Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*

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I. INTRODUCTION

It has now been almost a century since the people of the State of Washington ratified America's forty-third bill of rights.¹ As might be expected of the authors of a document that had been drafted and redrafted many times by different people in different ages, the framers of the Washington Declaration of Rights (the "Declaration") borrowed heavily from earlier versions, while incorporating new ideas and provisions that they considered appropriate to the peculiar conditions, history, and philosophy of their Territory and its people.

For a variety of reasons, however, the charter that was intended as the primary protector of the fundamental rights of Washingtonians² was largely ignored by subsequent generations.

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1. The Washington Constitution became effective on Washington's admission as the forty-second state of the Union on November 11, 1889. Thus, one federal and forty-one state bills of rights were in effect at the time the Washington Declaration of Rights came into force. Depending on how one defines such terms as "constitution," "bill of rights," and "America," however, the Washington Declaration of Rights may have had approximately 130 American predecessors. For instance, by 1889 Georgia had adopted seven different constitutions, one of which was in effect from 1861 to 1865 and reflected Georgia's transfer of allegiance to the Confederate States of America. 2 COLUMBIA U. CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE (1983) (Notes preceding the Georgia Constitution).

of lawyers, judges, and scholars who assumed erroneously that the attitudes, beliefs, and intentions of the framers of the 1889 Washington Declaration were identical to those of the drafters of one of the other bills of rights a full century earlier on the other side of the continent. In recent years, this assumption has been questioned more frequently by lawyers and judges searching for the scope the founders of our state intended to give to fundamental individual freedoms. Increasingly, Washington courts are being asked to consider our Declaration as an independent and effective source of protection for individual rights, including some rights not recognized or protected by the United States Supreme Court, and to give our state constitution a truly independent interpretation. No matter how sympathetic they may be to such requests, lawyers and judges face at least three major problems in making a truly independent interpretation of a state constitutional provision.

First, they must justify departing from precedents laid down by the United States Supreme Court, a step which makes many people understandably uncomfortable until the differing histories of the federal and state acts are understood.

Second, they must decide when and how to approach a state constitutional problem. Typical questions include whether the state or federal constitution should be raised or considered first; whether and how a state constitutional provision should be compared with the comparable federal provision, if any; how to weigh federal court precedents and state court dicta; how to avoid the danger of federal review and reversal of decisions that rest on independent state constitutional grounds; and, how to develop an independent framework for analyzing the state Declaration of Rights.

Finally, they must decide how to analyze state constitutional provisions with few or no Washington Supreme Court precedents for guidance. Although most judges are familiar with the usual forms of textual analysis, many are unaccustomed to making the necessary in-depth inquiry into the intent of the people who wrote and ratified the Declaration, and few know what resources are available to aid them in discovering such intent.† Furthermore, trial judges are generally reluctant to base

(1979).

† [Editor's Note: For a highly informative and in-depth treatment of researching state legislative history, see the Comment entitled "Legislative History in Washington" within this issue.]
their decisions even in part on their analysis of contemporary values and conditions, an analysis that is uniquely necessary to the continued existence and vitality of a modern constitution.

II. GROUNDS FOR INDEPENDENT INTERPRETATION OF THE WASHINGTON DECLARATION OF RIGHTS

The United States Supreme Court has consistently held that state courts may interpret state constitutions to be more protective of individual rights than the United States Constitution. The Washington Supreme Court has expressly accepted this responsibility on a number of occasions. In Alderwood Associates v. Washington Environmental Council, for example, the Washington Supreme Court found a state constitutional right to solicit initiative signatures in privately-owned shopping centers, and explained this departure from federal constitutional precedent as follows:

State courts are obliged to determine the scope of their state constitutions due to the structure of our government.


4. See, e.g., State v. Chrisman, 100 Wash. 2d 814, 817, ___ P.2d ___, ___ (1984) (holding that WASH. CONST. art. I, § 7, unlike the fourth amendment to the United States Constitution, prohibits a police officer's warrantless entry into the residence of a person he has just arrested for a misdemeanor unless the officer possesses specific articulable facts demonstrating a threat to the officer's safety, the possibility that the evidence of the crime for which the person was arrested will be destroyed, or a strong likelihood of escape); State v. Ringer, 100 Wash. 2d 686, 674 P.2d 1240 (1983) (holding that WASH. CONST. art. I, § 7, unlike the fourteenth amendment to the United States Constitution, limits warrantless searches incident to arrest to areas within the arrested person's immediate control and only for the purpose of removing weapons or preventing the destruction of evidence for which the arrest is made); State v. White, 97 Wash. 2d 92, 108, 640 P.2d 1061, 1070 (1982) (holding that, in spite of federal constitutional law to the contrary, WASH. CONST. art. I, § 7 requires exclusion of evidence obtained by arresting a citizen for refusing to comply with an unconstitutional stop-and-identify statute); Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 238, 635 P.2d 108, 112-13 (1981) (holding that, unlike the first amendment to the United States Constitution, WASH. CONST. art. I, § 5 protects the exercise of certain free speech rights in privately owned shopping centers); State v. Simpson, 95 Wash. 2d 170, 177, 622 P.2d 1199, 1204 (1980) (recognizing a right to "automatic standing" to contest illegal searches and seizures under WASH. CONST. art. I, § 7 in cases where such standing would be absent under the fourth amendment to the United States Constitution); State v. Fain, 94 Wash. 2d 387, 392, 617 P.2d 720, 723 (1980) (holding that, unlike the eighth amendment to the United States Constitution, WASH. CONST. art. I, § 14 prohibits as unconstitutionally cruel the sentencing of a "habitual offender" to life imprisonment for three minor felonies).

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments; and then the portion allocated to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time each will be controlled by itself.

When a state court neglects its duty to evaluate and apply its state constitution, it deprives the people of their "double security." It also removes from the people the ability to try "novel social and economic experiments"—which is another important justification for the federal system.

. . . .

We have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart when the reasoning and evidence indicate such was intended and is necessary. . . .

There are many other compelling reasons, of course, for state courts to interpret state constitutional provisions independently from the corresponding provisions, if any, of the United States Constitution, even where the two provisions contain identical language.

A. Differences between the state and federal constitutions

Various courts and commentators have noted the most crucial differences between the federal and state constitutions. For instance, the Washington Supreme Court has often observed that the United States Constitution is a grant of limited power, authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states. The state constitutions, on the other hand, serve as limitations on the otherwise plenary power of state governments to do anything not expressly forbidden by the state constitutions or

6. Id. at 237-38, 635 P.2d at 113 (citations omitted).
federal law. Consequently, state constitutions are typically much longer and more detailed than the federal Constitution, and contain much more specific provisions for the regulation of state governmental conduct.

