts have failed to build an independent

179. Note that the defendant did not raise any Fourth Amendment issues.
180. See *State v. Kirchoff*, 156 Vt. 1, 587 A.2d 988 (1991).
181. See *Commonwealth v. Podgurski*, 386 Mass. 385, 436 N.E.2d 150 (1982).

body of state constitutional law and have left themselves open to criticism and reversal.

D. Policy

1. The Privacy of the Home

The Supreme Court traditionally has recognized that an individual's privacy interest in the home enjoys a heightened level of protection.[182] Therefore, some state courts have applied this reasoning and protected individuals from warrantless participant monitoring in the home. Furthermore, because the *White* plurality did not consider the implications of participant monitoring on the sanctity of the home, when some of the conversations occur in the defendant's home, state courts may be justified in departing from the *White* analysis when considering the privacy interests of the home. The *Beavers* court most likely considered this concern in justifying its departure from federal jurisprudence on this issue. The Florida court also focused on the privacy of the home, which suggests that its decision was valid. The Michigan court, however, did not mention the home in its *Collins* opinion. The Montana and Louisiana decisions did not involve participant monitoring conducted in the home.

Although *Glass* involved participant monitoring in the home, the Alaska court did not rely on the special privacy considerations of the home when it rejected *White*. Both the Vermont and the Massachusetts courts, however, focused on the privacy of the home.[183] The Vermont court specifically confined its decision to electronic surveillance conducted in the home by refusing to comment on the outcome of participant monitoring outside the home.[184] *Brooks* confirmed that the court would not recognize a reasonable expectation of privacy in conversations held in public.[185] Likewise, the Massachusetts court emphasized that people generally do not expect that private conversations in their home will be broadcast to uninvited listeners.[186]

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182. See Gormley, 1992 Wis. L. Rev. at 1374 (cited in note 2); *Payton v. New York*, 445 U.S. 573, 589 (1980).

183. *Blow*, 602 A.2d at 556; *Blood*, 507 N.E.2d at 1033, 1038.

184. *Blow*, 602 A.2d at 556.

185. *Brooks*, 601 A.2d at 464-65.

186. *Blood*, 507 N.E.2d at 1033.

Although this heightened protection of the home enjoys federal and state judicial acceptance and appears to be a legitimate justification for affording citizens greater protection against warrantless participant monitoring, the decision of the Michigan court in *Collins* and the Florida electorate indicate that protection will not necessarily survive additional judicial scrutiny. Massachusetts's and Vermont's *Blood* and *Blow* decisions, therefore, are susceptible to being overruled in an effort to bring stato constitutional jurisprudence in line with federal interpretation.

2. Law Enforcement

State courts frequently have examined a warrant requirement's potential effect on state law enforcement agents' ability to use consensual participant monitoring. Although the *White* plurality did not discuss the effect of its ruling on law enforcement agents, Justice Harlan correctly noted that imposing a warrant requirement would not preclude the use of participant monitoring.[187] Rather, a warrant requirement merely would impose an impartial third party's judgment on the validity of police monitoring of the target. In refusing to impose a warrant requirement for fear that it would restrict law enforcement agents' ability to solve and prevent crimes effectively, state courts have neglected to address the truth of Justice Harlan's observation.

Adopting Justice Harlan's reasoning as the basis for its decision, the Michigan court in *Beavers* weighed the burden of the warrant requirement on police enforcement against citizens' interest in preserving their private communications and ruled that the burden was slight in comparison to the interest.[188] Later, in *Collins*, the court stressed the important role that participant monitoring plays in law enforcement, particularly in obtaining probable cause to support an arrest or an additional search or seizure.[189] Although the court correctly expressed concern for the safety of officers who use body wires to keep back-up officers apprised of potentially dangerous situations,[190] it failed to acknowledge that a warrant requirement would not preclude this use of electronic surveillance but merely

187. *United States v. White*, 401 U.S 745, 789-90 (1971) (Harlan, J., dissenting).
188. *Beavers*, 227 N.W.2d at 515.
189. *Collins*, 475 N.W.2d at 696-97.
190. Id. at 697-98.

would exclude any evidence resulting from this surveillance. The court's reliance on this factor, therefore, was misplaced.

