Toward a Theory of the Washington Constitution*

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> You are, then, to conceive the constitution in the formal sense as the nucleus of a set of ideas. Surrounding this and overlapping it to a greater or less extent is constitutional law . . . . Outside this, finally, but interpenetrating it and underlying it is constitutional theory, which may be defined as the sum total of ideas of some historical standing as to what the constitution is or ought to be.[1]

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I. INTRODUCTION

Perhaps the most important development in American constitutionalism in the past several decades is the emergence of a "new" judicial federalism.[2] We

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1. EDWIN S. CORWIN, *Constitution v. Constitution Theory*, *in* AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN 101 (Alpheus T. Mason & Gerald Garvey eds., 1964).

2. An excellent overview of the literature on the development of new judicial federalism is found in Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law, 1980-1989*, 20 RUTGERS L.J. 1093 (1989). For a general overview of the differences between the federal constitution and state constitutions and the development of new judicial federalism, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997) [hereinafter Tarr, *New Judicial Federalism*]; G. Alan Tarr,

have always lived in a system of dual constitutionalism. Chief Justice John Marshall recognized this fact in 1833 by declaring that the restrictions in the Bill of Rights applied only to the federal government and not to states.[3] While state constitutions frame state governments and proclaim rights for their citizens, the Federal Constitution empowers a national government and creates rights applicable against that government. Although the Fourteenth Amendment altered the scope and application of the Bill of Rights, it did not lessen the importance of state constitutions in framing and restricting state governments. This dualism was one of the structural protections of liberty intended by the framers. To quote Madison:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.[4]

Despite our long history of constitutional dualism, Americans remain largely ignorant about state constitutions and state constitutional law. Leading constitutional commentaries and texts focus almost exclusively on the federal constitution, and many Americans do not even realize that their state has a constitution.[5] During the past two decades, however, state constitutionalism has taken on new significance as many state high courts have turned to their state

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Understanding State Constitutions, 65 TEMP. L. REV. 1169 (1992); Robert F. Williams, Foreword, *Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

3. In *Barron v. Mayor of Baltimore*, Marshall wrote: "Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated." 32 U.S. (7 Pet.) 243, 247 (1833). Justice Marshall further stated that limitations on the powers of the federal Constitution must be understood as restraining the power of the general government and not the states. *Id.*

4. THE FEDERALIST No. 51, at 264 (James Madison) (Buccaneer Books 1992). A more recent recognition of this structural protection is discussed in *Printz v. United States*:

> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

521 U.S. 898, 921 (1997) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

5. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 15 (1991). Fifty-two percent of Americans surveyed knew their state had a constitution, eleven percent believed that it did not, and thirty-seven percent did not know. *Id.*

charters to protect or expand individual rights and liberties not protected under federal law. The Vermont Supreme Court's decision to require the state to provide spousal benefits to same-sex partners under the Common Benefits Clause of Vermont's Constitution is only one recent example underscoring the political ramifications of this trend. Writing for that court, Chief Justice Amestoy explained:

> In considering this issue, it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is altogether fitting and proper that we do so. Vermont's constitutional commitment to equal rights was the product of the successful effort to create an independent republic and a fundamental charter of government, the Constitution of 1777, both of which preceded the adoption of the Fourteenth Amendment by nearly a century.
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> . . . [T]he Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters.[6]

Given the politics surrounding rights controversies, it is not surprising that the emergence of an independent constitutional jurisprudence at the state level has generated a good deal of debate and exposed state high courts to a new level of public scrutiny and criticism.[7]

The Washington Supreme Court has been at the forefront of the

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6. Baker v. State, 744 A.2d 864, 870 (Vt. 1999). The Common Benefits Clause is found in the Vermont Constitution. VT. CONST. ch. I, art. 7. The Vermont Supreme Court's decision follows a similar decision by the Supreme Court of Hawaii in *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (holding that same-sex couples have an equal protection right to marry under the Hawaii Constitution).

7. For a discussion of the debates and critiques of new judicial federalism, see James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459 (1996); Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985). Some of the better known defenses of recent developments in state constitutional interpretation include Daniel J. Elazar, *A Response to Professor Gardner's The Failed Discourse of State Constitutionalism*, 24 RUTGERS L.J. 975 (1993); Earl M. Maltz, *James Gardner and the Idea of State Constitutionalism*, 24 RUTGERS L.J. 1019 (1993); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 456 (1996); Tarr, *New Judicial Federalism*, *supra* note 2.

development of judicial federalism, and its recent decisions demonstrate both the promise and problems of crafting an independent state constitutional jurisprudence.[8] As in other states, the initial excitement of discovering that the state constitution is an independent source of rights has given way to the task of interpreting its provisions and justifying deviations from more familiar federal precedents. In particular, the Washington experience illustrates why state courts must take more seriously the need to develop general theories of state constitutions as a guide to the interpretive enterprise.

Constitutional interpretation must proceed from more generalized theories of a particular constitution's goals, purposes, and structure (even if that theory is never fully articulated by the interpreting judge or lawyer). The United States Supreme Court's development of a preferred freedoms jurisprudence since the 1930s, for example, was linked to an outpouring of constitutional theorizing aimed at justifying, explaining, and critiquing the Court's development of constitutional law in this area.[9] State constitutional interpretation also requires judges to engage in the process of discovering and remaking theoretical narratives that can link the present with the past and future of constitutional law in their states. Unfortunately, and in stark contrast to what has occurred at the federal level, theorizing about state constitutions has been nearly nonexistent.[10] As one commentator recently noted: "Not withstanding the highly touted turn toward state constitutional discourse of the past two decades[,] . . . . [s]tate constitutional theory remains a rather barren, mundane field, with little substantive controversy, creative thinking, or paradigm-shaking."[11]

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8. For a discussion of the Washington Supreme Court's development of an independent constitutional jurisprudence, see Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992). *See also* Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall: *"Articulable, Reasonable and Reasoned" Approach?*, 60 ALB. L. REV. 1871 (1997); Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington State*, 21 SEATTLE U. L. REV. 1187 (1998); Symposium, *The Washington Constitution*, 8 U. PUGET SOUND L. REV. 157 (1985); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1015-30 (1997).

9. For a general discussion of the connection between constitutional theory and developments in constitutional law during this period, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996). An excellent discussion of the current crisis in constitutional theory at the federal level is found in LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

10. The best guide to constitutional theory at the state level is G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998). *See also* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998).

11. Rodriguez, *supra* note 10, at 271.

This article examines the reason for this failure at the state level and represents an initial effort toward developing an independent theory of the Washington State Constitution. In Part II, this article examines the political and historical context of the evolving debate over interpreting state constitutions. In particular, this article considers how political criticism has distracted state high courts from the task of articulating state constitutional theory and forced them to justify deviations from federal constitutional law. In Part III, this article sketches the development of judicial federalism in the state of Washington and how the Washington high court reacted to criticism of its decisions. This article argues that concerns about legitimacy have undermined the development of an autonomous theory of the Washington Constitution. In Part IV, it turns to the process of constructing a theory of state constitutions, and considers how it might differ from theories of the federal constitution. Although a full-blown theory of the Washington Constitution is well beyond the scope of this article, it considers four major features that will shape any such theory and discusses their implications for state constitutional law.