In addition, the Washington Constitution is a more "political" document than its federal counterpart. The relative ease with which it can be amended, combined with its much more recent authorship, make our state constitution much more reflective of current local values than the federal charter and much more responsive to changes in those values.\(^9\)

Furthermore, state constitutions often protect individual rights that are nowhere explicitly recognized in the United States Constitution. For instance, article 1, section 7 of the Washington Constitution provides express constitutional protection for certain privacy rights of Washington citizens.\(^11\) Article 9, section 1 creates a right of all Washington children to be amply provided with a public education.\(^12\) Article 1, section 24 guarantees an individual right to bear arms, in contrast to the federal Constitution's collective right to bear arms for purposes of maintaining a well-regulated state militia.\(^13\)

**B. Differences between the state and federal courts**

There are also significant differences between the federal and Washington judiciaries.\(^14\) For instance, Washington judges are elected, and are subject to periodic reelection, while federal judges are appointed for life. On the one hand, this gives federal judges potentially more freedom to interpret the national Con-

9. Id.
10. See Howard, supra note 7, at 938-39.
12. WASH. CONST. art. IX, § 1 declares that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders. . . ." That this duty creates a corresponding right of Washington children to be educated was recognized by the Washington Supreme Court in Seattle School Dist. 1 v. State, 90 Wash. 2d 476, 510-14, 585 P.2d 71, 90-93 (1978).
13. See U.S. CONST. amend. II; United States v. Miller, 307 U.S. 174 (1939) (holding that the second amendment right to keep and bear arms was designed only to assure the continuation and effectiveness of state militias); United States v. Oakes, 564 F.2d 384 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978) (purpose of the second amendment was to preserve the effectiveness and to assure the continuation of the state militias); Annot., 37 A.L.R. Fed. 696, 706-07 (1978) (citing numerous cases on the federal constitutional right to bear arms).
stitution in an "activist" manner, since they face less severe personal consequences if their decisions are greatly out of line with popular notions of justice. On the other hand, while an activist role may be personally riskier to an elected judge, it may also be considered more democratically legitimate than activism by unelected, politically unresponsive federal judges. Similarly, the relative ease of amending state constitutions reduces the risk of erroneous or politically unacceptable constitutional lawmaking by state judges once it occurs.\footnote{15}

Superimposed upon these differences are some related constraints on the United States Supreme Court's ability to broadly interpret the United States Bill of Rights. For instance, the United States Supreme Court establishes rules that must be practical and accepted in all areas of the nation, forcing the Court to choose the lowest common denominator of individual rights.\footnote{16} Similarly, the United States Supreme Court must be careful to respect the principles of federalism, one of which requires that the states be left free to try a broad range of social, political, and legal experiments.\footnote{17} Neither of these constraints applies to state judges in interpreting state constitutions.

Many of the factors discussed above suggest that state judges have more freedom than federal judges to interpret their constitutions and to provide a greater degree of protection to individual rights than is possible under the United States Constitution.

C. Early constitutional history

The early constitutional history of the United States leaves no doubt that state bills of rights were never intended to be dependent on or interpreted in light of the United States Bill of Rights. In fact, most of the early states had declarations of rights some years before the United States Constitution was written, and the United States Bill of Rights was finally added to meet demands for the same guarantees against the federal government that people enjoyed against their state governments.\footnote{18} Moreover, Washington, like the vast majority of rela-
tively newer states, copied much of its Declaration of Rights from the constitutions of older states, rather than from the federal charter. It would be illogical to assume that a state constitution that was written before the United States Constitution, or a declaration of rights copied from such a state constitution at a time when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts' interpretations of the federal Constitution. In fact, "[t]he case for uniformity of state constitutions (to be prepared by the Continental Congress) was debated extensively during the months preceding independence and rejected in favor of recommendations that the respective states call conventions to form constitutions satisfactory to themselves. Diversity was the only politically realistic answer."20

It is by now commonplace to note that the state constitutions were originally intended as the primary devices to protect individual rights,21 and the United States Bill of Rights was intended as a secondary layer of protection against the power of a weak central government with very limited powers. Perhaps this is why state courts have often been the first to develop techniques for protecting individual rights22 that the United States Supreme Court later adopted and read into the United States Constitution.23

D. Intent of the framers of the Washington Constitution

When the delegates to the Washington Constitutional Con-

21. See supra note 2.
vention met in Olympia in 1889, their single overriding purpose was probably to pave the way for the creation and admission into the Union of a new and independent state, with all the attributes of sovereignty enjoyed by American states in the late nineteenth century.\textsuperscript{24} Among those attributes were an independent constitution and an independent judiciary to interpret it. Although the Civil War had already proved that states were not sovereign in the ultimate sense, the phrase "state sovereignty" did not yet have the hollow and anachronistic sound that many attribute to it today. In 1889, the United States Bill of Rights did not apply to the states, and federal law was not nearly so predominant in the minds of lawyers and the general population. It is extremely unlikely that the Washington framers, in light of their central purpose in drafting our state constitution and the then current view of states' rights, intended that the federal constitution and courts should have any significant role in interpreting or setting limits on the interpretation of Washington's constitution.

To say that the framer's single overriding purpose was to pave the way for the admission of Washington into the Union is not to deny that they had other purposes as well. One such purpose was undoubtedly to protect the rights of Washingtonians, and to secure for our people the same fundamental rights as were enjoyed by the other citizens of the Union. Does this common general intent mean that the provisions of the Washington Declaration were meant to mirror the corresponding provisions of the United States Bill of Rights?\textsuperscript{25} Given the vast differences in culture, politics, experience, education, and economic status between the Northwestern framers of 1889 and the Eastern framers of the United States Bill of Rights in 1789, and the enormous differences of history and local conditions that separated the two conventions, it is unlikely that the two documents were written by men with much more in common than a shared language and a similar, if vague, democratic philosophy. Thus, even in the relatively few cases where the two documents used identical language, the intent could be quite different. Although it is difficult to say just what phrases like "cruel punishment," "freedom of conscience," or "due process" meant to a Northwestern pioneer in 1889, it is probably safe to say that they did

\textsuperscript{24} Conversation with Justice Hans Linde, Oregon Supreme Court, July 1983.

\textsuperscript{25} For a slightly different version of this question, see Linde, \textit{supra} note 20, at 333.
not mean exactly the same thing that they meant to an aristocratic Virginia plantation owner and slaveholder of 1789.  

In summary, there are many reasons why state courts should avoid the temptation of assuming that the Washington Declaration of Rights contains nothing more than a restatement of the United States Bill of Rights. An independent interpretation and application of the Washington Constitution is not just legitimate, historically mandated, and logically essential; it is, in the words of the Washington Supreme Court, a "duty" that all state courts owe to the people of Washington.  

III. STATE CONSTITUTIONS AND RECENT STATE COURT ACTIVITY

Washington is one of many states that rely on their own constitutions to protect civil liberties. Since the recent retrenchment of the United States Supreme Court in this area, the appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution. A few examples will help illustrate the nature and scope of these decisions.

State constitutional provisions protecting freedom of speech have been given substantial attention by state courts. For example, shortly after the United States Supreme Court held that the first amendment, with its explicit "state action" requirement, does not protect the exercise of certain free speech rights in private shopping centers, the state courts of Washington, California, Connecticut, New Jersey, New York, and Pennsylvania found that their own constitutions protected the exercise of free

26. Id.
30. For a more complete survey of these cases up to the date of its publication, see Note, Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982).
speech rights even in the absence of "state action" as defined by the United States Supreme Court.\(^{32}\)

In balancing freedom of the press against the right to a fair trial, the Washington Supreme Court in *Federated Publications v. Kurtz\(^{33}\)* refused to follow an indistinguishable federal case\(^{34}\) because although it agreed with the result, it disagreed with the reasoning of the United States Supreme Court. Instead, the court relied on article 1, section 10 of the Washington Constitution in holding that the press could be excluded from pretrial hearings to protect a criminal defendant’s right to a fair trial.\(^{35}\) The supreme courts of Oregon and Arizona also refused to follow federal precedent. Unlike Washington, however, they found that their constitutions required news media access to all judicial proceedings.\(^{36}\)

Defendants’ rights against unreasonable searches are also greater under many state constitutions than under the federal Constitution. In *New York v. Belton\(^{37}\)* and *United States v. Ross*,\(^{38}\) for example, the United States Supreme Court held that a police officer may make a valid warrantless search of every part of a vehicle and all containers within it after arresting a vehicle occupant, or upon probable cause. The Washington Supreme Court held in *State v. Ringer\(^{39}\)* that although such searches are not prohibited by the fourth amendment, they violate article 1, section 7 of the Washington Constitution, which


\(^{33}\) 94 Wash. 2d 51, 615 P.2d 440 (1980).


