

# Foreword: Reliance on State Constitutions—Beyond the “New Federalism”

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*[S]tate Bills of Rights should be preserved with the expectation that we may yet see the day when state constitutional adjudication will drastically limit the occasions for the Supreme Court to test state action by the Fourteenth Amendment.*

—Vern Countryman  
Washington (1970)<sup>1</sup>

The “new federalism” isn’t new anymore.

It’s been over a decade since the “new federalism”<sup>2</sup> appeared on the American constitutional scene. What New Jersey did in *Mount Laurel*,<sup>3</sup> Hawaii in *State v. Kaluna*,<sup>4</sup> California in *Sail’er Inn*,<sup>5</sup> and Alaska in *Baker v. City of Fairbanks*<sup>6</sup> today hardly merits the appellation “new.” In the era following

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1. Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 453, 456 (1970). This article was first presented to the Washington State Constitutional Revision Conference in June 1968. For an elaboration of the point quoted in the text, see Morris, *New Horizons for a State Bill of Rights*, 45 WASH. L. REV. 474, 475 & n.3 (1970). See also *infra* text accompanying notes 60-61; *infra* note 137.

2. See, e.g., Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974). See also *infra* note 37.

3. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975). For a thorough policy analysis of the *Mount Laurel* case and its progeny, see Harrison & Tarr, *Legitimacy & Capacity in Supreme Court Policymaking* (unpublished paper delivered at 1983 Annual Meeting of the Northeastern Political Science Association, Philadelphia, Nov. 17-19, 1983). See also Rosen, *Changing the Way Americans Live*, The Sunday Recorder (Northern N.J.), Sept. 30, 1984, at 1, col. 1.

4. 55 Hawaii 361, 520 P.2d 51 (1974) (rejecting *United States v. Robinson*, 414 U.S. 218 (1973)).

5. *Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (strict scrutiny applied in gender-discrimination cases). See also *Hewitt v. State Accident Ins. Fund Corp.*, 294 Or. 33, 653 P.2d 970 (1982) (equality of “privileges or immunities” guarantee held to require equal compensation under state workers’ compensation statute; “specific biological differences” absolute standard of review).

6. 471 P.2d 386 (Alaska 1970) (right to jury trial for certain petty offenses).

the *Watergate Tapes Case*, Earl Warren's death, America's gasoline shortage, and Hank Aaron's 715th home run,<sup>7</sup> courts and commentators have certainly "discovered" state bills of rights as founts of liberty. Since 1974, when the Kremlin expelled the dissident novelist Aleksandr Solzhenitsyn, state high courts have handed down over 200 published opinions holding that the constitutional minimums announced by the national Supreme Court interpreting the federal Constitution are insufficient to satisfy the more stringent requirements of state law.<sup>8</sup> In the flurry of this activity it is all too easy to forget exactly how much things have changed, how much the novel has become the normal.

During the 1970s, the focal point of the "new federalism" debate was the legitimacy of state court reliance on state law to secure rights not otherwise protected under federal law. The issue was battled around in the literature<sup>9</sup> and in the courts.<sup>10</sup> After all, "independent" decision-making in the individual rights area was virtually unthinkable to the generation of state judges living in the shadow of the Warren Court.<sup>11</sup> As interest in state charters burgeoned, the Burger Court responded by tightening the reins on the "adequate and independent state grounds" doctrine. In the span of time between Justice White's opinion in *Delaware v. Prouse*<sup>12</sup> and Justice O'Connor's declaration in *Michigan v. Long*,<sup>13</sup> the rule was recast to suit the pre-

7. All of these events occurred in 1974. See *United States v. Nixon*, 418 U.S. 683 (1974); *ENCYCLOPAEDIA BRITANNICA*, 1975 BOOK OF THE YEAR 27, 537 (1975).

8. See Collins, *Rebirth of Reliance on State Constitutions*, Nat'l L.J., Mar. 12, 1984, at 25-32 (special state constitutional section).

9. See, e.g., Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720 (1972); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977). On this point, I had my differences with both sides. See Collins, *Reliance on State Constitutions—Away From A Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Collins & Welsh, *California Constitution Turns Into a Political Toy*, L.A. Times, July 17, 1980, pt. II, at 7, col. 1.

10. See, e.g., the majority and dissenting opinions in *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *State v. Flores*, 280 Or. 273, 570 P.2d 965 (1977); *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975).

11. See, e.g., Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1140, 1147 (1978).

12. 440 U.S. 648 (1979).

13. 463 U.S. 1032 (1983). See Collins, *Plain Statements*, 70 A.B.A. J. 92 (1984).

sent Court's penchant for dominancy over matters traditionally thought to be beyond its jurisdiction. The majority's constitutional handiwork in *Long* evidences just how widespread the "new federalism movement" had become by the 1980s.<sup>14</sup>

The once "new federalism" found its chief judicial defenders in the persons of Justices Brennan,<sup>15</sup> Mosk,<sup>16</sup> and Charles Douglas.<sup>17</sup> The Reagan decade brought with it new champions of the now old and slightly modified federalism. The second generation of "new federalists" includes the likes of Justices Stevens,<sup>18</sup> Abrahamson,<sup>19</sup> Carson,<sup>20</sup> Hennessey,<sup>21</sup> Hill,<sup>22</sup> Pollock,<sup>23</sup>

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14. At least three members of the Court have expressed their willingness to go even further in order to squelch the kind of "innovation" that has manifested itself at the state level. See, e.g., *Colorado v. Nunez*, 104 S. Ct. 1257 (1984) (White, J., concurring, joined by Burger, C.J., and O'Connor, J.). See also *Florida v. Casal*, 462 U.S. 637 (1983) (Burger, C.J., concurring). During oral arguments in *Nunez*, Justice William Rehnquist, who declined to join in Justice White's concurring opinion, observed: "We can think they are bananas if we want to, but if [their decision rests on a] state ground, it is none of our business." Oral arguments, United States Supreme Court, Washington, D.C., Jan. 17, 1984. In light of the latest developments in federal-state relations, perhaps we can expect more *Nunez*-type advisory opinions whenever some of the Justices believe that a state court has gone "bananas" in construing a state individual rights guarantee. One hopes, however, that the "conservative" Justices will restrain themselves. On this point, they would do well to take a lesson from Justice Rehnquist. See also Justice Stevens's opinion in *Nunez*.

15. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Thurgood Marshall has also defended the "new federalism." See, e.g., Galie & Galie, *State Constitutional Guarantees and Supreme Court Review*, 82 DICK. L. REV. 273 (1978).

16. See, e.g., Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711 (1978); Mosk, *Rediscovering the 10th Amendment*, 20 JUDGES J., Fall 1981, at 16; Mosk, *The State Courts*, in *AMERICAN LAW: THE THIRD CENTURY* 213 (B. Schwartz ed. 1976). For a more current statement, see Mosk, *State Constitutionalism After Warren*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* ch. 7 (B. McGraw ed. 1984).

17. Douglas, *supra* note 11, at 1123, 1150.

18. See, e.g., Collins, *Justice Stevens Becomes Advocate of States' Role in the High Court*, NAT'L L.J., Aug. 27, 1984, at 20, col. 1. Judge J. Skelly Wright is the most recent federal court defender of the "new federalism." See Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984).