II. THE NEW JUDICIAL FEDERALISM AND CONSTITUTIONAL THEORIZING

It is appropriate to begin by contrasting constitutional theory at the federal level with what is occurring at the state level. At the risk of over-simplification, contemporary constitutional theorizing in the United States has been dominated by a simple question since the 1930s: when is it legitimate for courts to strike down the enactments of the democratically elected branches? Or to put the question in the terms of Alexander Bickel, the father of modern constitutional theory: how do we resolve the "Counter-Majoritarian Difficulty" raised by the power of judicial review?[12] Mainstream constitutional theorists all agree on one

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12. Bickel states the problem in the following way:

> The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of the "people," the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. . . . But the word "people" so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR

response to this question: courts should invalidate the actions of the democratic branches when those actions violate the Constitution. The debate, of course, centers on the meaning and purpose of the constitution. For example, John Hart Ely approaches the problem of constitutional interpretation by focusing on the democratic character of the Federal Constitution and the "democracy reinforcing" role of courts.[13] Ronald Dworkin, by contrast, relies on the concept of constitutional integrity rooted in the protection of fundamental individual rights and the courts' unique institutional capacity for protecting such rights against majoritarian processes.[14] Meanwhile, Bruce Ackerman recasts the problem of constitutional interpretation as one of historical continuity, explaining the "dualist" nature of the constitution and the role of courts in enforcing both formal and informal amendments to our constitutional tradition.[15] Similarly, Robert Bork points to the linguistic and intentional integrity of the Constitution and the need for judges to adhere to its original purposes rather than to impose their own views of good public policy on the elected branches.[16] For all of these theorists, however, the question of judicial interpretation—or how judges should construe particular phrases or clauses of the Constitution—is a secondary question answered by appeal to a more general theory about what the Constitution is and the substantive values that it embodies. This point bears emphasizing: at the federal level, questions of judicial legitimacy and interpretive approach are resolved by appeals to substantive theories of constitutional meaning and value.

By contrast, constitutional theorizing at the state level, to the extent it occurs at all, has centered on a very different set of concerns. Rather than the relationship between courts, the elected branches, and constitutional values, theorizing at the state level has tended to focus on the relationship between state courts and federal courts. Indeed, the recent interest in state constitutions can be traced back to a speech, delivered more than twenty years ago by former Justice Brennan, entitled "State Constitutions and the Protection of Individual Rights."[17] In that speech, Brennan applauded the judicial doctrine of incorporation and the Fourteenth Amendment's absorption of the Bill of

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OF POLITICS 16-17 (2d ed. 1986).

13. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

14. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

15. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

16. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

17. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

Rights.[18] At the same time, however, Brennan urged state judges to look past those federal protections toward the liberties protected in their own state charters.[19] The rights protected by state constitutions may extend well beyond the boarders covered by federal guarantees, even when the two documents employ analogous language.[20] Brennan argued that decisions of the United States Supreme Court "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[21]

Brennan's call ushered in a renaissance in state constitutional law. One state high court after another began the process of explicating the language and history of their constitutions to find new rights.[22] Today, this once "new judicial federalism" is no longer new but rather an accepted feature of our jurisprudence.[23] State courts now regularly rely on their own constitutions to protect individual liberties in ways that go well beyond the "federal floor" provided by the Fourteenth Amendment.[24] According to one study, state courts used their own constitutional provisions to afford greater protection than those available under the Federal Constitution in only ten cases between 1950 and 1969, but more than 300 cases between 1970-1986.[25] Moreover, in many of these cases—cases involving school finance, the right to privacy, rights of the accused, equal protection—state courts have created sweeping new rights initiatives in areas where the United States Supreme Court refused relief under the Federal Constitution.[26] Additional evidence of the acceptance of this new

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18. Brennan, *State Constitutions*, *supra* note 17, at 493-95.

19. *Id.* at 503.

20. *Id.* at 495.

21. *Id.* at 502.

22. *See generally supra* note 2.

23. *See* Ronald K.L. Collins, Foreword, *The Once 'New Judicial Federalism' and Its Critics*, 64 WASH. L. REV. 5 (1989).

24. In *Pruneyard Shopping Center v. Robins*, the United States Supreme Court held that state courts may construe *state law* to authorize greater protection of individual rights than the minimal rights required by the Federal Constitution so long as those rights do not conflict with other federally protected rights. 447 U.S. 74, 81 (1980).

25. Ronald K. L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS: J. FEDERALISM 141, 142 tbl.2 (1986); Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 16 PUBLIUS: J. FEDERALISM 111, 111 (1986).

26. For a discussion of state court developments in the wake of U.S. Supreme Court refusals see BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991); Russell S. Harrison & G. Alan Tarr, *School Finance and Inequality in New Jersey*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 178 (G. Alan Tarr ed., 1996); Symposium, *Investing in Our Children's Future: School Finance Reform in the '90s*, 28 HARV. J. ON LEGIS. 293 (1991); G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New*

judicial federalism has emerged from the growing number of casebooks and courses on state constitutional law in law schools to the burgeoning scholarly literature on this subject.[27] Indeed, even undergraduate textbooks on the American Constitution can now be considered incomplete if they do not include sections on the development of the new judicial federalism.[28]

If judicial federalism is now an established feature of our jurisprudence, it nevertheless remains a very controversial one.[29] The nature of this controversy is worthy of comment. First, as noted earlier, dual constitutionalism has always been a feature of government in the United States. State constitutions and charters of rights preexisted the federal document.[30] Moreover, there is little doubt that the nineteenth century system envisioned state constitutions as the primary protection for individual rights. It was state governments—not the national government—that possessed the general police powers and posed the greatest threat to those rights.[31] Nevertheless, while there are isolated examples of nineteenth and early twentieth century state courts using state constitutional provisions to protect citizens rights, such cases are relatively rare.[32] Contrary to what many suppose, there was not an extensive nineteenth century tradition of state courts using their own constitutions to protect individual rights.[33] For that reason, when advocates of judicial federalism began to use state constitutions to protect rights in the 1970s and 1980s, they had to *create*, not *rediscover*, an interpretive tradition. Professor Alan Tarr explained:

> [T]he standard account [that state courts used state rights charters to protect rights during the nineteenth and early twentieth century] . . . is more edifying than accurate: the new judicial federalism is indeed new. Although

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Jersey Court and Exclusionary Zoning, 15 RUTGERS L.J. 513 (1984); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

27. *See supra* notes 2, 7.

28. *See, e.g.*, 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 751-64 (4th ed. 2000).

29. *See supra* note 7.

30. For an excellent discussion of the making and remaking of state constitutions and how they have influenced and been influenced by the Federal Constitution, see TARR, *supra* note 10, at 60-93 (1998). *See also* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 3-6 (Rita Kimber & Robert Kimber trans., 1980); DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 219-21 (1990); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 541-44 (1989).

31. TARR, *supra* note 10, at 7-9.

32. Tarr, *New Judicial Federalism*, *supra* note 2, at 1100-06.

33. For a discussion of the common misconception that the new federalism was a rediscovery of an older state constitutional tradition, see *id.* at 1099-1106.

> the conditions may have seemed ripe for the development of state civil liberties law in the nineteenth and early twentieth centuries, no such development occurred. In fact, until the advent of the new judicial federalism, state courts' contributions to developing constitutional protections for civil liberties were minimal.[34]

Not only were there few existing interpretive traditions on which to base the new judicial federalism, but there is little doubt that when it began (particularly as led by Justice Brennan and Justice Stevens) it was an avowedly strategic political endeavor.[35] Liberals wished to find ways to extend and protect rights jeopardized by the conservative retrenchment of the Rehnquist Court.[36] Given the political impetus and lack of historical precedent, it is not surprising that when state courts actually began to interpret their own constitutional rights provisions independently, they often found themselves criticized for a new liberal activism. State justices who led the movement were characterized as unprincipled or for "picking and choosing" between state and federal guarantees in a result-oriented fashion.[37] Indeed, one of the major academic critics of the new judicial federalism, Professor Paul Kahn, described the new judicial federalism as nothing more than "a kind of forum shopping for liberals."[38]

In some states the criticism of state high courts translated into direct political responses. In California and Florida, two states where high courts were particularly active in expanding state individual rights protections, unhappy electorates responded by recalling "liberal" justices at the polls and by adding amendments to their state constitutions that compelled courts to interpret their rights provisions uniformly with federal law.[39] More often, criticism was voiced

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34. *Id.* at 1101.