In *Brackman*, Montana argued that departure from the *White* reasoning would end the use of consensual electronic surveillance.[191] The court correctly rejected this argument and recognized the distinction between using body wires for safety and using them to obtain evidence.[192] The *Brown* court later overruled *Brackman* but did not address this argument.[193]

In its original decision, the Louisiana court noted that a warrant requirement would not impinge unreasonably on law enforcement, especially because law enforcement agents usually have ample time to secure a warrant.[194] On rehearing, however, the court did not address the law enforcement issue directly.

Like the Florida court, the Vermont court did not discuss the issue of law enforcement in its opinion. The Massachusetts court, however, specifically adopted Justice Harlan's reasoning that a warrant requirement does not preclude the use of participant monitoring.[195] Likewise, the Alaska court contended that imposing a warrant requirement on the use of participant monitoring would not necessarily thwart law enforcement efforts.[196] Therefore, like the *Brackman* court in Montana and the *Reeves* court in Louisiana, the *Blood* and *Glass* courts of Massachusetts and Alaska correctly rejected the argument that imposing a warrant requirement on participant monitoring would end the use of an effective and needed police practice. The fate of the *Brackman* and *Reeves* decisions, however, suggests that although correct, the *Blood* and *Glass* decisions may be overruled in the future.

3. Speech

Many state courts also have considered the chilling effect that warrantless electronic surveillance could have on free speech and expression. These courts worry that individuals will be less willing to engage in day-to-day conversations if they know that someone may be monitoring or recording their conversations. The *White* plurality did

191. *Brackman*, 582 P.2d at 1221.
192. Id. at 1221-22.
193. See *Brown*, 755 P.2d at 1369-71.
194. *State v. Reeves*, 427 S.2d 403, 410 (La. 1982).
195. *Blood*, 507 N.E.2d at 1038.
196. *Glass*, 583 P.2d at 881.

not explore this possibility because it focused on the perspective of the wrongdoer rather than the innocent citizen.[197] Both Justice Douglas[198] and Justice Harlan[199] identified this shortcoming in their dissents. The *White* majority's argument assumes that innocent citizens are aware that law enforcement agents could monitor their private conversations even if those citizens are not suspected of wrongdoing. Under *White*, however, any citizen could become the target of consensual electronic surveillance. Therefore, a departure from the *White* plurality opinion may be justified.

In *Beavers*, the Michigan court relied solely on Justice Harlan's dissent in *White* and therefore addressed his concern that warrantless participant monitoring could have a chilling effect on free speech.[200] That court overruled *Beavers* in *Collins* and quickly dismissed this concern for lack of evidence that this right would wither.[201] The court also noted that to guard against perceived abuses, the state legislature still may restrict the use of participant monitoring.[202]

Initially in *Reeves*, the Louisiana court did not explore the effect of warrantless consensual electronic surveillance on free speech.[203] On rehearing, however, the court defended against the argument that its original decision would have a chilling effect on speech. Like the Michigan court, the Louisiana court used federal law enforcement and other states as examples of how free discourse has not been inhibited.[204]

The Montana court took a very similar approach. Although the *Brackman* court barely mentioned free speech, focusing instead on the decision's effect on law enforcement,[205] the *Brown* court proclaimed that its holding would not create an "Orwellian society" because Montana citizens had protection against nonconsensual monitoring and monitoring conducted by any nongovernment party.[206]

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197. *White*, 401 U.S. at 752-53.
198. Id. at 758-61 (Douglas, J., dissenting).
199. Id. at 768 (Harlan, J., dissenting).
200. The court stated, "Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society." *Beavers*, 227 N.W.2d at 515.
201. *Collins*, 475 N.W.2d at 695.
202. Id.
203. The court did mention the right of the innocent citizen to "carry on his private discourse freely." *Reeves*, 427 S.2d at 408.
204. Id. at 418.
205. *Brackman*, 582 P.2d at 1221.
206. *Brown*, 755 P.2d at 1371.

Of the state courts that have continued to reject *White*, the Alaska and Vermont courts only cursorily discussed the implications of the *White* reasoning in the context of free speech.[207] In *Blood*, however, the Massachusetts court stated that search and seizure power historically was used to suppress free speech and that electronic surveillance has the capability of invading our most secret thoughts and emotions.[208] Thus, that court insulated itself from reversal by basing its decision, in part, on the consideration that the *White* plurality failed to mention: the potentially chilling effect of participant monitoring on the free discourse of innocent citizens.[209] As the *Collins* and *Reeves* decisions illustrate, however, *Blood* may nevertheless be overruled.