\(^{35}\) 94 Wash. 2d at 58, 615 P.2d at 447-48.


\(^{38}\) 456 U.S. 798 (1982).

\(^{39}\) 100 Wash. 2d 686, 699, 674 P.2d 1240, 1247 (1983).
imposes much greater restrictions on warrantless searches.\textsuperscript{40} The New Hampshire and Rhode Island Constitutions have also been interpreted to impose greater restrictions on warrantless automobile searches, while the Washington Constitution has recently been held to place greater restrictions on warrantless "plain view" searches of arrestees' homes.\textsuperscript{41}

The United States Supreme Court held in United States v. Robinson\textsuperscript{42} that a full body search incident to a lawful arrest is reasonable per se under the fourth amendment. Washington and Hawaii have rejected this approach under their own constitutions and require full body searches to be reasonable and no broader than necessary under the circumstances.\textsuperscript{43} Alaska, California, and Oregon also require that all searches be no broader than necessary under the circumstances.\textsuperscript{44}

Many state courts have granted criminal defendants more protection against the use of illegally obtained evidence under their state constitutions than is currently available under the federal Constitution. For instance, the United States Supreme Court found a stop-and-identify statute unconstitutional in Michigan v. DeFillippo,\textsuperscript{45} but held that the fourth amendment did not require the exclusion of evidence obtained from an arrest made in good-faith reliance on the invalid statute.\textsuperscript{46} The Washington Supreme Court found a similar statute unconstitutional under article 1, section 7 of the Washington Constitution in State v. White,\textsuperscript{47} but held that the state constitution required the exclusion of the illegally-obtained evidence.\textsuperscript{48}

\textsuperscript{40} Wash. Const. art. I, § 7.
\textsuperscript{42} 414 U.S. 218 (1973).
\textsuperscript{45} 443 U.S. 31 (1979).
\textsuperscript{46} Id. at 40.
\textsuperscript{47} 97 Wash. 2d 92, 640 P.2d 1061 (1982).
\textsuperscript{48} Id. at 104, 640 P.2d at 1068.
In *United States v. Salvucci,* the United States Supreme Court held that a defendant charged with a possessory offense has no standing to suppress evidence obtained from an illegal search of premises owned by another person, on the theory that the defendant had no legitimate expectation of privacy in the other person’s property. The Washington Constitution has been interpreted to allow a defendant charged with a possessory offense automatic standing to challenge the admissibility of evidence obtained from illegal searches without regard to who owns the premises searched.

The United States Supreme Court also held in *Harris v. New York* that a statement by a criminal defendant is admissible for impeachment purposes even though the police did not adequately advise the defendant of his rights and obtain a knowledgeable waiver before interrogation commenced. The supreme courts of California, Hawaii, and Pennsylvania have subsequently held that such evidence is not admissible for impeachment purposes under their respective state constitutions.

In *Baldwin v. New York,* the United States Supreme Court held that the sixth amendment does not require a jury trial for petty offenses, which the Court defined as crimes that are punishable by imprisonment for six months or less. Some states, including Washington, Maine, Minnesota, and Oregon, interpret their constitutions to guarantee the right to a jury trial in all criminal prosecutions regardless of the potential punishment.

While the use of peremptory challenges to remove jurors

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49. 448 U.S. 83 (1980).
50. Id. at 95.
52. 401 U.S. 222 (1971).
53. Id. at 225; see Miranda v. Arizona, 384 U.S. 436 (1966).
56. Id. at 73-74.
because of their race was held not to violate the sixth amendment in *Swain v. Alabama,* Massachusetts and California have found their constitutions to bar peremptory challenges on racial grounds. Nor does the sixth amendment guarantee suspects the assistance of counsel relating to preindictment identification by crime victims. The California Supreme Court has held, however, that the California Constitution requires access to legal assistance during preindictment lineups.

The United States Supreme Court has expressly rejected the argument that the death penalty is unconstitutional per se as cruel and unusual punishment under the eighth amendment. The California Supreme Court, however, found the death penalty invalid as both cruel and unusual under the California Constitution.

Recidivist statutes which authorize life sentences for defendants convicted of a few minor felonies were also found not to constitute cruel and unusual punishment under the federal constitution. However, the Washington Supreme Court has found a similar statute to be unconstitutionally cruel under the Washington Constitution.

The United States Supreme Court has upheld congressional restrictions on government payment for therapeutic abortions. Many states have refused to allow constitutional abortion rights to be so restricted. Courts in California, Connecticut, and Massachusetts, for example, have relied on their own constitutions to hold that state health insurance programs must subsidize


63. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972). The people of California reacted to this decision by amending their constitution (Cal. Const. art. I, § 27) to provide that the death penalty did not constitute either cruel or unusual punishment within the meaning of the California Constitution art. I, § 6.


both pregnancy and abortion expenses on equal terms.\textsuperscript{67} Colorado, New Jersey, and Oregon also require state subsidization of abortion expenses pursuant to their own constitutions.\textsuperscript{68}

The federal Constitution guarantees no right to an education.\textsuperscript{69} However, a number of states, including Washington, California, and West Virginia, have recognized that education is a fundamental right under their own constitutions.\textsuperscript{70} Furthermore, numerous states, including Washington, California, Connecticut, and Wyoming, have overturned systems linking educational finances (and hence quality) to property wealth distribution, in spite of federal constitutional precedent to the contrary.\textsuperscript{71}

These examples, while by no means exhaustive, illustrate that it is becoming increasingly common\textsuperscript{72} for state courts to rely on their own constitutions to expand protection for individual rights beyond the level provided by the federal Constitution and courts.

IV. HOW TO APPROACH THE WASHINGTON DECLARATION OF RIGHTS

Once a lawyer or judge decides to engage in independent


\textsuperscript{72} To keep abreast of the latest developments in state constitutional law, see the periodic columns on this issue by Professor Ronald Collins in the National Law Journal.
interpretation of the Washington Constitution, he or she enters a largely uncharted area. Since one of the purposes of independent interpretation is to allow Washington courts to examine their own state's historical mandate, lawyers and judges should avoid the easy and well-worn path of searching for answers in federal cases.

In fact, Justice Linde of the Oregon Supreme Court and several other commentators have urged state courts to consider state declarations of rights before turning to the United States Bill of Rights and the federal cases construing it. Under this approach, if a state court rules as a matter of state law that a right has been violated and must be redressed, it becomes unnecessary to reach the federal constitutional question. This is consistent not only with the dignity and independence of our state courts and constitution, but also with the oft-stated "fundamental principle" that courts should not rule on constitutional issues when a case can be resolved on lesser grounds. The basic purposes of the rule — to promote judicial economy, respect for the authority of the lower law, and a concern for the propriety of unnecessary judicial application of the highest law to invalidate lower laws or governmental actions — all apply equally well in the case of two constitutions, as in the case of a constitution and a statute.