19. See, e.g., Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982). It should be noted that Justice Abrahamson's familiarity with state constitutions is hardly new. See *id.* at 965. See also *State v. Rodgers*, 119 Wis. 2d 102, 116, 349 A.2d 453, 459 (1984) (Abrahamson, J., dissenting). For a more current expression of her views, see Abrahamson, *Home Grown Justice: The State Constitutions*, in *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* ch. 11 (B. McGraw ed. 1984).

20. See, e.g., Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L.J. 641 (1983).

21. See, e.g., Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 SUFFOLK U.L. REV. 873 (1980). Cf. *Commonwealth v. Colon-Cruz*, 393 Mass. 150, —, 470 N.E.2d 116, 130 (1984) (Hennessey, C.J., concurring).

22. See, e.g., Hill, *Foreword: Toward A Federalist System of Rights*, 1984 ANN.

and Utter, among others.<sup>24</sup> And then there is Hans Linde, who today, as in 1970,<sup>25</sup> continues to address the "premises" that give rise to the notion that federalism can be understood as "a touchstone for theory."<sup>26</sup> Generally speaking, the debate between the judicial defenders and the judicial critics of the "new federalism" now has less to do with process than with prudence. That is, the question is no longer *whether* the state constitution should be invoked, but rather *how* it should be applied as a separate source of law.<sup>27</sup> Admittedly, there are a handful of jurisdictions, such as Illinois,<sup>28</sup> that subscribe to the notion that even differently worded criminal justice state guarantees should be interpreted in *all* cases in a manner consistent with the national Supreme Court's interpretations of the federal Bill of Rights. Nevertheless, this wholesale approach to criminal justice decision-making is at present not likely to extend too far beyond

SURV. AM. L. 1 (1984).

23. See, e.g., Pollock, *State Courts, Land Use, & Public Resources*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW ch. 5 (B. McGraw ed. 1984); Pollock, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 705 (1983).

24. See, e.g., Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984). This list should also include the name of Justice David A. Nichols of the Maine Supreme Judicial Court. See, e.g., *State v. Larrivee*, 479 A.2d 347 (Me. 1984); *State v. Cadman*, 476 A.2d 1148 (Me. 1984), discussed in Tinkle, *The Resurgence of State Constitutional Law*, 18 ME. B. BULL. 257 (1984).

25. See, e.g., Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) [hereinafter cited as Linde, *E Pluribus*]; Linde, *Without "Due Process." Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). See also *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983).

26. Linde, *E Pluribus*, *supra* note 25, at 193.

27. *Id.* at 179.

28. See, e.g., *People v. Tisler*, 82 Ill. 2d 613, 469 N.E.2d 147 (1984). Accord *State v. Jackson*, 672 P.2d 255 (Mont. 1983), discussed and analyzed in Collins, *Reliance on State Constitutions: The Montana Disaster*, 63 TEX. L. REV. — (1985).

Chief Justice Ryan, writing for the *Tisler* majority, observed in the context of a search and seizure case: "The [drafters of the Illinois Constitution] manifested no intention to expand the nature of the protection afforded by the fourth amendment of the Federal Constitution." 82 Ill. 2d at 621, 469 N.E.2d at 155. (Of course, the fourth amendment was not binding on the states in 1870 when the Illinois Convention met.) By contrast, Oregon's Justice Linde maintains:

The right question is not whether a state's guarantee is the same or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may turn out to be more protective. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.

Linde, *E Pluribus*, *supra* note 25, at 179.

that area of the law.

The current trend among state judges is, by comparison, to take a more judicious look at state provisions. Considerations of history, text, structure, and analytical soundness are more regularly taken into account in judging whether in each case to embrace the federal view of the law.<sup>29</sup> Thus, for example, state jurists, mindful of the independent character of state law, may not elect to limit the focus of their inquiry in a double jeopardy case to what the Court said in *Oregon v. Kennedy*.<sup>30</sup> Instead, they may take their cue from what Arizona's high court said in *Pool v. Superior Court*.<sup>31</sup> The central point, be it a criminal or crèche case,<sup>32</sup> is that we have arrived at that stage in the history of the "new federalism" where state judges are no longer prone simply to ignore their own bills of rights or defend what is even more troubling—the wholesale alignment of state and federal constitutional doctrine. Certainly, on this point of contention the judicial defenders of the "new federalism" have triumphed.

Another sign of how old the "new federalism" has become is the counter-response that it has received by way of constitutional amendments and judicial elections. Popular initiatives, like the ones that revived the death penalty in California,<sup>33</sup> Massachusetts,<sup>34</sup> and Oregon,<sup>35</sup> have added a new twist to the federalism and individual rights debate. The kind of constitutionally crude tampering we have witnessed in Florida with its amended state search and seizure guarantee<sup>36</sup> presents a special challenge

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29. See, e.g., Linde, *E Pluribus*, *supra* note 25, at 179-93. Accord Williams, *In the Supreme Court's Shadow*, 35 S.C.L. REV. 353, 402 (1984).

30. 456 U.S. 667 (1982). For an impressive theoretical critique of *Kennedy*, see Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching As a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76 (1983). For an impressive lawyerly critique of *Kennedy*, see Amicus Brief, National Ass'n of Crim. Lawyers (prepared by J.H. Hingson), *State v. Fuller*, No. C3-83-2002 (Minn. pending as of Dec. 15, 1984).

31. 139 Ariz. 98, 677 P.2d 261 (1984) (following *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983)).

32. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). Cf. *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1983).

33. CALIF. CONST. art. I, § 27.

34. MASS. CONST. pt. I, art. 26.

35. OR. CONST. art. I, § 40 (as amended 1984).

36. FLA. CONST. art. I, § 12. A similar measure to amend article I, § 7 of the Washington Constitution has recently been recommended by the Ringer Committee, formed at the request of the Attorney General of Washington and with the concurrence of the Washington Association of Prosecuting Attorneys. A variation of the Ringer recommendation was rejected by Oregon's chief law enforcement officer, Attorney General David

to the advocates of the "new federalism." The constitutional tug of war has now shifted from courtrooms to voters' booths.<sup>37</sup> Where in the early 1970s the future of the "new federalism" turned largely on what lawyers wrote in legal briefs, in the 1980s its fate hinges as much on a ballot title<sup>38</sup> or voters' pamphlet and, of course, on political campaigning.<sup>39</sup> The "new federalism" has returned popular constitutionalism to the American stage. Thus, popular consensus directly rivals the institution of judicial review in the constitutional arena. The challenge is even more direct when one considers what the "new federalism" has meant for state judges facing re-election. One of the greatest achievements of the "new federalism" has been the public's expression of confidence in those state judges who have kept state bills and declarations alive in the face of ardent political attacks.<sup>40</sup>

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Frohnmayr. See Collins, *AG's Office Should Have Avoided Potential for Conflict*, [Salem, Oregon] *Statesman-Journal*, Apr. 15, 1984, at E1, col. 1 (Sunday ed.). From the wording of the Ringer recommendation, one wonders how much its drafters actually reflected upon what has been proposed. Moreover, the proposal is premised—despite the oversight contained in its wording—on the continued applicability of the fourth amendment to the states. If, however, the Court should in the future retreat from the incorporation doctrine of *Mapp v. Ohio*, 367 U.S. 643 (1961), and other cases, what then? See *infra* text accompanying notes 60-61. More could, and may, be said about the recommendation of the Ringer Committee. Meanwhile, it remains incumbent on the bench and bar to remember that short-term victories may bring with them long-term harm, quite apart from the circumstances that gave rise to the initial action.