35. *See supra* note 17; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 690-91 (1986) (Stevens, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1065-66 (1983) (Stevens, J., dissenting).

36. *See, e.g.*, Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1973).

37. *See, e.g.*, EARL M. MALTZ, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES ST. CONST. L. 233 (1989); *see also* Donald E. Batterson, Comment, *A Trend Ephemeral? Eternal? Neither?: A Durational Look at the New Judicial Federalism*, 42 EMORY L.J. 209 (1993); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 978-88 (1979); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985); Lawrence Gene Sager, Foreword, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

38. Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 464 (1995).

39. The amendment to the Florida Constitution is found in article I, section 12. FLA. CONST. art. I, § 12 (amended 1982). For an informative discussion of the events in California,

by dissenters within state courts. Unhappy with the liberal and rights-expanding decisions of their colleagues, conservatives on state high courts wrote sharp dissents denouncing the "activist," "result-oriented" nature of the new rulings. Typical of such attacks is Justice Richardson's dissent from a 1976 California Supreme Court decision that gave a more liberal interpretation to California's self-incrimination clause than that adopted by the U.S. Supreme Court under the Fifth Amendment:

> The simple fact is that in the instant case there is in reality only *one* privilege long recognized by the common law, subsequently incorporated in the federal Constitution, and much later adopted in the California Constitution. Nonetheless, under the majority holding notwithstanding the fact that we have but *one* privilege expressed in almost identical language they insist on *multiple* interpretations. The logic of this approach totally escapes me. The transient exhilaration drawn from our assertion of an independent "California" rule in this area will, in my opinion, speedily pass and leave in residue an unnecessary compounding and multiplicity of constitutional rules that should, so far as possible, be simple, uniform, consistent, and cohesive. The majority's approach makes transparently clear that the vigor with which the newly discovered separate and independent state constitutional interpretations are asserted ebbs and flows depending upon the approval or rejection by the majority of the particular constitutional interpretation which, in a given case, emanates from the federal Supreme Court. This accordion-like effect, this divergence and convergence, though in a sense predictable with the shifting winds of judicial policy and personal predilection, is not calculated to produce that kind of uniformity or harmony conducive to the logical and uniform development of constitutional law. As a device of constitutional interpretation the majority approach is dubious and suspect. As an instrument of judicial policy it is illogical and unnecessary.[40]

Whether the new judicial federalism necessarily engenders a liberal activism is not at all clear. Professor Barry Latzer, for example, has argued that in light of the Rehnquist Court's recent reassertion of Tenth Amendment

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see Barry Latzer, *California's Constitutional Counterrevolution*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 149-77 (G. Alan Tarr ed., 1996). For a discussion of events in Florida, see Talbot D'Alemberte, *Rights and Federalism: An Agenda to Advance the Vision of Justice Brennan*, *in* FEDERALISM AND RIGHTS 131-34 (Ellis Katz & G. Alan Tarr eds., 1996).

40. People v. Disbrow, 545 P.2d 272, 284-85 (Cal. 1976) (Richardson, J., dissenting); *see also* People v. Norman, 538 P.2d 237, 245-47 (Cal. 1975) (Clark, J., dissenting); State v. Miller, 630 A.2d 1315, 1327-28 (Conn. 1993) (Callahan, J., concurring in part and dissenting in part); People v. Scott, 593 N.E. 2d 1328, 1356 (N.Y. 1992) (Bellacosa, J., dissenting); State v. Florance, 527 P.2d 1202, 1208-10 (Or. 1974).

principles and the real possibility of disincorporation under the Fourteenth Amendment, development of independent interpretive traditions at the state level has the potential to advance conservative policies as well as more traditional liberal ones.[41] Moreover, as a matter of theory, whether independent interpretations of state constitutional provisions will lead to liberal or conservative policy results will ultimately depend on the substance of state constitutions themselves. For example, state courts could conceivably use state constitutions to expand protection of economic liberties and property rights over and above what is required by the Fifth Amendment of the Federal Constitution. The U.S. Supreme Court's use of rights doctrines to invalidate progressive legislation during the *Lochner* era attests to the fact that the protection of rights can advance causes on the political right as well as that of the left.[42]

Regardless of what political direction the new judicial federalism ultimately turns, criticisms of state courts during the 1970s and 1980s led judges to seek ways of legitimizing their deviation from familiar federal court interpretations of analogous federal constitutional provisions. Indeed, a recent survey of state jurisprudence in this area reveals that state courts have usually adopted one of four different approaches to state constitutional interpretation, all of which focus on the process of departure from federal constitutional interpretations:

(1) *The primacy approach.* This approach, championed by former Justice Hans Linde of the Oregon Supreme Court,[43] emphasizes the priority of state declarations of rights. When evaluating rights claims, state courts should turn first to interpret state constitutional provisions and resort to an analysis of federal constitutional protections only if a party is found to lack protection under the state charter.[44] The primacy approach thus requires judges to engage in full state constitutional analysis whenever a constitutional claim is raised and promotes judicial efficiency by allowing judges to avoid comment on federal provisions when the state constitutional provisions are adequate.[45] Supreme courts of several states—including Oregon, New Hampshire, and Maine—have explicitly adopted some form of this approach.[46]

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41. *See* Barry Latzer, *Whose Federalism? Or, Why "Conservative" States Should Develop Their State Constitutional Law*, 61 ALB. L. REV. 1399 (1998); *see also* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

42. For a description of the Court's *Lochner* era jurisprudence and the liberal critique see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

43. *See* Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

44. Hon. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647 (1987).

45. *Id.*

46. State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); State v. Ball, 471 A.2d 347,

(2) *The dual sovereignty approach.* This approach also views state constitutions as the first source of individual rights but requires a separate analysis of both the federal and state constitutions when a rights claim is made.[47] Accordingly, even if the court interprets the state constitution to provide the rights sought by the litigants, the Federal Constitution is also analyzed, thus providing two independent bases for decision. The dual sovereignty approach has long been championed by former Justice Robert F. Utter of the Washington Supreme Court[48] and was implicitly accepted by the Washington high court in *State v. Gunwall.*[49]

(3) *The interstitial approach.* In contrast to the first two approaches to interpretive sequence, the latter two approaches view the U.S. Constitution and not the state constitutions, as the primary source of rights. In interstitial states, courts analyze rights claims under the federal document first and only turn to an analysis of state constitutional provisions if the litigant's claim is valid under the federal document.[50] This approach reflects the modern role of the U.S. Supreme Court and the federal charter as the basic protector of individual liberties, while allowing state constitutions to be a source of supplemental or interstitial rights. At least two state high courts—Kentucky and New Jersey—have explicitly accepted this approach.[51]

(4) *The lock-step or deferential approach.* Finally, under the lock-step approach, state constitutional rights provisions are interpreted identically, or in lock-step, with U.S. Supreme Court interpretations of similar federal provisions. Under this approach, U.S. Supreme Court decisions interpreting federal guarantees are viewed as the primary and exclusive source of fundamental rights whenever state constitutions employ similar language.[52]

350-52 (N.H. 1983); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981); Utter & Pitler, *supra* note 44, at 647.