E. Summary

No clear pattern emerges from these six factors collectively. In the original decisions rejecting *White*, some courts relied on particular factors, and others did not; yet all of these decisions later were reversed. The fact that each court that initially departed from *White* subsequently overturned its own decision, regardless of the grounds on which the decision rested, suggests that the three "hold-outs" soon could follow suit. The fate of the Alaska, Vermont, and Massachusetts decisions, therefore, remains uncertain.

Of these three states, Vermont is the most likely to reverse its decision because it rests on an insignificant textual difference, is supported by no legislative history, and relies solely on the privacy of the home as a policy argument. The Alaska decision, although strongly supported by textual differences between the state and federal constitutions, is not buttressed by legislative or state history and does not rely heavily on policy justifications. Nevertheless, Alaska's *Glass* decision has survived for sixteen years, suggesting that the court and the electorate are committed to interpreting the privacy amendment to afford greater protection for individual liberties than the federal constitution. The Massachusetts decision is the most likely of the three to survive subsequent judicial review. Although Massachusetts's search and seizure provision is similar to the Fourth

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207. In its discussion of the Alaska search and seizure clause, the *Glass* court mentioned the effect of participant monitoring on day-to-day discourse. *Glass*, 583 P.2d at 877-78. The court, however, ultimately rested its decision on the state privacy amendment.

208. *Blood*, 507 N.E.2d at 1034.

209. Id. at 1033-34.

Amendment, the *Blood* decision is supported by legislative history and state tradition and espouses three strong policy reasons that support the outcome. None of these factors, however, precluded other courts from adopting the *White* reasoning to interpret their own state constitutions.

V. ANALYSIS

After examining an area of criminal constitutional law in which all state courts that initially rejected the federal interpretation either have or likely will reverse those initial decisions and bring their states' interpretations in line with federal law, the more interesting question is why these states have followed this trend. One commentator has suggested that the expectation of privacy that courts are willing to recognize as "reasonable" depends on the subject matter of the case.[210] A classic example is a defendant charged with a drug offense.[211]

Of the cases considered in this Note, two that have been reversed, *Beavers* and *Sarmiento*, involved drugs. This involvement of drugs in *Sarmiento* may have motivated the Florida electorate to overrule it by constitutional amendment. *Collins*, the case that overruled *Beavers*, did not involve a drug offense nor did it specifically mention the drug charge in *Beavers* specifically. It is difficult to conclude, therefore, that the war on drugs was a motivating factor in the Michigan court's decision. In contrast, both the Vermont and Alaska state courts rejected *White* in cases involving drugs. Thus, although the nature of the crime may influence the Supreme Court in its analysis of Fourth Amendment privacy, these cases suggest that the nature of the crime does not necessarily influence state courts.

The fact that many state judges are elected and therefore are publicly and politically accountable for their rulings may explain the trend among state courts to reverse prior decisions that had expanded the rights of criminal defendants under state constitutional provisions. Crime prevention is high on the national political agenda, and it

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210. Gormley, 1992 Wis. L. Rev. at 1370 (cited in note 2).

211. Id. at 1372. The overflight cases further illustrate this argument. See, for example, *Oliver v. United States*, 466 U.S. 170 (1984) (holding that narcotics agents could trespass on land to locate a field of marijuana); *California v. Ciraolo*, 476 U.S. 207 (1986) (allowing officers to photograph marijuana growing in the defendant's back yard from a plane 1000 feet in the air); *Florida v. Riley*, 488 U.S. 445 (1989) (permitting officers to observe a greenhouse containing marijuana from a helicopter hovering at 400 feet).

deeply concerns most voters.[212] State court decisions adopting federal rulings that restrict or fail to protect the rights of criminal defendants reflect this concern.[213] The ease with which state constitutions can be amended is another way that the public is able to shape state constitutional jurisprudence.[214] The case of warrantless consensual electronic surveillance in Florida is a prime example.