37. See Fisher, *Ballot Propositions: A Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43 (1984); Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, 54 MISS. L.J. — (1984); Collins, *Government by Popular Initiative: States Amend Their Constitutions*, Nat'l L.J., June 18, 1984, at 14, col. 1. See also D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984).

38. See, e.g., *Wells v. Paulus*, 296 Or. 338, 675 P.2d 482 (1984); *Remington v. Paulus*, 296 Or. 317, 675 P.2d 485 (1984).

39. Just this year, a "victims' rights" initiative—similar to California's Proposition 8—was rejected by Oregon voters. See Leeson, *Law and Order Issues Split on Oregon Ballot*, *The Oregonian*, Nov. 15, 1984, at C9, col. 1. The defeat of this measure may be due to several factors, including: (1) the extremist character of the prosecutor-drafted proposal; (2) the role played by the press in informing the public about the complexities of the "victims' rights" proposal; (3) organized opposition by civil liberties groups and others; and (4) attempts by civil liberties groups to understand and address the concerns of victims' groups. See also *Wells v. Paulus*, 296 Or. 338, 675 P.2d 482 (1984) (ballot title); *Remington v. Paulus*, 296 Or. 317, 675 P.2d 485 (1984) (ballot title).

40. Justice Hans Linde was re-elected (by a comfortable margin) to the Oregon Supreme Court in November 1984 after being challenged by a prosecutor and a trial judge, both of whom conducted "law and order" campaigns. See Lauter, *Celebrezze Beaten in Ohio; Most Incumbent Judges Win*, Nat'l L.J., Nov. 26, 1984, at 9, col. 1 [hereinafter cited as Lauter, *Celebrezze Beaten*]; Lauter, *Some Bench Battles Are Bitter, Costly*, Nat'l L.J., Nov. 12, 1984, at 6, col. 1; Girdner, *Oregon Justice Fights to Stay on High Court*, L.A. Daily J., Oct. 31, 1984, at 5, col. 3; Leeson, *Civil Liberties Central*

Whether state law and its interpreters can continue to survive the political pressures of majoritarianism will depend on the extent to which enlightened constitutionalism can be fused with modern democracy. For the time being, the "new federalism" has, on the whole, shown that the two can coexist.

The other side of the "popular constitutionalism" has been the progress made, largely between 1970 and 1980, in enacting state constitutional provisions that buttress the individual rights edifice. For example, the era of the "new federalism" has been one during which gender equality became the constituted supreme law of many states,<sup>41</sup> despite the failure of the proposed twenty-seventh amendment to win voter approval. Similarly, legal progressivism is nowhere more evident in written charters of liberties than in the amended declarations of rights approved in the 1970s by the citizens of Montana<sup>42</sup> and Louisiana.<sup>43</sup> This public appreciation of state constitutionally secured rights con-

*Issue in Court Race*, The Oregonian, July 19, 1984; Leeson, [Oregon] *Court Seat Fight Gets Bitter*, Nat'l L.J., May 14, 1984, at 3, col. 3; Turner, *Law-and-Order Groups in Oregon Opposing Re-election of a Justice*, N.Y. Times, Apr. 2, 1984, at A17, col. 1.

Despite fierce ideological opposition, the chief justice and justices of the California Supreme Court have stayed their ground and have survived the political storms. See Turner, *California Justices Await Verdict—on Themselves*, N.Y. Times, Nov. 18, 1984, E2, col. 3; Turner, *California's Chief Justice Is Facing a Recall Move*, N.Y. Times, Nov. 15, 1982, at A13, col. 1; Turner, *California Judges Get District Case*, N.Y. Times, Jan. 14, 1982, at A20, col. 1; *California Democrats Suffer Losses as [Governor] Brown Coasts to a Victory*, N.Y. Times, Nov. 9, 1978, at A24, col. 2. See also B. MEDSGER, *FRAMED* (1983); P. STOLZ, *JUDGING JUDGES* (1981).

See also Lovrich & Sheldon, *Voters in Judicial Elections: An Attentive Public or Uninformed Electorate?*, 9 JUST. SYS. J. 23 (1984); *Group Seeks Ouster of [Indiana Justice] in "Baby Doe" Case*, N.Y. Times, Oct. 4, 1984, at A21, col. 1. Indiana Justice Givan was re-elected in November of 1984. See Lauter, *Celebrezze Beaten*, *supra* this note.

41. See, e.g., *ERA Impact Project: Legal Reference Guide to State ERAs* (P. Segal ed., NOW Legal Defense & Educ. Fund, N.Y., N.Y.); Collins, *New Tack on E.R.A.*, N.Y. Times, July 3, 1982, at A21, col. 3. On Nov. 6, 1984, voters in Maine turned down a proposed state equal rights amendment. See Lindsey, *Tax-Cutting Proposals Defeated in Three States*, N.Y. Times, Nov. 8, 1984, at A28, col. 5. At the judicial level, the Pennsylvania Supreme Court has been something of a constitutional pacesetter. See, e.g., *Hartford Accident & Indem. Co. v. Insurance Comm'r*, — Pa. —, 482 A.2d 542 (1984) (gender-based insurance rates held unconstitutional).

42. See MONT. CONST. art. I, § 4 (prohibiting certain private discrimination); § 8 (right to participate in agency decision-making process); § 9 (right to know); § 10 (right to privacy); § 14 (rights of 18-year-olds); § 15 (rights of persons not adults); § 18 (right to sue state and local governments).

43. See LA. CONST. art. I, § 3 (right not to be discriminated against on basis of race, religion, age, sex, culture, physical condition, or political ideas); § 5 (right to privacy); § 20 (right to humane treatment). See also Hargrave, *Louisiana Constitutional Law*, 44 LA. L. REV. 423 (1983); Hargrave, *Louisiana Constitutional Law*, 36 LA. L. REV. 533 (1976).

tinues in states like Georgia,<sup>44</sup> Utah,<sup>45</sup> and North Dakota.<sup>46</sup> So while the "new federalism" has drawn a counter-response by way of rights-reducing measures, it has also brought with it a social consciousness that recognizes the importance of measures that reinforce rights.

Finally, the "new federalism" has already greatly altered the way in which the bench and bar litigate individual rights cases. Back in the early days of *State v. Santiago*<sup>47</sup> and *Darrin v. Gould*<sup>48</sup>—both decided before Justice Brennan<sup>49</sup> and Professor Howard<sup>50</sup> published what have almost become articles of faith—raising a state constitutional claim was considered to be something akin to an academic exercise. By the time the word got out to practitioners that state law could be of practical value, state judges were wondering what to do with the forgotten guarantees for which decisional precedent was scarce. These and other problems diminished during the 1980s, due in part to continuing legal education programs,<sup>51</sup> increased academic commentary,<sup>52</sup> and a comparative approach to state law decision-making.<sup>53</sup> The Williamsburg Conference of 1984<sup>54</sup> proved to be a

44. See GA. CONST. art. I, § 1, ¶ 2 (incorporating equal protection guarantee). Prior to the 1982 general election, the Georgia Bill of Rights did not have an equality guarantee.