47. Utter & Pitler, *supra* note 44, at 651.

48. Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

49. 106 Wash. 2d 54, 58-59, 720 P.2d 808, 811 (1986). *But see* Spitzer, *supra* note 8. Professor Spitzer argues that while the court has accepted the primacy of the state constitution in theory, it has not done so in practice. *Id.* at 1188. This approach was also accepted by the Pennsylvania Supreme Court in *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991).

50. *See* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 708-09 (1983).

51. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Right to Choose v. Byrne, 450 A.2d 925, 931-32 (N.J. 1982).

52. Utter & Pitler, *supra* note 44, at 645. For a summary of the arguments in favor of the lock-step approach, see JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 13-17 (2d ed. 1996).

This approach, which served as the default approach for most states' courts until the 1970s, fosters uniformity of law and embraces the Supreme Court's contemporary role in the nationalization of a regime of individual liberties.[53]

Each of these approaches has been discussed at length in court opinions and in scholarly literature.[54] Each has advantages and disadvantages, and it is not my purpose to analyze them here. Rather, I wish only to point out how criticisms of the legitimacy of new judicial federalism has forced state courts to focus their attention on questions of interpretive process and sequence rather than on questions of constitutional substance and meaning. The preoccupation with the question of when it is appropriate for state courts to deviate from U.S. Supreme Court precedents has in fact seriously warped efforts to construct more substantive theories that might otherwise provide a "principled" guide to state constitutional interpretation.[55]

III. JUDICIAL FEDERALISM IN THE STATE OF WASHINGTON

As an early leader in the development of judicial federalism, Washington's Supreme Court also became preoccupied with questions of interpretive process at the expense of developing substantive theories of the state constitution. In several cases during the 1970s and 1980s, the court began the process of interpreting rights provisions of the Washington Constitution, conferring greater civil liberty protections than counterpart federal provisions.[56] In

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53. *See* Gardner, *supra* note 7, at 771-72.

54. *See* John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1025-29 (1993); Williams, *supra* note 8, at 1018-21; Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206-18 (1998); *see also supra* notes 43-53.

55. *See* TARR, *supra* note 10, at 173-209; Williams, *supra* note 8, at 1055.

56. *See, e.g.*, State v. Williams, 102 Wash. 2d 733, 741-42, 689 P.2d 1065, 1070 (1984) (involving search and seizure); State v. Ringer, 100 Wash. 2d 686, 689-700, 674 P.2d 1240, 1242-48 (1983), *overruled by* State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986); Alderwood Assoc. v. Washington Envtl. Council, 96 Wash. 2d 230, 235-43, 635 P.2d 108, 111-16 (1981) (involving free speech); Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 510-14, 585 P.2d 71, 91-93 (1978) (involving equitable funding for schools); Weiss v. Bruno, 82 Wash. 2d 199, 206, 509 P.2d 973, 978 (1973) (involving establishment of religion); *see also* State v. Simpson, 95 Wash. 2d 170, 174-82, 622 P.2d 1199, 1203-07 (1980); State v. Fain, 94 Wash. 2d 387, 391-402, 617 P.2d 720, 723-28 (1980); State v. Hehman, 90 Wash. 2d 45, 49, 578 P.2d 527, 529 (1978); Darrin v. Gould, 85 Wash. 2d 859, 868-69, 540 P.2d 882, 887-88 (1975); Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 421-22, 511 P.2d 1002, 1005 (1973). For a general discussion of this development in Washington, see Justice Robert F. 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,

Alderwood Associates v. Washington Environmental Council,[57] for example, the court held that the free speech clause of article I, section 5, of Washington's Constitution required private shopping center owners to accommodate free expression and petitioning on their property, even though the First Amendment protects against state restraints on expression only.[58] Writing for a plurality, Justice Utter rejected the importation of a federal "state action requirement" to the state's free speech provision, stating: "The fourteenth amendment to the United States Constitution, which applies the federal constitution to the states, only establishes the minimum degree of protection that a state may not abridge."[59] "State courts are obliged to [independently] determine the scope of their state constitutions due to the structure of our government."[60]

In another prominent case, *State v. Chrisman,*[61] the Washington high court reversed a narcotics conviction of a university student under article I, section 7 of Washington's Constitution and excluded evidence from the trial that the U.S. Supreme Court later permitted against a Federal Fourth Amendment claim.[62]

Not only did the court set out to establish an independent state constitutional rights jurisprudence, but early cases show its assertion of the primacy of state constitutional protections. In *State v. Coe,*[63] for example, the court used the free speech provisions of article I, section 5, to bar a trial judge's gag order on the broadcast of a lawfully obtained tape recording in a highly publicized murder trial.[64] Writing for the court, Justice Utter articulated several reasons why the validity of a prior restraint should be analyzed under Washington's Constitution rather than the First Amendment:

> First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely

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492, 499-504 (1984); Utter, *supra* note 8, 1156-60.

57. 96 Wash. 2d 230, 635 P.2d 108 (1981).

58. *Id.* at 239-46, 635 P.2d at 114-17.

59. *Id.* at 237, 635 P.2d at 112.

60. *Id.* at 237, 635 P.2d at 113.

61. 94 Wash. 2d 711, 619 P.2d 971 (1980), *rev'd sub nom.* Washington v. Chrisman, 455 U.S. 1 (1982).

62. Washington v. Chrisman, 455 U.S. 1, 5-10 (1982).

63. 101 Wash. 2d 364, 679 P.2d 353 (1984).

64. *Id.* at 374, 679 P.2d at 359.

> associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment. Finally, to apply the federal constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons.[65]

As in other states, Washington's high bench soon found itself under attack for its new rights jurisprudence. In the 1983 case *State v. Ringer*,[66] for example, the court held that a warrantless search of a vehicle based only on an aroma of marijuana was impermissible under article I, section 7, of Washington's Constitution, even though a similar search was permissible under U.S. Supreme Court interpretations of the Fourth Amendment.[67] By coming to this decision, the court was forced to reverse several previous decisions interpreting that provision in lock-step with Federal Fourth Amendment cases.[68] Writing for a 7-2 majority, Justice Dolliver explained:

> Rather than engage in a further analysis as to the applicability of the Fourth Amendment, we instead focus on article 1, section 7 of our state constitution. . . . We conclude that Const. art. 1, § 7 poses an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions which we will note below.
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> . . . .
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> . . . [In the past] we neglected our own state constitution to focus instead on protections provided by U.S. Const. amend. 4.
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> We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings. To do so, however, we find it necessary to overrule several of our previous cases. . . .

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65. *Id.* at 373-74, 679 P.2d at 359.

66. 100 Wash. 2d 686, 674 P.2d 1240 (1983), *overruled by* State v. Stroud, 106 Wash. 2d 144, 720 P.2d 436 (1986).

67. *Id.* at 689-700, 674 P.2d at 1242-48.

68. *Id.* at 699, 674 P.2d at 1247.