Applying the Washington Constitution first also serves the equally important goal of preserving the power of the Washington courts as ultimate arbiters of the validity of state laws under the state constitution. This is because a decision that a statute, regulation, or governmental action is invalid under the state constitution is not reviewable by the federal courts as long as the state ground is independent of any federal ground and is adequate to support the judgment. In order to enjoy such immunity from review and reversal by the United States Supreme Court, however, the state court opinion must contain an explicit statement that the decision is "alternatively based on bona fide separate, adequate, and independent [state] grounds,"

73. See, e.g., Linde, supra note 18, at 380.
at least in cases in which federal law is also discussed. Where federal cases are cited, the opinion must clearly state that they are considered for guidance only and do not compel the result.

Justice Linde's approach has been criticized. One critic has described it as unrealistic and obsolete in light of the current dominance of the United States Bill of Rights in constitutional litigation, adding that to ignore well-established federal precedent is inefficient and detracts from the legitimacy of state court decisions. The Linde approach, it is argued, could also dampen the lively interaction between state and federal interpretations of the Federal Bill of Rights, and thereby decrease the ability of the United States Supreme Court to select from a wide variety of innovative and well-considered interpretations of the federal charter.

Whether raising or applying the state constitution before, after, or simultaneously with the United States Constitution, lawyers and judges should feel free to adopt modes of analysis that differ from those employed by the United States Supreme Court. Concepts such as "balancing" and "strict scrutiny" were developed by the federal courts to deal with federal constitutional questions. Entirely different approaches may be employed in analyzing the Washington Constitution, either to improve upon imperfect federal doctrines, to create a mode of analysis more suitable to the Washington Constitution and courts, or to avoid the danger that excessive use of federal language may lead the federal courts to conclude that a decision based on state grounds was in reality based in part on federal law and, therefore, reviewable by the federal courts. While United States Supreme Court decisions should be given the same weight and respect as decisions of courts of sister states interpreting similar provisions of their own constitutions, Washington attorneys and courts should not feel compelled to adopt the terms and modes of analysis used by the federal Court, or to explain why they chose not to follow the federal rule in a case involving a similar or even identical provision of our Declaration of Rights. No

76. Michigan v. Long, 103 S. Ct. at 3476.
77. Id.
78. Note, supra note 30.
explanation is necessary.

In addition, one should be neither ignorant of nor intimidated by the case law and doctrines that may be cited by parties opposing independent interpretation. In most cases the problems they present can and should be overcome. For example, a number of Washington cases contain dicta, and sometimes actual holdings, to the effect that provisions of our constitution should be interpreted in exactly the same way that the federal courts interpret the federal Constitution, unless a very good reason for variance can be shown. While the Washington Supreme Court's holdings must of course be followed unless overturned by that court, it is clear from a number of more recent cases that such an approach does not reflect the court's current attitude. Thus, older state supreme court pronouncements should be scrutinized to determine whether they constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid.

Another troublesome line of cases holds that statutes and executive orders are presumed to be constitutional until a challenger proves them unconstitutional beyond a reasonable doubt. This doctrine, which is founded on the separation of powers and a presumption of the honorable intent of executive and legislative officials who have also sworn to uphold the constitution, makes it difficult to apply the Declaration at all, let alone in an independent manner. It seriously hampers the courts' accomplishment of what article 1, section 1 of the Washington Declaration defines as the fundamental purpose of our state's constitution and government: to protect and maintain individual rights. The federal courts, and state courts faced with questions of federal law, have solved this problem by presuming that statutes involving fundamental rights or suspect


81. See cases cited supra in note 4.


classifications are unconstitutional.\textsuperscript{84} and the Washington Supreme Court has taken a similar approach in at least one area of significant state constitutional concern.\textsuperscript{88} Logic and a proper concern for individual freedom strongly support the expansion of this approach to all the fundamental rights guaranteed by the Washington Declaration.

Even in cases not involving fundamental rights or suspect classifications, the "beyond a reasonable doubt" standard of persuasion is too high. It reflects an excessive level of deference to the legislative and executive branches, almost to the point of placing their actions above the constitution.\textsuperscript{88}

Another problem with the beyond a reasonable doubt standard is that it was originally applied to facts, not law.\textsuperscript{87} It was designed to prevent innocent people from being convicted of serious crimes. When applied to legal questions of constitutional validity, however, this rigorous standard has no such noble goal. Rather, it serves to undercut the fundamental rights of Washington citizens, and should therefore be discarded.\textsuperscript{88}

Precedents and doctrines like those discussed above should be vigorously challenged whenever they threaten the effectiveness of independent constitutional interpretation. Some are changing rapidly, while others are more likely to change if lawyers and judges actively scrutinize their public policy implications and their role in the emerging area of state constitutional interpretation.

V. \textbf{How to Analyze the Washington Declaration of Rights}

Once a judge or lawyer has decided to apply Washington's


\textsuperscript{85} Fine Arts Guild, Inc. v. City of Seattle, 74 Wash. 2d 503, 445 P.2d 602 (1968) (holding that certain restraints on state constitutional free speech and press rights are presumed unconstitutional).

\textsuperscript{86} See Wash. Const. art. I, § 29, which states that "[t]he provisions of this Constitution are mandatory."


\textsuperscript{88} For other arguments supporting a lower standard of persuasion in cases involving the constitutionality of statutes, and for an excellent article on this subject in general, see Satter & Geballe, \textit{Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence}, 15 Conn. L. Rev. 57 (1982).
Declaration of Rights and to analyze it from a fresh and totally independent perspective, he or she must decide what the words mean. As noted earlier, the Washington Supreme Court has decided only a handful of recent cases on independent state grounds, so most of the problems faced will not be subject to resolution by reference to any authoritative precedent. The analyst must therefore resort to essentially the same techniques as when construing statutes. A brief discussion of those techniques, applicable to all states but with emphasis on their specific application to the Washington Declaration of Rights, follows.