45. UTAH CONST. art. I, § 6 (as amended 1984) (strengthening right to bear arms guarantee).

46. N.D. CONST. art. I, § 1 (as amended 1984) (adding right to bear arms guarantee).

47. 53 Hawaii 254, 492 P.2d 657 (1971) (rejecting *Harris v. New York*, 401 U.S. 222 (1971)). *Accord Commonwealth v. Triplett*, 462 Pa. 241, 341 A.2d 62 (1975), *overruled by constitutional amendment*, PA. CONST. art. I, § 9 (as amended 1984). See Goldberger, *Suppressed Confession Amendment: No . . .*, Philadelphia Inquirer, Nov. 2, 1984, at 23-A, col. 1; Greenleaf, *Discourage Perjury . . . or does it deserve to be approved?*, Philadelphia Inquirer, Nov. 2, 1984, at 23-A, col. 2; Editorial, *Suppressed Confessions*, Philadelphia Inquirer, Oct. 31, 1984, at 26-A, col. 1.

48. 85 Wash. 2d 859, 540 P.2d 882 (1975).

49. See Brennan, *supra* note 15.

50. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

51. Continuing legal education programs on state constitutional law have been held in California, Connecticut, Florida, Oregon, Washington, and elsewhere. More recently, the Northern New England Supreme Court Conference (Oct. 10, 1984, Maine) had a panel on state constitutional law presided over by Justice David Nichols. Also, the Practising Law Institute is sponsoring state constitutional law educational programs in New York City (Feb. 1, 1985) and in San Francisco (Feb. 8, 1985).

52. See Collins, *supra* note 8, at 31-32. Additional state constitutional law articles are scheduled for publication this year in the *Texas Law Review*, the *Annual Survey of American Law*, the *Notre Dame Law Review*, and the *Mississippi Law Journal*.

53. See, e.g., Collins, *Reliance on State Constitutions—Some Random Thoughts*, 54 Miss. L.J. — (1984). Cf. Linde, *E Pluribus*, *supra* note 25, at 173.



milestone in the history of the "new federalism," if only because of the added legitimacy it gave to principled attempts to discern the meaning of state law affecting individual rights. During the remainder of this decade, it will be considered malpractice—particularly in light of *Michigan v. Long*—to overlook that body of law that only ten years ago was thought to be the sole province of the scholastic specialist.

What then lies beyond the "new federalism"? First, and as outlined above, we are already beyond that point. Second, we can expect considerably more independent decision-making *outside* of the criminal justice area.<sup>55</sup> The next tide of cases will probably involve questions of the constitutionally proper relationship between religion and the state. Depending on economic circumstances, we may also experience considerably more state law-based litigation related to the social allocation of resources. Renewed interest in the first category of cases could well be spawned by the decisions rendered by the Supreme Court during the October 1983 Term.<sup>56</sup> The other line of cases might develop in response to political decisions made at the federal and state executive levels. Furthermore, anticipated developments in civil rights cases will, to an important extent, be con-

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54. See DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (B. McGraw ed. 1984). The conference was held in Williamsburg, Virginia, in March of 1984 and was sponsored by the Conference of Chief Justices, the National Center for State Courts, and the William & Mary Law School. See Barbash, *State Courts Expanding Individuals' Rights*, Wash. Post, Apr. 2, 1984, at A1, col. 1.

55. Surprisingly enough, state law-based decisions involving peremptory challenges to exclude minorities systematically from juries may prompt the Court to reconsider its holding in *Swain v. Alabama*, 380 U.S. 202 (1965). See Riley, *Minority Jury Exclusion Blocked*, Nat'l L.J., Dec. 17, 1984, at 3, col. 1 (noting recent 2d Cir. decision following state rulings rejecting *Swain*); Collins, "O'Connor Court" Attempts to Stifle State Justices' Brand of Innovation, Nat'l L.J., Mar. 28, 1983, at 16, cols. 1, 4.

56. See, e.g., *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (nativity scene in public park during Christmas season held to be constitutional); *Wallace v. Jaffree*, 705 F.2d 1526 (11th Cir. 1984), *prob. juris. noted*, 52 U.S.L.W. 3719 (U.S. Apr. 2, 1984) (No. 83-812) (whether statute authorizing public school teachers to announce a minute of silence for meditation or voluntary prayer violates establishment clause); *School Dist. of Grand Rapids v. Ball*, 718 F.2d 1389 (6th Cir. 1983), *cert. granted sub nom. Americans United for Separation of Church and State v. School Dist. of Grand Rapids*, 52 U.S.L.W. 3631 (U.S. Feb. 27, 1984) (No. 83-990) (constitutionality of state provision of secular services to part-time public school students on premises leased from religious schools); *Aguilar v. Fetton*, 739 F.2d 48 (2d Cir. 1984), *juris. posted*, 53 U.S.L.W. 3269 (U.S. Oct. 9, 1984) (No. 84-237) (constitutionality of New York City's use of federal funds to aid disadvantaged children in parochial schools). See also cases discussed in Lauter, *Judicial Mus-ing—Or a Hint of How He'll Vote?*, Nat'l L.J., Dec. 17, 1984, at 5, col. 1.

tingent on the availability of damages and attorneys' fees<sup>57</sup> for violations of state law. Third, as more states adopt variations of a primacy approach<sup>58</sup> to decision-making in this area, independent *bodies* of state law will begin to develop in ways similar to the decisional explosion that accompanied the Supreme Court's nationalization of the Bill of Rights. This wealth of new case law will in turn encourage state courts to look to one another for precedential guidance previously sought exclusively from the federal high Court.<sup>59</sup> Fourth, the momentum generated by the "Williamsburg movement" could prompt a newly constituted Supreme Court to abdicate a significant measure of responsibility for announcing minimum standards of constitutional protection. One consequence would be an attempted return to a pre-incorporation, "shock the conscience" approach to national Bill of Rights issues.<sup>60</sup> The pretext for a "new" standard of federal judicial review might be said to derive from the gains made by the "new federalism." If the activism of the 1960s was based on the failure of state courts to safeguard rights, then a new Court majority might argue that the advances made since 1970 warrant a return to a more deferential "ordered liberty" standard of review.<sup>61</sup> Such a development would have the effect of further

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57. See, e.g., *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921 (1984) (recognizing cause of action for violation of state constitution); Collins, *Veto Guts Bias Law By Voiding Enforcement Mechanism*, *The Oregonian*, Aug. 19, 1983, at C13, col. 1 (discussing proposed law allowing for attorneys' fees for actions brought to enforce state constitutional equality guarantee) (the measure, which was vetoed by the governor in 1983, will be reintroduced during the 1985 Oregon legislative session). For a thoughtful discussion of these and related topics, see Friesen, *Damage Remedies for Violations of State Constitutions*, 63 TEX. L. REV. — (1985) (tentative title). See *infra* text accompanying note 98.