> For too long they have been allowed to lie fallow in the fields of our state jurisprudence.[69]

In her dissent, Justice Dimmick chided the majority for a "sudden leap to the sanctuary of our own state constitution."[70] Complaining of the confusion that deviation from federal precedent creates, Justice Dimmick wrote:

> Once again we confound the constabulary and, by picking and choosing between state and federal constitutions, change the rules after the game has been played in good faith. . . .
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> As the majority's historical treatise points out, for at least 15 years we have interpreted the scope of searches incident to arrest in accordance with federal pronouncements under the Fourth Amendment.
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> . . . .
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> . . . The majority [now] disapproves the precedent we have previously required law enforcement officials to heed. Police officers are now told to disregard federal constitutional principles under the circumstances this case presents. Predicting the proper course of action for the officer's daily encounters with unexpected situations arising during arrests from vehicles will be precarious. This decision compounds the confusion by throwing into doubt untold number of convictions based on searches made pursuant to the established case law.[71]

In the wake of *Ringer*, the court placed new restrictions on police "stop-and-frisk" procedures the following year in *State v. Williams*.[72] The *Williams* Court, however, attempted to shield itself from Justice Dimmick's criticism by separately analyzing the Fourth Amendment and emphasizing that its decision under the state's privacy provision was consistent with federal interpretations of the Fourth Amendment.[73] That same year in *State v. Coe*,[74] the court again used this two track or dual sovereignty interpretive process.[75] To buttress its conclusion that section 5 barred a "prior restraint" on the press, Justice Utter analyzed decisions from other state high courts interpreting similar or identical state constitutional provisions[76] and then turned to an analysis of the U.S.

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69. *Id.* at 690, 699, 674 P.2d at 1242-43, 1247 (citations omitted).

70. *Id.* at 706, 674 P.2d at 1251 (Dimmick, J., dissenting).

71. *Ringer*, 100 Wash. 2d at 703, 705-06, 674 P.2d at 1250-51 (Dimmick, J., dissenting) (footnote omitted).

72. 102 Wash. 2d 733, 739-42, 689 P.2d 1065, 1069-70 (1984).

73. *See id.* at 735-41, 689 P.2d at 1067-70.

74. 101 Wash. 2d 364, 679 P.2d 353 (1984).

75. *See id.* at 373-81, 679 P.2d at 359-63.

76. *See id.* at 376-78, 679 P.2d at 360-61.

Supreme Court's interpretation of the First Amendment.[77] Although the court's decision rested on "bona fide separate, adequate, and independent [state constitutional] grounds,"[78] Utter explained that examining the federal constitution was useful for two reasons:

> First, our reasoning may be of aid to other courts with similar problems who do not have state constitutional provisions similar to ours and must rely on the appropriate federal constitutional provisions and decisions. Second, although the federal cases in no way influenced our decision under the Washington Constitution, such a discussion demonstrates that federal constitutional law also forbids a court to impose prior restraints on the publication of information lawfully obtained at public court proceedings.[79]

Despite efforts to reassure its critics that independent interpretations of state rights provisions were principled and legitimate, criticism of the court continued. As in other states, the attack eventually turned overtly political. Legislative responses focused on curbing the court's power of judicial review and subjecting its constitutional decisions to democratic oversight.[80] Although such efforts proved largely unsuccessful, they nevertheless sent clear signals that members of the court have not ignored.[81]

More importantly, cases such as *Alderwood, Ringer*, *Williams*, and *Coe*, generated public controversy that eventually brought personnel changes to the court. Successful candidates for seats to the Washington Supreme Court since the mid-1980s have often criticized the court's activism in expanding individual rights, especially in the area of criminal justice.[82] Changes in the court's composition also brought retrenchment in important areas of the court's new federalism jurisprudence. In a pair of 1986 cases, for example, the court overruled its *Ringer* and *Williams* precedents on search and seizure. In *State v. Stroud*,[83] the court continued to assert that the state constitution offered greater protection of privacy rights, but also adopted a balancing test that significantly

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77. *See id.* at 378-81, 679 P.2d at 361-63.

78. *Id.* at 378, 679 P.2d at 361 (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)).

79. *Coe*, 101 Wash. 2d at 378, 679 P.2d at 361-62.

80. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 700-03 (1999).

81. *See id.* at 702, 723-33.

82. For a description of the 1984 judicial elections, see CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 183-84 (1988). *See also* Charles H. Sheldon, *"All Sail And No Anchor" in New Federalism Cases-Attempted Remedial Efforts by The Supreme Court of Washington*, 1 ST. CONST. COMMENT. & NOTES 8, 10 (1990); Utter, *supra* note 8, at 1159-60.

83. 106 Wash. 2d 144, 720 P.2d 436 (1986).

reduced any differences between its protections and those under federal interpretations of the Fourth Amendment.[84] In *State v. Kennedy*,[85] the court rejected the procedural direction in *Williams* and practically ignored its independent state constitutional analysis, thus reverting back to the U.S. Supreme Court's "stop-and-frisk" standards under the Fourth Amendment as enunciated in *Terry v. Ohio*.[86]

Three years later in *Southcenter Joint Venture v. National Democratic Policy Committee*,[87] the court revisited its free speech decision in *Alderwood*.[88] In abandoning the balancing test it articulated a few years earlier for determining the scope of speech claims on private property, the court now appealed to the general principles of constitutionalism to apply a federal-style "state action" requirement to article I, section 5 claims.[89]

In the face of blunt criticism that its new rights jurisprudence was unprincipled, the court eventually adopted a set of criteria explaining when it was willing to deviate from federal constitutional norms and standards. In the 1986 case *State vs. Gunwall*,[90] former Justice Andersen articulated "six nonexclusive neutral criteria . . . relevant to determining whether, in a given situation, the constitution of the state of Washington should be considered as extending broader rights to its citizens than does the United States Constitution."[91] The *Gunwall* criteria are: (1) the language of the state constitution; (2) differences in the texts of parallel provisions of the two constitutions; (3) differences in state constitutional and common law history; (4) differences in preexisting state law; (5) differences in structure between the two constitutions; and (6) differences that may emerge from matters of particular state interest or local concern.[92]

The court's reliance on a criteria approach for determining when it will engage in an independent interpretation of the state constitution was clearly an effort to reassure dissenters, on and off the court, that its constitutional jurisprudence was not result-oriented and that it was "articulable, reasonable, and reasoned."[93] Nevertheless, since 1986 there has been a good deal of debate

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84. *Id.* at 147-53, 720 P.2d at 438-41.

85. 107 Wash. 2d 1, 726 P.2d 445 (1986).

86. *See* Terry v. Ohio, 392 U.S. 1, 16-28 (1968); Kennedy, 107 Wash. 2d at 10-11, 726 P.2d at 450-51.

87. 113 Wash. 2d 413, 780 P.2d 1282 (1989).

88. *See id.* at 427, 780 P.2d at 1289.

89. *See id.* at 419-30, 780 P.2d at 1285-91.

90. 106 Wash. 2d 54, 720 P.2d 808 (1986).

91. *Id.* at 61, 720 P.2d at 812.

92. *Id.* at 61-62, 720 P.2d at 812-13.

93. *See* Utter, *supra* note 8, at 1161 (quoting *Gunwall*, 106 Wash. 2d at 63, 720 P.2d at 813). For a discussion of similar approaches by other state high courts, see Rachel A. Van

about the meaning of *Gunwall*.[94] At a minimum, the court now expects parties raising state constitutional claims to fully brief the six *Gunwall* criteria. Indeed, in the 1988 case of *State v. Wethered*,[95] the court was asked to consider a claim under the self-incrimination provision of article I, section 9 of Washington's Constitution.[96] However, because counsel failed to brief the *Gunwall* criteria, the court refused to even consider the state constitutional claim.[97] Reminding the bar of the procedural obligation imposed by *Gunwall*, Justice Utter wrote:

> Wethered urges this court to [conclude that] . . . the Washington Constitution can be and has been interpreted as more protective of individual rights than the United States Constitution. He fails to use the *Gunwall* interpretive principles to assist this court to determine whether the self-incrimination provisions of that article confer the right to *Miranda* or *Miranda*-like warnings. By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, he requests us to develop without benefit of argument or citation of authority the "adequate and independent state grounds" to support his assertions. We decline to do so. . . .
>
> While many states have found independent grounds in their own constitutions for *Miranda* warnings and have held their constitutions to provide wider protection than the United States Constitution, we will not consider that question until the issue is adequately presented and argued to us. We therefore will only consider Wethered's claims under federal constitutional law.[98]

Not only must counsel fully brief the *Gunwall* criteria, but subsequent holdings require briefs to be completed in a particular way. In *State v. Clark*,[99] for instance, the court refused to consider a claim under the double jeopardy provisions of article I, section 9, even though the issue received a full *Gunwall* briefing.[100] Writing in *Clark*, Justice Utter admitted that the petitioner's reply

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Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206-19 (1998).