The fact that individual liberties are subject to the whims of the electorate is disconcerting. Public opinion of criminal defendants and their rights likely is formed by daily headlines and images in the media rather than textual analysis of the state constitution, faithfulness to legislative history, or thoughtful consideration of policy implications. Each court considering the question of participant monitoring, including the Supreme Court in *White*, has deemed these factors to be important in reaching its decision. Furthermore, even if the amendment process is a proper means for public opinion to shape state law, it may not always operate to ensure an informed choice by the state electorate.[215]

Justice Brennan, however, among others, regards the influence of public opinion on the state judiciary as a positive phenomenon.[216] The accountability of the judiciary ensures that state court decisions reflect the diversity of the states and their independent bodies of law. Furthermore, because the Supreme Court's interpretation of individual liberties under the federal constitution is a floor below which state courts cannot fall, public opinion never can dictate a result that violates a defendant's Fourth Amendment rights.

Justice Brandeis's laboratory metaphor is the most compelling explanation of why a state court may have adopted both sides of the consensual electronic surveillance debate at some time in its judicial history. Although commentators of the new federalism movement have viewed the movement as an innovative opportunity to expand individual freedoms under state constitutions,[217] state courts must be permitted to experiment both ways in order to achieve an effective laboratory. Under Justice Brandeis's theory of states as laboratories, states would tinker with new ideas until the ideas are perfected and

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212. Abrahamson, 63 Tex. L. Rev. at 1150-51 (cited in note 1).

213. Howard, 62 Va. L. Rev. at 941 n.354 (cited in note 130).

214. Id. at 938-40.

215. Professor Gormley, for example, suggests that ballot questions often are worded in a way te steer voters toward one result. Ken Gormley, *Ten Adventures in State Constitutional Law*, 1988 Emerging Issues in State Constitutional Law 29, 43-44 (1988).

216. Brennan, 61 N.Y.U. L. Rev. at 551 (cited in note 60).

217. See notes 60-61.

adopted at the federal level.[218] Since *White*, the constitutionality of consensual electronic surveillance has been and continues to be tinkered with at the state level. That tinkering is not to be discredited merely because the end result has been to afford the same but no more protection of individual rights than the federal constitution. The fact that state courts have and are re-examining their original positions suggests, perhaps, that the experiment failed. This failure could be the result of the fact that the state courts originally ignored their state law and history and gave a knee-jerk reaction to the *White* opinion. Certainly, a court should correct such a decision, even if it means refusing to find more protection under the state constitution.

The debate around the new federalism movement questioned the prudence of state courts departing from federal interpretation of individual rights. Proponents of the new federalism movement viewed it as an innovative opportunity to expand individual freedoms under state constitutions.[219] One must acknowledge, however, that to be an effective laboratory, state courts must experiment both ways. Liberals who relish the possibility of evading a conservative Supreme Court in the state courts cannot legitimately advocate denying conservatives this same forum to pursue a conservative agenda. One value of a federalist system is the opportunity it affords diverse segments of the population to participate and pursue issues at the state level. The elected state courts reflect these diverse interests. Therefore, a state court's decision not to expand individual rights under the state constitution does not signal the end of federalism, but the progress of federalist values.

VII. CONCLUSION

The participant monitoring experiment in the state courts has not come to an abrupt end; it merely has moved into their next phase. After *United States v. White*, several state courts turned to their state constitutions to reject the Court's interpretation of the constitutionality of warrantless consensual surveillance. This trend reflected what was labeled the "new federalism" and extended the right of individual defendants to be free from unreasonable searches and seizures. Recently, however, these same courts reversed prior

218. Gormley, 1988 Emerging Issues in State Constitutional Law at 46 (cited in note 215).
219. See notes 60-61.

decisions, bringing state constitutional interpretation in line with restrictive federal interpretation. This trend, however, does not sound the death knell of federalism. Although state courts should engage in independent state constitutional analysis, there are certain factors that courts must consider when departing from federal interpretation of similar constitutional provisions. The courts that rejected *White* often ignored or misapplied these factors. Therefore, the trend to reverse those decisions rejecting *White* has been, in part, a corrective process.

Even those decisions that are not corrective, however, do not deal a blow to the values of federalism; the opposite is true. The value of state courts serving as laboratories for the development of individual rights is that state courts reflect the diverse interests that a federal system should serve. For state courts to fulfill this role, experimentation must reflect more than one ideological agenda. The issue of consensual electronic surveillance continues to be a successful example of the state-as-laboratory metaphor. Although one may not agree with the effect of this trend on individual liberties, one cannot deny that it is a healthy development of the values of federalism.

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