58. See Collins, *Reliance on State Constitutions—Some Random Thoughts*, 54 MISS. L.J. — (1984).

59. *Id.* at —.

60. *Id.* at — n. 31.

61. In this regard Justice Brennan has correctly observed:

Of course state courts can be trusted to safeguard individual rights, but that cannot justify the Supreme Court in going on to limit the protective role of the federal judiciary. For in doing so it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Brennan, *State Constitutions & Our Freedoms* 7 (Feb. 10, 1984) (footnote omitted) (paper delivered to the Palm Beach Bar Association). Similarly, Justice Linde has noted: "The current revival of state constitutional law can be no excuse to weaken those national standards that protect us in every state." Linde, *E Pluribus*, *supra* note 25, at 200 (footnote omitted). See *infra* note 137.

subjecting both state law and its judges to the kinds of political pressures to which federal law and federal judges are immune.

*Law review articles . . . can stimulate a reasoned analysis of the role of state constitutions.*

—Justice Stewart Pollock<sup>62</sup>

The reader will find in what follows in this symposium on the Washington Constitution a splendid sampling of where we have been and where we may be going with the "new federalism." The articles evidence a genuine and scholarly regard for the state constitution as a legal document worthy of independent textual, historical, and doctrinal analysis. In certain ways the *University of Puget Sound Law Review* symposium itself represents something of a turning point in the history of academic commentary on the "new federalism."

Justice Robert Utter's article<sup>63</sup> on the Washington free speech guarantee<sup>64</sup> is a treasure trove of historical information and is certain to influence future interpretations of the provision. Washington's article I, section 5 guarantee, which is patterned after a provision appearing as early as 1790 in the Pennsylvania Constitution,<sup>65</sup> is notably different from its first amendment counterpart. Justice Utter's article focuses on the significance of the omission of any "no law" language in the state free speech guarantee. Drawing on the kind of research that would instill envy in an archivist,<sup>66</sup> Justice Utter makes a compelling case for the proposition that "the Washington Constitution does and should protect against private infringement of free speech rights."<sup>67</sup> His research demonstrates how instrumen-

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62. Pollock, *State Constitutions*, *supra* note 23, at 722. See Abrahamson, *Reincarnation of State Courts*, *supra* note 19, at 971.

63. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157 (1985).

64. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. I, § 5. Cf. Morris, *supra* note 1, at 487 (proposed freedom of expression guarantee).

65. PA. CONST. of 1790, art. IX, § 7. 8 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 292 (W. Swindler ed. 1979). See Collins, *American Bills and Declarations of Rights: Notes, Comparative Charts and Tables*, in THE AMERICAN BENCH (1985) [hereinafter cited as Collins, *American Bills & Declarations of Rights*]. This guarantee is probably of French origin. See G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 441 n.10 (1971).

66. See, e.g., Utter, *supra* note 63, at 163 n.36, 164 n.39, 166 n.50, 172 n.79, 173 n.81, 174 n.85, 175 nn.88-89, 178 n.101.

67. *Id.* at 193.

tal historical evidence can be in construing constitutional provisions. Anyone who in the future takes exception to the Utter argument will first have to explain away the eye-opening evidence he unearthed in the July 13, 1889, issue of the *Tacoma Daily Ledger*.<sup>68</sup> This is not to say, of course, that historical evidence, standing alone, is necessarily determinative. The Utter article is not insensitive to that point, as indicated by the way the author weaves in textual and policy arguments to support his historical findings. One need not be devotedly wed to the "accommodation" test<sup>69</sup> he proposes in order to agree with his central premise concerning the scope of the state free speech guarantee. Some may take exception to his preference for "accommodation"<sup>70</sup> tempered, not surprisingly, by a strong presumption<sup>71</sup> in favor of the "preferred right."<sup>72</sup> Perhaps this line of argument will lead its author to a more diversified "eclectic approach"<sup>73</sup> or maybe even to a more structured definitional approach grounded in doctrinal premises.<sup>74</sup> However all this may be, one thing is certain: Justice Utter's writings and opinions<sup>75</sup> demonstrate that the judge from Olympia is busy constructing a theory of freedom of expression. Parts of the foundation have been laid already, and ably so. It is to be hoped that he will next undertake to answer the other riddle found in article I, section 5, namely, the meaning of the "abuse"<sup>76</sup> provision. Until then, the Washington bench and bar will be well served by what Justice Utter has revealed about the reach<sup>77</sup> of that guarantee central to

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68. *Id.* at 172.

69. *Id.* at 182. Cf. *State v. Tourtillott*, 289 Or. 835, 618 P.2d 423 (1980) (Linde, J., dissenting). See *supra* note 7.

70. Utter, *supra* note 63, at 182.

71. *Id.*

72. *Id.* at 187.

73. See Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U.L. REV. 1212, 1251-61 (1983); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 609-12 (1980).

74. See, e.g., *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) (interpreting Oregon State free speech guarantee). See also Linde, *E Pluribus*, *supra* note 25, at 186-88.

75. See, e.g., *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984).

76. For a novel but convincing discussion of this provision, see *In re Laswell*, 296 Or. 121, 124, 623 P.2d 855, 857 (1983); *State v. Robertson*, 293 Or. 402, 412-13, 649 P.2d 569, 576-77 (1982); *Hall v. May Dep't Stores*, 292 Or. 131, 145-47, 637 P.2d 126, 135-36 (1981); *Wheeler v. Green*, 286 Or. 99, 117-19, 593 P.2d 777, 788-89 (1979); Amicus Brief, Or. Newspaper Publishers' Ass'n (prepared by H. Linde) at 10-11 n.2, *Deras v. Myers*, 272 Or. 47, 535 P.2d 541 (1975).

77. A resourceful and balanced discussion of this issue is presented in Levinson, *Freedom of Speech & the Right to Private Property Under State Constitutional Law*, in

self-government.

One should not get too comfortable in the easy chair of history before reading Professor Pierre Schlag's challenging article.<sup>78</sup> In a rationally relentless assault on what he refers to as the " 'intentionalist' mode of interpretation,"<sup>79</sup> the good professor points to some of the trappings of undue reliance on historical intent. Though he concedes—with the usual qualifications, of course—that "the framers intent is neither irrelevant nor necessarily illegitimate,"<sup>80</sup> virtually all of his arguments set out to rid the world of intentionalism. In a Socratic fashion, he questions the theoretical foundations of the doctrine and finds them unconvincing. After critiquing the three major justifications<sup>81</sup> for intentionalism, Professor Schlag takes axe in hand and hacks away at the root evil: legal positivism.<sup>82</sup> Both the intentionalist and the legal positivist, he tells us, reduce "normative issues" to "questions of fact," and do so based on concepts that "are abstract and indeterminate, and incapable of . . . any concrete content or meaning."<sup>83</sup> At a time when so much of conventional legal thinking is grounded in intentionalist presumptions, it could be salutary to pause and consider the kind of provocative arguments Professor Schlag tenders. To the best of my knowledge, his is the first such article presented to state judges for

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DEVELOPMENTS IN STATE CONSTITUTIONAL LAW ch. 2 (B. McGraw ed. 1984).