94. *See* Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution*, State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986), 62 WASH. L. REV. 569 (1987); Spitzer, *supra* note 8; James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099 (1991).

95. 110 Wash. 2d 466, 755 P.2d 797 (1988).

96. *See id.* at 471, 755 P.2d at 800.

97. *See id.* at 471-73, 755 P.2d at 800-01.

98. *Id.* at 472-73, 755 P.2d at 800-01 (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983) (alteration in original)) (citations and footnote omitted).

99. 124 Wash. 2d 90, 875 P.2d 613 (1994), *overruled by* State v. Catlett, 133 Wash. 2d 355, 361, 945 P.2d 700, 702-03 (1997).

100. *Id.* at 95 n.2, 875 P.2d at 615 n.2.

brief "presented a proper state constitutional analysis"[101] but said that their "failure to engage a *Gunwall* analysis in a timely fashion precludes [the court] from entertaining their state constitutional claim."[102] To hold otherwise, Justice Utter argued, would encourage parties to save their *Gunwall* analysis for reply briefs and lead the court "to an unbalanced and incomplete development of the issues for review."[103]

Some limited exceptions to the *Gunwall-Wethered* requirements exist. In *Sofie v. Fibreboard Corp.*,[104] the court struck down a state limit on jury awards of non-economic damages arguing that the state imposed limit violated the right to a jury trial protected under article I, section 21.[105] In her dissent, Justice Durham complained that the litigants had not provided a proper *Gunwall* brief.[106] Writing for the majority, Justice Utter pointed out that the Seventh Amendment was not incorporated within the protections of the Fourteenth Amendment of the Federal Constitution; thus, "The right to jury trial in civil proceedings is protected solely by the Washington Constitution in article I, section 21. Therefore, the relevant analysis must follow state doctrine; our result is based entirely on adequate and independent state grounds."[107] *Sofie* thereby limited mandatory *Gunwall* briefing to cases where both the state and federal Constitution apply.[108] Moreover, in several recent cases, the court recognized that a full *Gunwall* briefing is unnecessary when the court has already established an independent interpretation of the state constitutional provisions at issue.[109]

Despite these exceptions, the *Gunwall* requirements have stunted development of an independent state constitutional jurisprudence in at least two ways. First, it is clear that the court's rigid adherence to the briefing criteria, especially since *Wethered*, has kept the court from considering many important constitutional issues. In an exhaustive empirical study of the court's *post-Gunwall* decisions, Professor Hugh Spitzer found that in the eleven years

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101. *Id.*

102. *Id.*

103. *Id.* at 96 n.2, 875 P.2d at 615 n.2; *see also* Forbes v. Seattle, 113 Wash. 2d 929, 934, 785 P.2d 431, 433-34 (1990). The Court admonished Forbes for failing to discuss the *Gunwall* criteria. *Id.*

104. 112 Wash. 2d 636, 771 P.2d 711 (1989).

105. *Id.* at 638, 771 P.2d at 712.

106. *Id.* at 688, 771 P.2d 737 (Durham, J., dissenting).

107. *Id.* at 644, 771 P.2d at 716.

108. *See* Williams, *supra* note 8, at 1026-27.

109. *See* State v. Hendrickson, 129 Wash. 2d 61, 69 n.1, 917 P.2d 563, 567 n.1 (1996); State v. Johnson, 128 Wash. 2d 431, 445, 909 P.2d 293, 301-02 (1996); State v. Hobble, 126 Wash. 2d 283, 298 & n.6, 892 P.2d 85, 94 & n.6 (1995); State v. Richman, 85 Wash. App. 568, 573, 933 P.2d 1088, 1090-91 (1997).

following *Gunwall*, the court cited the case in over 108 rulings.[110] In sixty-two of these cases, however, the court refused to even consider the state constitutional arguments raised in the litigation, citing *Gunwall* only to point to the parties improper briefs.[111] In another ten cases, the court cited *Gunwall* solely for its substantive holding on electronic eavesdropping.[112] This left only thirty-four cases where the court addressed the substantive constitutional claims asserted by the parties.[113] In twenty-six cases, the relevant state constitutional provisions were interpreted coextensively with analogous sections of the Federal Constitution, or the court reached the same result that it would have under the Federal Constitution.[114] Remarkably, in only eight of the 108 cases citing *Gunwall*, the court independently analyzed state constitutional claims and reached a result different from what the Federal Constitution required.[115] Moreover, in four of these cases the court was divided, with dissenting justices using the *Gunwall* criteria to castigate the majority for deviating from federal constitutional interpretations.[116]

If the purpose of the *Gunwall* requirements was to encourage a reasoned development of an independent state constitutional jurisprudence,[117] Professor Spitzer's study demonstrates that they have been a failure.[118] The court's use of the criteria to avoid substantive state constitutional issues has ensconced process at the expense of substance and has made *Gunwall* the greatest obstacle, rather than guide, to the development of state constitutional law.[119]

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110. Spitzer, *supra* note 8, at 1196.

111. *Id.* at 1196-97.

112. *Id.* at 1197.

113. *Id.*

114. *Id.* at 1199.

115. *Id.* at 1200 tbl.2.

116. State v. Boland, 115 Wash. 2d 571, 583-87, 800 P.2d 1112, 1118-20 (1990) (Guy, J., dissenting); Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 688, 771 P.2d 711, 737 (1989) (Durham, J., dissenting); Witters v. State Comm'n for the Blind, 112 Wash. 2d 363, 373-90, 771 P.2d 1119, 1124-33 (1989) (Utter, J., dissenting); State v. Stroud, 106 Wash. 2d 144, 158-64, 720 P.2d 436, 444-47 (1986) (Durham, J., concurring in judgment).

117. Spitzer, *supra* note 8, at 1209.

118. *See id.* at 1187-1215. *But see* Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall: *"Articulable, Reasonable and Reasoned" Approach?*, 60 ALB. L. REV. 1871 (1997) (arguing that the use of the *Gunwall* criteria approach has been successful in the area of search and seizure law).