A. Textual analysis

Most lawyers and judges are familiar with the general maxims of textual analysis as they apply to both statutory and constitutional construction. It is undisputed, for example, that "if a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible." In determining whether a constitutional provision is plain and unambiguous, and in interpreting it when it is not, the words used must be given their common and ordinary meaning. Of course, since the common and ordinary meaning of a given word may have changed over the last century, the judge must also inquire about the accepted meaning of the words at the time the provision was adopted, and this information must often be sought from extrinsic sources. This is especially true of legal terms, the meaning of which must often be sought in court decisions. It is equally axiomatic that every statement in the Washington Constitution must be interpreted in light of the entire document, that all fundamental principles are of equal dignity, and that none may be so construed as to nullify, substantially impair, or avoid giving effect to any other portion of the constitution. Furthermore, the express mention of one thing in a constitution implies the exclusion of things not

92. Id.
mentioned. 94

There are a few differences between statutory and constitutional textual construction, however. For instance, a constitution is an expression of the people's will and depends for its validity on their ratification. 95 Thus, the "common and ordinary meaning" in which the constitution's words must be construed is the meaning they would have had to the vast majority of ordinary voters, rather than to a group of highly educated lawyers and legislators, as may sometimes be considered when construing statutes. For example, the Wisconsin Supreme Court applied this rule in deciding that the state's payment of a workers' compensation claim did not constitute an "appropriation of public or trust money" subject to certain legislative procedures mandated by the Wisconsin Constitution. 96 The court stated that the rule of constitutional construction, where the document was submitted to the voters for adoption, is to determine what the words must have meant to the "general run of voters to whom they were submitted." 97 The court held that the voters probably understood "trust money" to mean public trust money in which the people of the state had some interest, rather than private money held in trust for third parties, even though such private trusts existed at the time the constitution was ratified and were probably well known to lawyers and educated people. 98

Also, the Washington Constitution is not the highest law, and each of its provisions must therefore be construed consistently not only with all of its other provisions, but also with the provisions of the United States Constitution, the federal laws in effect at the time, and the Enabling Act which paved the way for the state Constitutional Convention. This means in part that the Washington Constitution cannot affirmatively impair rights protected by the United States Constitution. It also means that since federal law is superior to state constitutional law, the Enabling Act which authorized the creation of the Washington Constitution set limits on what the delegates to the Constitutional Convention could have expected to do. For instance, section four of the Enabling Act provided, in pertinent part, "[t]hat perfect

96. O'Brien, 186 Wis. at 16, 202 N.W. at 326.
97. Id. at 19, 202 N.W. at 327.
98. Id. at 21, 202 N.W. at 328.
toleration of religious sentiment shall be secured and that no inhabitant of [Washington] shall ever be molested in person or property on account of his or her mode of religious worship." 99 More specifically, the Enabling Act commanded "[t]hat provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all children of [Washington], and free from sectarian control." 100 No portion of the Washington Constitution should be construed in a way inconsistent with such congressional mandates to the Constitutional Convention.

Generally, however, textual analysis of constitutional law is not significantly different than it is for statutory law.

B. Intent of the People

Our constitution begins: "We the people of the State of Washington . . . do ordain this constitution." 101 One commentator has observed that "the object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it." 102 The Washington Supreme Court has itself stated that "the constitution is the expression of the people's will, adopted by them." 103 Therefore, the intent to be determined is that of the people who ratified the document rather than the intent of the handful of men who wrote it. 104 Of course, in many cases the intent of the drafters is the only evidence we have of the people's intent, but there may be cases where even the expressed intent of the man who wrote a given provision should be disregarded, if it can be shown that the voters had a different understanding. The practical effect of this marked difference between statutory and constitutional construction is likely to be small, however.

It should also be noted that "intent" refers not only to the intent of the people in adopting specific provisions, but also to the general intent and philosophy that underlie the entire con-

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100. Id.
104. See Sundquist, supra note 2, at 536.
stitution. When the voters approved the provisions that state that “a frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government,” and “the enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people,” they must have had far more in mind than was contained within the four corners of the constitution itself. It was undoubtedly part of the people’s intent to create a system of government and guaranteed individual rights that conformed with all the then-current principles of democracy, representative government, state sovereignty, and fundamental human rights. This general intent should be considered and honored whenever a party urges a construction of the constitution that appears to violate any of these basic principles, whether expressly stated in the constitution or not.

But how can a judge actually determine the “intent of the people”? A number of factors, including the records of the Constitutional Convention, the text and judicial construction of constitutions from which various Washington provisions were drawn, the history and political climate of frontier Washington, and the early constructions of the provision under review, all deserve consideration.

First, the judge should look to the Enabling Act, which authorized the Constitutional Convention’s work, and the minutes of the convention itself. Unfortunately, however, “Washington is one of the few states in the Union which has not made available in published form the [full] proceedings of its constitutional convention.” The minutes set forth in the Journal of the Washington State Constitutional Convention, while enormously helpful, do not include the actual verbatim debates. To compensate partially for this regrettable omission, the Washington Supreme Court has used newspaper reports to fill in some of the gaps in the official minutes. Fortunately, quite a number

105. Id. at 556-62.
106. WASH. CONST. art. I, § 32.
109. Id. at vii.
110. Yelle v. Bishop, 55 Wash. 2d 286, 293, 347 P.2d 1081, 1084 (1959). In this case, the court looked to newspaper reports of the convention debates to determine that the framers intended the powers of the state auditor to be subject to change and diminution by the legislature.
of newspapers sent correspondents to cover the Constitutional Convention,111 and some of those newspapers printed verbatim reports of the debates on a number of crucial provisions. Similarly, newspaper articles and columns that shortly preceded the ratification vote may be of some help in determining how the people perceived, or were told to perceive, the document on which they were voting.112 Some of the delegates to the Constitutional Convention also wrote articles about the constitution that may help illustrate how they perceived certain provisions.113

Substantial insight can also be gained from the constitutions which the delegates copied from or referred to in drafting the Washington Constitution. It is well known that the delegates

111. The following newspapers, among others, contain reports on the Constitutional Convention, which met in Olympia from July 4 to August 22, 1889. Asterisked titles indicate that reports from those newspapers are assembled at the University of Washington Law Library.

*Anacortes Progress
Asotin Sentinel
*Chehalis Bee
*Chehalis Nugget
Colfax Palouse Gazette
*Daily Oregon Statesman
Morning Oregonian (Portland)
New York Times
New York Tribune
*Oregon Statesman (Salem)
Portland Evening Telegram
*Puget Sound Weekly Argus (Port Townsend)
Seattle Post-Intelligencer
*Seattle Times
Spokane Falls Northwest Tribune
*Spokane Falls Review
Tacoma Daily Ledger
*Tacoma Morning Globe
Territorial Republican (Olympia)
*Vancouver Independent
Walla Walla Weekly Statesman
Walla Walla Weekly Union
*Washington Standard (Olympia)
*Yakima Herald


to the Washington Convention borrowed heavily from the constitutions of other states.\textsuperscript{114} The Washington Declaration of Rights, for example, was largely based on W. Lair Hill’s proposed constitution\textsuperscript{115} and its model, the Oregon Constitution.\textsuperscript{116} The Oregon Constitution in turn borrowed heavily from the Indiana Constitution.\textsuperscript{117} The Washington delegates also appropriated portions of the United States and California Constitutions.\textsuperscript{118} The 1878 Washington Constitution,\textsuperscript{119} which was adopted by the people of the Territory in an abortive bid for early statehood, also had an impact because it still had influential backing at the time of the 1889 Convention.\textsuperscript{120} In addition, Francis Henry, one of the members of the Bill of Rights Committee that drafted the 1889 Declaration, had also been a member of the 1878 Convention’s Bill of Rights Committee.\textsuperscript{121} Besides the pre-1889 case law interpreting these constitutions, guidance may be found in the transcripts of the constitutional conventions of the relevant states. Even where a constitutional provision has independent roots, it is not unusual for state courts to follow the reasoning of a court of a sister state in interpreting a closely similar provision of its own constitution.\textsuperscript{122}

It should be repeated, however, that even where the Washington Constitution contains language identical to a provision of the United States or some other state constitution, it is quite possible that the intent of the framers was different from that of

\textsuperscript{114} See, e.g., \textit{Journal}, supra note 108, at v; A. Beardsley, supra note 19, at iv.