Perhaps the most immediate "extension" of the protections of art. I, § 5 will be in the area of private employer infringements of employee speech. See Utter, *supra* note 63, at 166, 192-93.

In light of Justice Utter's historical findings and arguments concerning Washington's free speech guarantee, it is appropriate to ask how much of the same thinking might be applicable to still other provisions of the Washington Declaration of Rights, which likewise do not contain an express direction to the government alone. See, e.g., WASH. CONST. art. I, § 4 (right to petition); § 11 (religious freedom); § 30 (rights retained). See also WASH. CONST. art. I, § 7 (requiring "authority of law" for government or private individuals to disturb "private affairs" or invade home). See *infra* text accompanying notes 92-97.

78. Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985).

79. *Id.* at 285.

80. *Id.* at 287. According to Professor Schlag: "The only legitimate role for the framers intent in constructing a constitutional decision is that of providing contextual meaning. The framers intent can merely serve as a stage set, a background against which the constitutional decision sets off its meaning." *Id.* In this regard, consider *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981) (interpreting Oregon's "unnecessary rigor" guarantee).

81. See Schlag, *supra* note 78, at 289-325.

82. *Id.* at 325-29.

83. *Id.* at 328 (footnote omitted).

consideration.<sup>84</sup> Maybe, in light of what the Puget Sound professor maintains, the *Tacoma Daily Ledger* should be the first rather than the final place to take one's constitutional inquiry. Then again, Professor Schlag may not read old newspapers. The question, however, is not whether to declare unyielding fidelity to dusty papers or dead philosophers. Rather, the appropriate inquiry is what principles do we as a people and a nation of states accept in ascribing meaning to the law we proclaim to be supreme. Viewed from that vantage point, Professor Schlag's arguments deserve more, far more, than mere headline attention.

In his discussion of "state action,"<sup>85</sup> Professor David Skover begins by defending a premise that some might think "revolutionary" or even "radical."<sup>86</sup> Dismantle the "state action" doctrine, he says. True, he does limit his argument to article I declaration of rights cases arising under the Washington Constitution. And he does admit that the worth of such a constitutional claim "may be influenced, even decisively, by the strength of the nexus between the public or private identity of the adversary . . . and the core value of the constitutional guarantee asserted."<sup>87</sup> But it is on with the revolution after that. In fairness, though, his claim does not appear so extreme after one considers his case for taking the stance he has. Professor Skover offers what I found to be forceful arguments for *not* incorporating the federal fourteenth amendment "state action" doctrine into Washington declaration of rights law.<sup>88</sup> Also impressive is his doctrinal craftwork with the political power<sup>89</sup> and fundamental principles<sup>90</sup> provisions. He uses them as a theoretical founda-

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84. Professor Schlag's arguments are not, however, addressed to state judges alone. See *id.* at 286-87. One state judge has observed: "Constitutional interpretation of broad clauses locks neither the powers of lawmakers nor the guarantees of civil liberties into their historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle." *State v. Robertson*, 293 Or. 402, 434, 649 P.2d 569, 588 (1982). Accord *State ex rel. Oregonian Publishing Co. v. Deiz*, 289 Or. 277, 284, 613 P.2d 23, 27 (1980); Linde, *E Pluribus*, *supra* note 25, at 184.

85. See Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 221 n.1 (1985). See also Countryman, *supra* note 1, at 473-74.

86. Skover, *supra* note 85, at 279, 282.

87. *Id.* at 278.

88. *Id.* at 224-54.

89. WASH. CONST. art. I, § 1, which provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."

90. WASH. CONST. art. I, § 32, which provides: "A frequent recurrence to fundamen-

tion for erecting the argument that Washington's "courts should recognize that the two provisions warrant a fundamental right to state action for protection of constitutional liberties against private infringement."<sup>91</sup> This position should have some appeal to old-fashioned textualists who examine what is set out in Washington's guarantees touching due process,<sup>92</sup> right of petition and assemblage,<sup>93</sup> freedom of speech,<sup>94</sup> personal privacy and sanctity of the home,<sup>95</sup> and the rights of religious conscience.<sup>96</sup> In this respect, some of the thinking of Professor Skover tracks the textual and historical conclusions presented by Justice Utter. And Justice Utter, liberal as he can be on occasion, is certainly not a radical. So the comparison runs, neither is Professor Skover. Of course, the professor is not as wed to textual considerations as his fellow traveler the judge. I am thinking, specifically, of Professor Skover's thesis as it pertains to Washington's constitutional equality guarantee, which begins with the words "No law shall be passed . . . ."<sup>97</sup> Equally intriguing, though not as troublesome, is the application of his understanding of the Washington Declaration of Rights to a theory of remedial relief for violations of the state constitution.<sup>98</sup> Liberals and conservatives (and maybe even radicals) will all find a satisfying measure of original thought in Professor Skover's essay.

Sensing that the next frontier of the "new federalism" will be religious establishment cases, Gonzaga Law Professors Frank Conklin and James Vaché have set out to convince the Washington Supreme Court why it should retreat from past decisional precedent in this area.<sup>99</sup> While the authors are displeased with the "Byzantine complexities of the United States Supreme

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tal principles is essential to the security of individual right and the perpetuity of free government." See *infra* note 137.

91. Skover, *supra* note 85, at 276.

92. WASH. CONST. art. I, § 3.

93. WASH. CONST. art. I, § 4.

94. WASH. CONST. art. I, § 5.

95. WASH. CONST. art. I, § 7.

96. WASH. CONST. art. I, § 11.

97. WASH. CONST. art. I, § 12. Professor Skover is not unaware of the apparent significance of the wording of this guarantee, though his argument does not find such textual points to be determinative. See Skover, *supra* note 85, at 244-46, 256-57, 266-67.

98. See *supra* note 57.

99. Conklin & Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411 (1985).

Court's treatment of free exercise and establishment cases,"<sup>100</sup> they are not prepared to accept as gospel the more constitutionally stringent view proclaimed by the Washington Supreme Court in cases like *Weiss v. Bruno*.<sup>101</sup> Moreover, they recognize that there is "strong constitutional and case law support" for an "enhanced" level of constitutional restrictions on government, particularly when public monies or resources are involved.<sup>102</sup> Limitations like those contained in article I, section 11<sup>103</sup> and article XXVI<sup>104</sup> of the Washington Constitution, both of which prohibit government expenditures for religious purposes, have historical antecedents dating back at least to the time of the Michigan Constitution of 1835.<sup>105</sup> Though Professors Conklin and Vaché do not track their inquiry quite that far back in time, they do nevertheless devote a considerable amount of detailed historical attention to the events surrounding the pertinent enabling legislation that affected North Dakota, South Dakota, Montana, and Washington. Their account makes for fascinating reading that bears more or less on their subject. Against that backdrop the authors maintain:

To read the language of the constitution without regard to the context in which it was written and to fail to consider the possibility that changing contexts should change the reading, would be inconsistent with modern perceptions of appellate court jurisprudence. Therefore, if a contemporary analysis should reveal that the values associated with the particular language have changed, one should entertain the possibility that the interpretation must change to accommodate modern

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100. *Id.* at 417.