119. Professor Spitzer makes five specific suggestions to address this problem: (1) The court should be less deferential to U.S. Supreme Court interpretations, and more willing to assert independent interpretations of both the Washington State and Federal Constitutions; (2) when parties have improperly briefed a case, the court, rather than refusing to address the state constitutional issue involved, should return the brief to counsel with instructions for re-briefing; (3) the court should sanction "lawyers who plead state constitutional issues but fail to brief them;" (4) the court "should continue its insistence that low-income criminal

Justice Madsen recently recognized this problem in her dissent in *State v. Thorne*.[120] Disagreeing with the majority's refusal to reach a state due process claim because of improper briefing, Justice Madsen wrote:

> Since this court has already recognized greater protection *in the very context presented in this case*, it is unnecessary for the defendant to present a *Gunwall* argument to receive state constitutional protection. To hold to the contrary, as the majority does, is to elevate form over substance and to unjustly deny the defendant the protections he deserves as a Washington State citizen.[121]

Even if the court were to relax its post-*Gunwall* insistence on briefing, the criteria approach cripples the development of an independent constitutional jurisprudence in a more systemic way. The criteria explicitly forces litigants, as well as the court, into a mode of analysis that compares and contrasts state constitutional provisions with analogous federal provisions. Thus, despite insistence that *Gunwall* recognizes the primacy and independence of the state constitution, it necessarily makes its interpretation contingent and dependent on federal constitutional law.[122] In a recent analysis of how state courts have used criteria approaches such as *Gunwall*, Professor Robert Williams of Rutgers shows that this feature of constantly "comparing and contrasting" creates rigidity in state constitutional thinking.[123] *Gunwall*-style requirements place upon litigants and the courts a burden of showing the differences between the state right provisions and analogous federal provisions. Unless those differences can be clearly demonstrated, state courts will continue to rely on the U.S. Supreme Court's approach and hesitate to adopt their own interpretation. Williams' argument is supported by Professor Spitzer's empirical findings in Washington that even in cases where the court reached the substantive state constitutional claim, it adopted an independent interpretation only eight times over an eleven-year period.[124] Justice Madsen has been equally critical of this aspect of the court's *Gunwall* approach. In *State v. Gocken*,[125] Justice Madsen complained that the rigid requirement of distinguishing federal constitutional provisions under *Gunwall* has left "independent state constitutional analysis . . .

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defendants receive . . . competent appellate representation;" and (5) the court, "which oversees the bar examination process, should . . . require the inclusion of a substantive state constitutional question on each exam." Spitzer, *supra* note 8, at 1210-13.

120. 129 Wash. 2d 736, 785, 921 P.2d 514, 537 (1996) (Madsen, J., dissenting).

121. *Id.* at 785, 921 P.2d at 537 (Madsen, J., dissenting).

122. For an early version of the criticism see Atkins, *supra* note 94.

123. Williams, *supra* note 8, at 1027.

124. Spitzer, *supra* note 8, at 1200 tbl.2.

125. 127 Wash. 2d 95, 896 P.2d 1267 (1995).

lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than our own state courts."[126]

Whether *Gunwall's* failure lies in its rigid application or in its comparative and dependent nature, the deeper problem in the court's jurisprudence is its fixation on questions of interpretive process (when is it legitimate for state judges to deviate from federal interpretations?) rather than questions of interpretive substance (what meaning ought to be given to particular state constitutional provisions?). Of course, the difficulty here is that to make questions of constitutional substance central to the interpretive exercise the court would need a coherent theory of the values and meaning embodied in the Washington Constitution. Unfortunately, such theorizing has been virtually absent at the state level, in Washington or elsewhere.

IV. TOWARD A THEORY OF THE WASHINGTON CONSTITUTION

A complete and coherent theory of the Washington Constitution is beyond the scope of this analysis. However, in the remainder of this article I will sketch four major factors that will contour such a theory and distinguish it from similar theories of the federal document.[127] I will also suggest briefly what implications they have for state constitutional law.

A. *Originalism and Washington Constitutional History*

Constructing a theory of the state constitution might logically begin by building on theories already developed at the federal level. Originalism, or the notion that the values and beliefs of the framers' should guide interpretation of the constitution, is a good a place to begin.[128] There is much debate about what an original intent jurisprudence entails, and there are likewise well known

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126. *Id.* at 111, 896 P.2d at 1274-75 (Madsen, J., concurring in part and dissenting in part).

127. Much of my discussion in this section relies on insights suggested in TARR, *supra* note 10, at 173-209.

128. Some of the better known explanations and defenses of originalism are: BORK, *supra* note 16, at 143-60; OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 10 (1987); Edwin Meese, III, Address; *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22 (1985); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). For an interesting contemporary discussion of neo-originalist approaches, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996).

criticisms of various applications of this approach.[129] For present purposes, however, it is important to note that most of the debate does not center on whether it is appropriate to consider the values and intentions of the framers, but rather on what level of specificity or abstraction an interpreter should look.[130] Thus, while nearly all constitutional theorists agree on the importance of the framers' intent to protect certain values (say, the value of equality embedded in the Fourteenth Amendment), they disagree on whether those values should be limited to the particular, concrete examples present in the mind of the framers or whether more contemporary, abstract examples and conceptions of those values might also be used:[131] Should conceptions of equality be limited to specific and concrete examples drawn from the issues of slavery and reconstruction, which animated the framers of the Equal Protection Clause, or should judges turn to more contemporary ideas and applications of the concept of equality, perhaps updating and expanding the scope of protection under that clause?[132]

Of course, all general concerns and criticisms of original intent jurisprudence at the federal level are equally applicable to jurisprudence lodged at the state level.[133] I do not wish to defend originalist jurisprudence. Rather, the point I wish to make is that if original intent and history are to be used as a guide for interpreting a state constitution, the goal should not be to simply distinguish state provisions from similar federal provisions, but to generate an organic and independent theory of substantive values embodied in the state's charter. This is a much more difficult historical task that involves more than "law office historiography," a process where lawyers begin with a desired

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129. One of the best early critiques of the originalist position is Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). *See also* Philip B. Kurland, *History and the Constitution: All or Nothing at All?*, 75 ILL. B.J. 262 (1987). For a more contemporary exchange between Antonin Scalia and several critics of originalism, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). Mark Tushnet argues for an alternative way of using history in legal interpretation in *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT. L. REV. 909 (1996).

130. Dorf, *supra* note 128, at 1766 ("Most, if not all, of us are what Paul Brest has called 'moderate' originalists; we are interested in 'the framers' intent on a relatively abstract level of generality.'") (Brest, *supra* note 129, at 214); Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 306 (1996) ("[W]e are all originalists, at least to some extent."); Jeffrey Rosen, *Originalist Sin*, NEW REPUBLIC, May 5, 1997, at 26 ("We are all originalists now.").

131. *See supra* notes 128-30.

132. For a discussion of this problem, see RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 267-71 (1996).

133. For an attack on the use of originalism in the Washington constitutional context, see Pierre Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985).

interpretation of a provision and work backwards to support their position.[134]

First, there is the obvious point that the political times and culture surrounding the creation of Washington's Constitution in Olympia in 1889 were quite different from those surrounding the Federal Constitution's adoption in Philadelphia a century before.[135] This fact alone colors every phrase of the state constitution, even when it employs similar words or language as the federal document.[136] Although the detailed notes of the convention debates were lost or destroyed,[137] there are several good sources, which provide a starting point for understanding the substantive values embedded in the state constitution and which shed light on the specific attitudes and views of the seventy-five delegates who gathered in Olympia in 1889.[138]

More generally, late-nineteenth century America was an era of wrenching social and economic change. The nation was shifting from an agrarian economy to industrial capitalism, and the period was marked by rapidly increasing concentrations of wealth, rising corporate power, and government corruption.[139]

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134. For a discussion of the problems with historical and other inter-disciplinary approaches to the law, see Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840 (1993); Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 80 (1992) (referring to the "superficial and ill-informed treatment of serious ideas").

135. Former Justice James Dolliver argues that the political climate in Washington in 1889 was marked by five primary concerns: "(1) the private abuse of public office; (2) the private use of public funds; (3) concentrations of power, whether inside and outside the government; (4) the preservation of individual liberties; and (5) public education." James M. Dolliver, *The Mind of the Founders: An Assessment of the Washington Constitution of 1889*, *in* WASHINGTON COMES OF AGE: THE STATE IN THE NATIONAL EXPERIENCE 135, 139 (David H. Stratton ed., 1992).