\textsuperscript{116} A. Beardsley, \textit{supra} note 19, at v.

\textsuperscript{117} Id.

\textsuperscript{118} Id. at v-x.

\textsuperscript{119} For a complete text, see \textit{Washington’s First Constitution, 1878, and Proceedings of the Convention} (E. Meany & J. Condon ed. 1919) (hereinafter cited as \textit{Washington’s First Constitution}).


\textsuperscript{122} See, e.g., Biggs v. Department of Retirement, 28 Wash. App. 257, 259, 622 P.2d 1301, 1303, \textit{review denied}, 95 Wash. 2d 1019 (1981). In Biggs, the court of appeals looked to a similar provision of the Indiana Constitution to decide that the Governor’s appointment of the Director of the Department of Ecology was not an “appointment vested in the legislature” within the meaning of art. III, § 13 of the Washington Constitution, even though Senate confirmation was necessary.
the framers of the other constitution. Consequently, no interpretation of such constitutional provisions by the courts of other states or the federal judiciary is binding on the Washington courts. Very few provisions of the Washington Declaration contain precisely the same language as the corresponding provisions of the federal constitution. Some of the most important state provisions are worded almost totally differently from the federal provisions, including the sections that guarantee the freedoms of speech and press,\textsuperscript{123} freedom of religion,\textsuperscript{124} right to privacy (search and seizure),\textsuperscript{125} right to bear arms,\textsuperscript{126} and equal protection.\textsuperscript{127} Even the provisions that appear to be generally similar often contain subtle but crucial differences in language. For instance, the Washington Constitution protects its citizens from any "cruel" punishments, while the United States Constitution apparently prohibits only punishments that are both "cruel and unusual."\textsuperscript{128} Similarly, the Washington Constitution protects Washingtonians from being compelled to give "evidence" against themselves, while the United States Constitution only forbids compelling a citizen to be a "witness" against himself.\textsuperscript{129} It is reasonable to assume that the men who drafted the Washington Constitution, many of whom were lawyers,\textsuperscript{130} were well aware of these linguistic differences and their likely effect on the future legal interpretation of their work, and that they therefore intended to create such differences. Ordinary rules of textual and constitutional interpretation,\textsuperscript{131} as well as the logic of federalism,\textsuperscript{132} require that meaning be given to the differences in language between the Washington and United States Constitutions, and that even identically worded provisions be interpreted independently\textsuperscript{133} unless a very good historical justification for assum-

\textsuperscript{123} Compare U.S. Const. amend. I with Wash. Const. art. I, § 5.
\textsuperscript{124} Compare U.S. Const. amend. I with Wash. Const. art. I, § 11.
\textsuperscript{125} Compare U.S. Const. amend. IV with Wash. Const. art. I, § 7.
\textsuperscript{126} Compare U.S. Const. amend. II with Wash. Const. art. I, § 24.
\textsuperscript{127} Compare U.S. Const. amend. XIV with Wash. Const. art. I, § 12.
\textsuperscript{128} Compare U.S. Const. amend. VIII with Wash. Const. art. I, § 14.
\textsuperscript{130} Twenty-seven of the seventy-five delegates were lawyers or had studied law, including three of the seven members of the Preamble and Bill of Rights Committee. See the biographies of the delegates contained in Journal, supra note 108, at 465-90; B. Parkany, supra note 121, at 3.
\textsuperscript{131} See supra text accompanying notes 89-100.
\textsuperscript{133} See Young v. Konz, 91 Wash. 2d 532, 539, 588 P.2d 1360, 1364 (1979) (holding
ing that the framers intended an identical meaning can be found.

The Washington Supreme Court has also stated that "in determining the meaning of a [state] constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered." Similarly, "[i]t is a rule of statutory, as well as constitutional construction that the antecedent mischief may be considered, also the history and circumstances of the legislative enactment."  

A few examples illustrate how history can shed light on specific evils the Declaration may have been intended to correct, as well as the political philosophy behind its adoption, and thus on how certain provisions should be interpreted.

Portions of Washington Territory suffered two periods of martial law, one during an Indian uprising and one prompted by anti-Chinese riots some thirty years later. The Governor made the first declaration of martial law in 1856 solely to suspend the right of habeas corpus for a handful of suspected Indian sympathizers illegally held by the military. No military justification for martial law existed, since the Indians had already been defeated in the affected counties before the decree went into effect. The imposition of martial law resulted in some egregious violations of individual rights, as well as several violent confrontations between judicial and executive authorities. The Territory's Chief Justice sent a posse to the Executive Office to arrest the Governor (they were ejected by a group of loyal soldiers and clerks), and the Governor retaliated by arresting the Chief Jus-

that federal precedent regarding due process was not controlling with regard to state due process, even though the state and federal due process clauses were identically worded).

134. Yelle v. Bishop, 55 Wash. 2d 286, 291, 347 P.2d 1081, 1084 (1959). See also State ex rel. Evans v. Brotherhood of Friends, 41 Wash. 2d 133, 146, 247 P.2d 787, 795 (1952) ("[c]ontemporary facts and circumstances unquestionably should and must be accorded great weight and serious consideration" in state constitutional interpretation); Sears v. Western Thrift Stores, 10 Wash. 2d 372, 382, 116 P.2d 756, 761 (1941), overturned on other grounds, Remington Arms Co. v. Skaggs, 55 Wash. 2d 1, 345 P.2d 1085 (1959) ("[t]he history of the times and the circumstances under which the provision was adopted may be considered in the [state constitutional] construction").

135. State ex rel. Pub. Util. Dist. No. 1 v. Wylie, 28 Wash. 2d 113, 127, 182 P.2d 706, 714 (1947); see also Bowen v. Department of Social Sec., 14 Wash. 2d 148, 150, 127 P.2d 682, 684 (1942) ("one of the basic factors in the interpretation of a constitution is the historical background which provoked its various provisions").

136. W. Airey, supra note 120, at 319-386.

137. Id. at 322.
tice and holding him at a local fort for approximately two weeks.\textsuperscript{138} Thereafter, judges who dared to hold court were forced to assemble scores of bailiffs to protect them against the Governor's troops.\textsuperscript{139}

The second declaration of martial law occurred just three years before the 1889 Constitutional Convention. The official purpose of the declaration was to restore order and to protect the rights of whole communities of Chinese laborers who were being forcibly expelled from Washington by lawless bands headed, in the largest such incident, by Seattle's police chief.\textsuperscript{140} It should be noted, however, that at least one of the men who urged the Governor to declare martial law hoped merely to suspend the right of the civil authorities to arrest and try five soldiers accused of gunning down several members of an anti-Chinese mob.\textsuperscript{141} Whatever the cause of martial law, Seattle residents experienced approximately two weeks of military control of civil government, characterized by curfews, military passes, court-martials, and military edicts banishing citizens from their homes.\textsuperscript{142}

One of the clearest examples of an "antecedent mischief" that the constitution was designed to correct is reflected in article 1, section 24 of the Washington Constitution, which provides:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

This limitation on the right to bear arms, which is otherwise much broader than the collective right protected by the second amendment to the United States Constitution, was in direct response to the use of armed detectives to brutally repress labor strikes in Washington mines.\textsuperscript{143} A knowledge of the history of those strikes and the means used to repress them would obviously be valuable in interpreting this rather vague limitation on

\textsuperscript{138} Id. at 330-31.
\textsuperscript{139} Id. at 335. For somewhat different versions of these events, see C. Reinhart, History of the Supreme Court of the State of Washington 70-73 (1930); D. Johansen & C. Gates, Empire of the Columbia: A History of the Pacific Northwest 310-11 (1957).
\textsuperscript{140} See, e.g., W. Airey, supra note 120, at 362.
\textsuperscript{141} Id. at 373, 380.
\textsuperscript{142} Id. at 377.
\textsuperscript{143} See, e.g., Journal, supra note 108, at 513; W. Airey, supra note 120, at 456.
a fundamental right.