101. 82 Wash. 2d 199, 509 P.2d 973 (1973). See also *State Higher Educ. Assistance Auth. v. Graham*, 84 Wash. 2d 813, 529 P.2d 1051 (1974); *Visser v. Nooksack Valley School Dist.* No. 506, 33 Wash. 2d 699, 207 P.2d 198 (1949); *Mitchell v. Consolidated School Dist.* No. 201, 17 Wash. 2d 61, 135 P.2d 79 (1943). All of these cases restrict various types of direct or indirect aid for sectarian purposes.

102. Conklin & Vaché, *supra* note 99, at 412.

103. In pertinent part WASH. CONST. art. I, § 11 provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise of instruction, or the support of any religious establishment . . . ." Based on a 1904 amendment, an exception is made for chaplains, though the exception is likewise limited.

104. The fourth part of art. XXVI provides: "Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all children of the state."

105. See MICH. CONST. of 1835, art. I, § 5; 5 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 204 (W. Swindler ed. 1979). See also N.J. CONST. of 1776, art. XVIII; MD. CONST. of 1776, art. III; KY. CONST. of 1792, art. XII, discussed in Collins, *American Bills & Declarations of Rights*, *supra* note 65.



conditions.<sup>106</sup>

After examining the historical record, and allowing for "modern conditions," the authors conclude that neither the enabling acts of the nineteenth century<sup>107</sup> nor the state decisional law of the twentieth century<sup>108</sup> should bar legislative attempts "again to aid private church-related endeavors, be they educational or social-service oriented."<sup>109</sup> Where exactly this leaves the state constitutional prohibitions against public expenditures for "sec-tarian" purposes is unclear. Still, the Conklin and Vaché discussion of this subject could prove useful to others who wish to explore the borderland of the "new federalism."

A colleague of mine, who devours law review writings like spy novels, once said to me after reading an impressive article: "This guy belongs on the Court. Maybe not; he's too good for it." After reading Professor George Nock's article on Washington search and seizure law,<sup>110</sup> I wondered whether he may be "too good" to remain in teaching given the need for his talents elsewhere. The University of Puget Sound law professor studied fourth amendment jurisprudence and found it in logical "disarray."<sup>111</sup> Then he turned to recent Washington law interpreting article I, section 7<sup>112</sup> and came away disillusioned, disquieted, and even disturbed by "unsupportable" dicta.<sup>113</sup> All of this from a friend of the court, no less. Some of the newer rulings, like *State v. Myrick*,<sup>114</sup> he found "nearly satisfactory."<sup>115</sup> Others, like *State v. Jackson*,<sup>116</sup> he concluded contain "outrageous"<sup>117</sup> propositions. So what does the professor expect of black-robed mortals who sit perched on high benches? Simply this: "rational bodies of law governing searches, seizures, and related governmental intrusions on privacy."<sup>118</sup> And "state courts," he adds,

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106. Conklin & Vaché, *supra* note 99, at 457.

107. *Id.* at 460.

108. See cases cited *supra* note 101.

109. Conklin & Vaché, *supra* note 99, at 460.

110. Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. PUGET SOUND L. REV. 331 (1985).

111. *Id.* at 374.

112. WASH. CONST. art. I, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

113. Nock, *supra* note 110, at 342.

114. 102 Wash. 2d 506, 688 P.2d 151 (1984).

115. Nock, *supra* note 110, at 343.

116. 102 Wash. 2d 432, 688 P.2d 136 (1984).

117. Nock, *supra* note 110, at 342.

118. *Id.* at 374.

today "have a splendid opportunity . . . [to enunciate those] applicable theories that must shape the creation of any rational body of law."<sup>119</sup> Amen.

Based on what we know from the *Ringer*<sup>120</sup> court's research, the historical record on article I, section 7 is inconclusive as to the framers' intention when they adopted the language of the existing guarantee over that found in the fourth amendment. (Sounds like something from Professor Schlag.) This leads us to the text—those seventeen words so often stressed yet seldom studied. An analysis of the wording of section 7 points Professor Nock to the first of the "competing theories" he places on the Washington Supreme Court's doorstep. According to the "literal theory," section 7 "justifies all of, and only, those home invasions or privacy disturbances authorized by statute, common law, or, perhaps, rules and express policies adopted by politically responsible institutions."<sup>121</sup> Popular constitutionalism? Yes. But Professor Nock is quick to remind us that, at least in Washington, history proves that generally it has been the legislature that has been diligent and the judiciary dangerous when it comes to protecting rights.<sup>122</sup> Properly understood and applied, the "literal theory" could prove to be "a truly radical idea compared to conventional fourth amendment law."<sup>123</sup> (Hints of "Skoverism"?) Enter the "orthodox theory." This view accepts the "Supreme Court's fourth amendment jurisprudence [as] fundamentally sound, except to the extent that its logical principles have been savaged by a number of patently irrational decisions."<sup>124</sup> Though not textually defensible, the theory is in prin-

119. *Id.*

120. *State v. Ringer*, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983).

121. Nock, *supra* note 110, at 347.

122. *Id.* at 348. Even so, Professor Nock is probably stretching the point when he adds: "There is not the slightest reason to think that citizens would cavalierly surrender their privacy rights in the face of any but the most compelling demands for official intrusion." *Id.* at 349.

123. Linde, *E Pluribus*, *supra* note 25, at 185.

124. Nock, *supra* note 110, at 352. More specifically:

The orthodox view, in its simplest form, requires that searches or seizures (including arrests) should be made on the basis of warrants issued by neutral and detached magistrates, on probable cause, and that the warrants must particularly describe the objects of the search or seizure. A warrant may be dispensed with only if one or more of a limited number of exceptions to the warrant requirement are present. These exceptions are for categories of exceptions of situations that normally require necessity, though actual necessity need not be present in a particular case.

*Id.* at 352-53 (footnotes omitted).

ciple "rational, workable, and tested."<sup>125</sup> Next, there is the "exigency theory." "The theory seems to be," observes Nock, "that every warrantless search, seizure, or arrest is justifiable only if the search is necessary and the exigencies of a particular situation preclude resort to a warrant."<sup>126</sup> All of the theories have their special consequences. And the author alerts us to them. Moreover, he points to "adjudicative principles" that may help guide the court in other areas like probable cause and the application of the exclusionary rule.<sup>127</sup> Though the author admits that some of the theories he sets out are "more persuasive than others," he is modest enough not to "recommend one over another,"<sup>128</sup> at least not expressly. The Washington Supreme Court would, I think, be better served if it eschewed ad hoc, case-matching, fact-comparing, abstract formula decision-making in the search and seizure context. It may instead announce a rule or set of rules, articulate a settled rationale, and apply both as it charts out what it believes to be a uniform and sound *body* of law. To be sure, this is asking a lot. Yet, isn't that characteristic of law professors?

For nearly a century, criminal defendants have not enjoyed a right to appeal under the authority of the national Constitution.<sup>129</sup> This is not to say, however, that they have no right at all, since statutory law provides what the federal Bill of Rights and the fourteenth amendment have not. But in the State of Washington the right is constitutionally guaranteed—under article I, section 22.<sup>130</sup> Washington attorney James Lobsenz's article<sup>131</sup> tells us why that is important. Can the state, in the name of judicial economy, promulgate a rule that dispenses with a criminal defendant's "opportunity to present oral argument to a

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125. *Id.* at 353.