The general political climate of the time may also shed some light on the intent of the people and their delegates. The decade preceding statehood was a time of considerable conflict and growth for Washington Territory, and the turbulence of those years gave the people and delegates an outlook on government that may well have been unique in the history of state constitution making.

The most significant development of the 1880's in Washington was undoubtedly the construction of an extensive network of railroads, culminating in the completion of the northern branch of the transcontinental railroad with a terminus in Tacoma. It would be difficult to overestimate the social, economic, and political consequences of the railroad expansion. Between 1880 and 1890 the population of the Territory grew from about 75,000 to almost 350,000, an increase of almost 500 percent. Almost overnight, an area that had recently been a wild frontier underwent rapid urbanization. An economic boom of unprecedented proportions accompanied the explosive population growth.

As might be expected, however, the boom of the 1880's was accompanied by serious problems. Large segments of the population developed bitter resentments toward the railroads and other large corporations. The causes included both monopolistic practices, such as price gouging of Washington farmers who had no other means of getting their products to market, and political abuses, such as extorting land and subsidies from the federal, state, and local governments as a condition of building railroad lines. Even more serious was the widespread belief that the corporations controlled legislators and government officials through bribes and other corrupt practices, which led to a general distrust of representative government. Similarly, substantial labor unrest and a xenophobic attitude toward foreign workers all contributed to the political climate of the day.

146. See D. Johansen & C. Gates, supra note 139, at 395.
147. Id. at 383-99.
149. See M. Avery, supra note 148, at 191-220.
The general frustration and discontent of the populace manifested itself in a number of ways. The most significant was the development of a broad-based, if somewhat diffuse, reformist or populist movement. Although the populists did not form their own political party until shortly after statehood, their ideas were already widespread by 1889. Many of the candidates for delegate to the Constitutional Convention ran on populist platforms, and those who were elected managed to include a number of populist provisions in the constitution.

Among the tenets of populist philosophy were a strong distrust of corruptible legislatures and the corporations that were believed to corrupt them, and a corresponding preference for more direct forms of democracy. The populists wished to protect personal, political, and economic rights from both the government and corporations, and they strove to place strict limitations on the powers of both. To these ends the populists advocated such reforms as a graduated income tax, mandatory government ownership of railroads and communications facilities, the replacement of the political patronage system with a professional civil service, the establishment and protection of unions, the prohibition of state officials from accepting free passes from the railroads, and the exemption of a certain portion of each person's property from seizure for the payment of debts. Some of these and other populist proposals found their way into the constitution. For example, many constitutional provisions that bear the mark of populist thinking are found throughout article 12 of the constitution, which deals with private corporations. A general understanding of the populist movement would be very helpful in interpreting some of these provisions.

There were, of course, fierce political debates in the 1880's that were only peripherally related to the populist movement. For example, women's suffrage and prohibition were hotly contested issues of individual rights that were brought forcefully to the attention of the delegates throughout the Convention. In addition, the period was characterized by a strong sectional split

151. See J. Fitts, supra note 150, at 8-10; M. Avery, supra note 148, at 200.
152. See M. Avery, supra note 148, at 199-200.
153. See JOURNAL, supra note 108, at vi.
154. W. Airey, supra note 120, at 469.
between Eastern Washingtonians and those from the Puget Sound region that often overshadowed party differences.\textsuperscript{155}

Still another potentially fruitful area of inquiry would be to explore the judicial system and procedures known to the lawyers who constituted the largest single occupational group on the Bill of Rights Committee and in the Convention as a whole.\textsuperscript{156} The rough, informal, and sometimes anarchic nature of territorial justice\textsuperscript{157} may well have influenced the constitutional provisions on judicial procedure and rights. For example, in territorial days the trial judge who decided a case also sat on the appellate court that reviewed his decision, since the Territorial Supreme Court consisted of the territory's three trial judges.\textsuperscript{158} Similarly, the pool of potential jurors in some counties was so small that some of the grand jurors who indicted a defendant sometimes had to serve on the petit jury that heard his case.\textsuperscript{159} In at least one instance a grand juror had to be specially excused from service long enough for his fellow grand jurors to indict him.\textsuperscript{160} Court-ordered executions were sometimes thwarted by the plots of nonjudicial officials,\textsuperscript{161} while others were carried out prematurely by lynch mobs.\textsuperscript{162} On a more general level, a useful knowledge of constitutional and judicial theory as an 1889 lawyer might have understood it can be gleaned from the legal treatises and textbooks of the era.\textsuperscript{163}

Determining the impact on the Declaration of Rights of any particular historical event or problem is beyond the scope of this article. Some of them may have had no impact, while many other historical and political factors undoubtedly influenced the document. The point is merely that the history and political climate of the times can provide valuable clues to the intent behind many of the broad provisions of the Declaration of

\textsuperscript{155} Id. at 446-49.

\textsuperscript{156} C. Barton, Barton's Legislative Handbook and Manual of the State of Washington, 1889-1890, at 169 (1890).


\textsuperscript{158} W. Airey, supra note 120, at 276; Beardsley & McDonald, supra note 156, at 79.

\textsuperscript{159} J. Swan, supra note 157, at 295, 300.

\textsuperscript{160} Beardsley & McDonald, supra note 157, at 72.

\textsuperscript{161} W. Airey, supra note 120, at 285.

\textsuperscript{162} Beardsley & McDonald, supra note 157, at 71.

\textsuperscript{163} See, e.g., T. Cooley, Constitutional Limitations (5th ed. 1883).
Rights, both by illustrating the evils they were intended to correct and by revealing the political and philosophical orientation of the people. An example of this type of analysis is found in *State ex rel. Weiss v. District Board of School District No. 8*, in which the Wisconsin Supreme Court referred to the history of religious persecution in the countries from which many Wisconsin settlers came, and the need to attract new immigrants from such countries, in deciding that the Wisconsin Constitution prohibited the reading of the King James version of the Bible in public schools.\(^{164}\)

Finally, the early legislative construction of a provision should be given great weight, especially if it extended over a long period of time.\(^{165}\) Similarly, early constructions by the courts and executive branch are relevant to the intent of various constitutional provisions. Of course, such constructions are more helpful the sooner they occurred after the adoption of the constitution; constructions that occurred after the United States Bill of Rights was applied to the states would be somewhat suspect both because of the length of time that had elapsed since the adoption of the Washington charter and because of the difficulty of telling how much a reading of the United States Constitution influenced the interpretation of the corresponding Washington provision.

### C. Current values

Sometimes the text of the constitution is so ambiguous or unclear, and the intent of the people is so obscure or so inappropriate in light of modern conditions and values, that one is left with little practical objective guidance in interpreting a specific provision. In *State v. Brunn*,\(^{166}\) for example, the Washington Supreme Court considered the Declaration's provision on double jeopardy in the following terms:

Candidly speaking, it is most unlikely that those who drafted our constitution, and the people who adopted it, greatly concerned themselves with the constitutional provision under dis-

\(^{164}\) *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 197-98, 203, 44 N.W. 967, 974-77 (1890).


\(^{166}\) 22 Wash. 2d 120, 154 P.2d 826 (1945).
cussion, or had any clear or fixed idea of its technical meaning. It is more likely that the provision was inserted in Article 1, entitled "Bill of Rights," [sic] because it was in the Federal bill of rights and had been included in the constitutions of practically all of the states that had theretofore entered the Union. 167

In addition, some concepts held by the drafters of the Constitution, reflected in its provisions, may no longer be acceptable to our society, and may therefore be unenforceable. As one commentator stated, "few persons would commit the Court to following the framers' views of all social issues—should we, for example, follow the framers' views of indentured servitude...?" 168 Various Washington cases have recognized that constitutional "law is not a static concept and it expands to meet the changing conditions of modern life." 169 In State ex rel. Evans v. Brotherhood of Friends, 170 for example, Washington's highest court quoted with approval the following passage:

"Constitutions are designed to endure through the years, and constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life..."

"'Although the meaning or principles of a constitution remain fixed and unchanged from the time of its adoption, a constitution must be construed as if intended to stand for a great length of time, and it is progressive and not static. Accordingly, it should not receive too narrow or literal an interpretation, but rather the meaning given it should be applied in such a manner as to meet new or changed conditions as they arise.'" 171

The Washington Constitution, then, is "organic not only in the sense of being the fundamental law, but as a living thing designed to meet the needs of a progressive society." 172

Many judges are understandably reluctant to refer to their understanding of current social values and needs in construing a

167. Id. at 139, 154 P.2d at 835.
170. 41 Wash. 2d 133, 247 P.2d 787 (1952).
171. Id. at 147, 247 P.2d at 795-96 (quoting State ex rel. Linn v. Superior Court, 20 Wash. 2d 138, 145, 146 P.2d 543, 547 (1944)).
172. State ex rel. Linn v. Superior Court, 20 Wash. 2d 138, 146, 146 P.2d 543, 547 (quoting Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court, 273 Ky. 674, 677, 117 S.W.2d 918, 920 (1938)).
constitutional provision. One line of Washington cases, as well as a sizeable subset of public and scholarly opinion, declare that judges should not substitute their own views, or even those of transient majorities, for those of the people who wrote the constitution in 1889.\textsuperscript{173}

One answer to this dilemma may be found in a recent article by G. Edward White.\textsuperscript{174} White suggests that both history and practical necessity require a certain amount of "judicial lawmaking" in the constitutional realm, and that such lawmaking is not really oppressive or undesirable. Under this view,

the art of judging, where constitutional issues are at stake, is now linked not so much to a persuasive articulation of "first principles" as to a persuasive articulation of deeply felt and widely shared values. Legal principles, like the principles of privacy and autonomy, are not now regarded as immutable, if mystical axioms, but as manifestations of values currently taken with great seriousness.\textsuperscript{175}

The primary defense against "bad judges" imposing their personal views on an unwilling majority, according to White, is the fact that "[t]oo 'immoral' or too 'unjust' an interpretation of the Constitution by the Court is simply not accepted by the public. It is not, to use a term from the contemporary debate, invested with legitimacy."\textsuperscript{176} White goes on to state that "[a] judgment by segments of the public that it will not follow a Court's decision is the equivalent of a judgment by segments of the public that it will vote a legislator out of office."\textsuperscript{177}

A related and more subtle check on the "bad judge" is that judges must give a written justification for their decisions that conforms at least superficially with both popular notions of

\textsuperscript{173} For some Washington cases standing for the propositions that constitutions should be construed consistently over time, that their meaning is fixed at the time of adoption, and that changing values and social and economic conditions do not justify new interpretations, see State \textit{ex rel.} Munro v. Todd, 69 Wash. 2d 209, 214, 417 P.2d 955, 958 (1966); State \textit{ex rel.} Lemon v. Langlie, 45 Wash. 2d 82, 110, 273 P.2d 464, 479 (1954); State \textit{ex rel.} Banker v. Clausen, 142 Wash. 450, 454, 253 P. 805, 807 (1927) (quoting 6 R.C.L. 49).

\textsuperscript{174} White, \textit{supra} note 168. This article contains an excellent general discussion of some of the justifications for and limits on judicial activism in constitutional interpretation. \textit{But see} Downs, \textit{Judges, Law-making and the Constitution: A Response to Professor White}, 63 \textit{Judicature} 444 (1980). \textit{Cf.} White, \textit{Letter to the Editor}, 63 \textit{Judicature} 455 (1980) (partial reply to Mr. Downs' criticisms).

\textsuperscript{175} White, \textit{supra} note 168, at 171.

\textsuperscript{176} \textit{Id.} at 172.

\textsuperscript{177} \textit{Id.} at 173.
morality and justice and current law. Furthermore, judges know that their opinions in one case may come back to haunt or even control them in future cases. White concludes that the need to justify judicial decisions and the possibility of noncompliance are sufficient checks. Subject to such limitations, courts must be able to divine and articulate deeply felt and widely shared values that are held by the public at large, as the United States Supreme Court did in Brown v. Board of Education, when they construe a living constitution.

Whatever the theoretical justifications for considering current conditions and values, the Washington Supreme Court has done so explicitly and implicitly on a number of occasions. For example, in Alderwood Associates v. Washington Environmental Council, the court considered the changing role of the shopping center in modern society, as well as the emphasis currently placed on the values of free speech and initiative, in deciding that shopping center owners must permit the gathering of initiative signatures on their property.

Thus, Washington judges should feel free to consider current values and conditions as one factor in interpreting our state constitution. Such considerations should play a part even when the text of the document and the intent of its drafters are clear. Neither the voters of 1889 nor the Washington Supreme Court of 1984 intended our twentieth century society to be rigidly and permanently locked into nineteenth century conceptions of justice and individual liberty.

VI. Conclusion

The Washington Declaration of Rights is the primary guarantor of the rights of Washingtonians. Therefore, Washington judges have both a right and a duty to examine it first whenever a state law, regulation, or action is alleged to violate the fundamental rights of a Washington citizen, and to interpret it in the truly independent manner that history, logic, and the principles of federalism require. Obviously, independent interpretation is more difficult than simply resorting to the wealth of established federal constitutional precedent and assuming that it also

178. See id. at 172.
180. 96 Wash. 2d at 239-40, 244-46, 635 P.2d at 113-14, 116-17.
applies to the Washington Constitution. In exchange for this extra effort, however, we will be rewarded with a revitalized state constitution supported by a growing body of independent case law that will provide the people of Washington with the high level of individual freedom mandated by the founders of our state. Furthermore, the definition and protection of many of our citizens' most fundamental rights would once again be largely in the hands of Washingtonians, as originally intended, and less subject to interpretation by the United States Supreme Court, which is necessarily confined to the "least common denominator" approach to fundamental human rights. These are not only desirable goals, they represent a return to some of the "fundamental principles" that the Washington Constitution reminds us are essential to the security of individual rights and the perpetuity of free government.\textsuperscript{181}

\textsuperscript{181} Wash. Const. art. I, § 32.