126. *Id.* at 354 (footnote omitted).

127. For an analytically valuable study of this rule, see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

128. Nock, *supra* note 110, at 374.

129. See *Jones v. Barnes*, 463 U.S. 745 (1983); *McKane v. Durston*, 153 U.S. 684, 687 (1894).

130. In relevant part, WASH. CONST. art. I, § 22 provides: "In all prosecutions, the accused shall have the right . . . to appeal in all cases."

131. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375 (1985).

three-judge panel"?<sup>132</sup> What prevents the government from relaxing the rules of waiver and dismissal in criminal appeals? And what, if anything, should restrict a trial court's discretion to impose a harsher sentence on a reconvicted defendant who successfully appealed a prior conviction? Ultimately, these are questions that require us to reflect upon the nature and consequences of constitutionalizing a right to appeal. In other words, they cause us to think about section 22. James Lobsenz does just that by scrutinizing the validity of a 1984 Washington Supreme Court rule of appellate procedure.<sup>133</sup> In his bout with a rule fashioned by the court he hopes to persuade, he manages to put the rule on the ropes.<sup>134</sup> His arguments are supported by comparative law research, which draws on the decisional law of other state courts.<sup>135</sup> Mr. Lobsenz's article demonstrates how problematic a common court rule can be when held up to examination under a guarantee no one would expect to find in a constitution.

This symposium issue<sup>136</sup> of the *University of Puget Sound Law Review* reflects the progress made since an earlier generation first returned to that body of supreme law that had been dormant for so long. There is good reason to be encouraged by what is found in this volume. What prompts this observation is the fact that we are finally beginning to see the caliber of scholarly work that was previously reserved largely for federal law and federal decisions. By holding state courts up to more critical evaluation, we stand to benefit from an improved work product. By examining the purpose and potential of the law set forth in the state constitution, we stand to make it more sensible to those who govern and are governed. In the process, it is to be hoped that we can revive that brand of federalism that comports

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132. *Id.* at 386.

133. *Id.* at 384-93 (analyzing Wash. R. App. P. 18.14).

134. *See, e.g., id.* at 386-89.

135. *Id.* at 376-77 nn.11-19.

136. A confession is in order here. Prior to reading Mr. Hugh Spitzer's article, *An Analytical View of Recent "Lending of Credit" Cases in Washington State*, 8 U. PUGET SOUND L. REV. 195 (1985), I had no working familiarity with his subject. Moreover, I had no idea that an entire book, *see id.* at 195 n.4, had been devoted to the topic or that five recent decisions exist, *see id.* at 196-97 nn.8-12, discussing the matter. His discussion of those cases presents a framework in which they can be understood "neither as inconsistent nor as erratic as some have contended." *Id.* at 218 (footnote omitted). Another indication of how far removed we are today from the "new federalism" is that ten years ago a symposium like this one would not have contained an article addressed to Mr. Spitzer's subject. Now the rest of us can begin to ponder what was once left to a handful of "credit case" specialists. We are, no doubt, the better for it.

with those "fundamental principles . . . essential to the security of individual right and the perpetuity of free government."<sup>137</sup>

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137. WASH. CONST. art. I, § 32. This provision is patterned after § 15 of the Virginia Declaration of Rights of 1776. See 10 SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 50 (W. Swindler ed. 1979).

The statement quoted from § 32 of the Washington Constitution affirms belief in a principle borrowed from an 18th-century document that established a form of constitutional government which in several significant respects was different from that of its successors. Given the relative ease with which most contemporary state bills or declarations of rights may be amended, in what sense can these state constitutional rights be understood as "fundamental"? See Collins, *Government By Popular Initiative: States Amend Their Constitutions*, Nat'l L.J., June 18, 1984, at 14, col. 2. While the underlying right may indeed remain "fundamental" as a matter of principle, the source of its protection affects our understanding of it. In this and other regards, it has been aptly noted that "[t]he states demystify constitutional law." Linde, *E Pluribus*, *supra* note 25, at 197. For example, state constitutions, including state bills or declarations of rights, tend to be detailed, sometimes in a way that is trivial when compared with the national Constitution. See, e.g., N.Y. CONST. art. I, § 9, cl. 2 ("bingo or lotto" games); OR. CONST. art. I, § 39 (sale of liquor by the glass). State constitutions are also diverse, sometimes in a way that might be seen as undermining social values thought to be entitled to protection under the national Constitution. See, e.g., CAL. CONST. art. I, § 27 (allowing for imposition of the death penalty); COLO. CONST. art. V (as amended 1984) (prohibiting most forms of publicly financed abortions). By the same token, such diversity may also allow for the adoption of laws that accord constitutional status to important social values that do not find explicit expression in the national Constitution. See, e.g., ARIZ. CONST. art. II, § 24 (right to appeal in criminal cases); MONT. CONST. art. II, § 10 (right to privacy); TENN. CONST. art. I, §§ 13, 32 (humane treatment of arrested and confined persons). Such detail and diversity serve to remind us of the *political* (and hence unsettled) character of state constitutional law as contrasted with federal constitutional law, which can properly be understood as more *value*-laden (and hence more enduring). This basic difference is evidenced by fundamental rights-protecting constitutional mechanisms like the amendment process set forth in U.S. CONST. art. V or the protections afforded to federal judges under U.S. CONST. art. III. Cf. *supra* notes 36, 37, 39, 40, 47.

All of this suggests that the constitutional significance of state-protected rights is perhaps better understood in terms of political limitations imposed by changing majorities bent on confining the scope of governmental choices. As such, the constitutionalism of the states has a schizophrenic quality to the extent that it must serve two quite frequently warring masters, politics and principle. Understood in this light, the maxim set forth in § 32 of the Washington Constitution seems more rhetorical than remarkable. Incorporation serves to help the states with this dilemma by confining the scope of political choices made by local majorities. It does so, however, only after popular constitutionalism has failed (for whatever reasons) to extend those *minimum* protections recognized under national law. See, e.g., *State v. Mapp*, 170 Ohio 427, 433, 166 N.E.2d 387, 390 (1960), *rev'd*, *Mapp v. Ohio*, 367 U.S. 643 (1961). See F. FRIENDLY & M. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* 138 (1984). Similarly, state laws that permit "fundamental rights" to be vindicated safeguard Bill of Rights values to a degree that the national Constitution never could if it had to be relied upon in order to police the actions of local officials. This federalism principle, dependent as it must be on incorporations, reinforces state sovereignty without restoring the doctrine of interposition. See *Hunter v. Martin*, *Devise of Fairfax*, 18 Va. (4 Munf.) 14 (1814). At the same time it advances the cause of "fundamental values" secured under national law without unduly centralizing the decision-making process affecting claims of right. Federalism of this kind

Meanwhile "new federalism" isn't dead, it just isn't new anymore.

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makes equal demands on both "sovereigns" and thereby allows the classic model of state government (on which § 32 is premised) to survive in a post-incorporation world. *See* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts*, 59 NOTRE DAME L. REV. 1118, 1123-26, 1133-43 (1984).