136. *See* Yelle v. Bishop, 55 Wash. 2d 286, 291, 347 P.2d 1081, 1084 (1959) ("In determining the meaning of a constitutional provision, the intent of the framers, and the history of the events and proceedings contemporaneous with its adoption may properly be considered.").

137. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 vii (Beverly Paulik Rosenow ed., 1962).

138. Perhaps the best general discussions of the convention and prevailing attitudes of the day are found in two unpublished sources: Wilfred J. Airey, A History of the Constitution and Government of Washington Territory (1945) (unpublished Ph.D. dissertation, University of Washington) (on file with the University of Washington Library); James Leonard Fitts, The Washington Constitutional Convention of 1889 (1951) (unpublished Master's thesis, University of Washington) (on file with the University of Washington Library). *See also* Dolliver, *supra* note 135. For views of three delegates to the convention, see EDMOND S. MEANY, HISTORY OF THE STATE OF WASHINGTON 283-84 (1946); John R. Kinnear, *Notes on the Constitutional Convention*, 4 WASH. HIST. Q. 276 (1913); Theodore L. Stiles, *The Constitution of the State and its Effects upon Public Interests*, 4 WASH. HIST. Q. 281 (1913). For an account of the conventions day-today actions, see THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, *supra* note 137.

139. Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles:*

In response to these problems, Progressive third parties had sprung up throughout the United States, and Washington was no exception.[140] State chapters of the Grange, Farmers Alliance, and Knights of Labor were all well established in territorial Washington, and ideas represented by these groups animated much of the debate at the Olympia convention.[141]

Needless to say, the delegates in Olympia had very different concerns about the operation of democratic institutions and their relationship to individual liberty than did the Federalists in 1789.[142] In particular, while Federalists were influenced by the ideas of civic republicanism and a fear of populist majorities, the framers of the Washington Constitution were strong believers in popular sovereignty and believed that liberty could best be secured through open democratic government.[143] They feared concentrations of power in government, but the tyranny they feared most was not *the tyranny of the majority* but the *tyranny of corporate power and special interests* that might capture control or otherwise corrupt governing institutions.[144]

Washington was similar to other western states adopting constitutions during this period and imposed severe constitutional restrictions on private industry and corporations.[145] For example, the very same year that delegates

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Individual Rights, Free Government, and the Washington State Constitution, 67 WASH. L. REV. 669, 670-73 (1992).

140. *Id.* at 672.

141. *Id.*; Harriet Crawford, *Grange Attitudes in Washington 1889-1896*, 30 PAC. N.W. Q. 243 (1939).

142. *See* Dolliver, *supra* note 135; Fitts, *supra* note 138.

143. Snure, *supra* note 139, at 684-85.

144. James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers' Views Been Followed?*, 12 U. PUGET SOUND L. REV. 163, 170-71 (1989); Snure, *supra* note 139, at 671-73; Fitts, *supra* note 138, at 106-16.

145. Leading sources about the *Progressive* views of constitution makers in western states at this time include GORDON MORRIS BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 (1987); JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES (photo. reprint 1990) (1924); DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890 (1992); Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945 (1994). *See also* G. Alan Tarr & Robert F. Williams, Foreword, *Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191, 193-94 (1998). But if corporations were feared as a source of corruption, delegates at western state constitutional conventions also recognized that they were sources of economic development. *Id.* at 193 n.16. Many delegates feared that excessive restrictions would drive corporations away. *Id.* Thus, while imposing populist restrictions on private corporations, western state conventions rejected some of the more onerous restrictions and even offered some important concessions specifically designed to attract corporations. *Id.* For example, Nevada's Constitution eliminated taxes on mines on the grounds that taxation "would drive away the 'foreign' capital . . . essential to developing the only resource the state

met in Olympia to draft the Washington Constitution, delegates to neighboring Idaho's 1889 constitutional convention declared railroads to be public highways and subjected their rates to direct legislative regulation.[146] Similarly, the Montana and Wyoming Constitutions specifically abrogated the federal common law "fellow-servant" rule which prevented workers from suing employers for work-related injuries.[147] The Wyoming charter further forbade labor contracts that released employers from liability for injuries suffered by workers, and the North Dakota Constitution forbade the exchange of worker "black lists" between corporations.[148] In addition, some western states specifically withdrew legislative authority to enact statutes that might benefit corporate interests[149] and created institutions, such as labor or railroad commissions, designed to monitor illicit practices and abuses.[150]

Much has been written about the political ideals of the Progressive Era and their influence on western state politics of the period, and I do not intend to recount that discussion here.[151] At the very least, however, understanding the

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possessed." *Id.* Similar arguments were reiterated in Montana to defeat a proposal "to make corporation directors and stockholders jointly liable for corporate debts." *Id.* A concession incorporated into the Colorado and Idaho Constitutions "permitted the taking of private property for private as well as public use, provided that just compensation was paid." *Id.*; *see* COLO. CONST. art. II, § 14; IDAHO CONST. art. I, § 14. However, the Washington Constitution specifically forbids state government from taking of private property for private use, except in very limited circumstances, and stockholders may, in limited circumstances, be liable for debts of their corporations. WASH. CONST. art. I, § 16 (amended 1920); WASH. CONST. art. XII, § 4, WASH. CONST. art XII, § 11 (amended 1940). This would suggest that populist fear of corporate and private power was more intense in the state of Washington than many other western states.

146. *See* IDAHO CONST. art. XI, § 5. For discussion of the development of the Corporations Article of the Idaho Constitution, see DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS 125-37 (1991).

147. *See* MONT. CONST. art. XV, § 16 repealed; WYO. CONST. art. IX, § 4.

148. WYO. CONST. of 1889, art. IX, § 4; WYO. CONST. art. X, § 4 (amended 1913, 1986, 1998); N.D. CONST. art. XII, § 17 (superceding N.D. CONST. of 1889, art. XVII, § 212). For a discussion of these provisions, see BAKKEN, *supra* note 145, at 80-81; HICKS, *supra* note 145, at 92-95; ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE 188-89, 193-96 (1993).

149. See, for example, the Idaho Constitution of 1889, article XI, section 12 and the Montana Constitution of 1889, article XV, section 13, which specifically forbade enactment of retroactive laws favorable to railroads. IDAHO CONST. art. XI, § 12; MONT. CONST. of 1889, art. XV, § 13 repealed. The Idaho provision is also discussed in COLSON, *supra* note 146, at 125 and DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 206-07 (1984).

150. For a discussion of these provisions, see BAKKEN, *supra* note 145, at 79-80; COLSON, *supra* note 146, at 127-29; and HICKS, *supra* note 145, at 92-95.

151. *See, e.g.*, SEAN DENNIS CASHMAN, AMERICA IN THE GILDED AGE (3d ed. 1993); JOHN A. GARRATY, THE NEW COMMONWEALTH: 1877-1890 (1968); Herman J. Deutsch, *A Prospectus for the Study of the Governments of the Pacific Northwest States in Their Regional*

historical milieu and the political culture in Washington at this time should allow us to make sense out of several otherwise disparate provisions of the state constitution. To secure a popular, democratic government against corruption and special corporate privilege, while simultaneously protecting individual rights, the framers of Washington's Constitution did at least four things:

(1) They adopted a broadly phrased declaration of rights containing twenty-seven individual liberties,[152] ranging from traditional legislative prohibitions on bills of attainder and ex post facto laws[153] to specific proclamations of individual liberties, including a right to assemble,[154] a right to speak freely,[155] a right to religious freedom,[156] a right to trial by jury and other due process restrictions,[157] a right to bear arms,[158] and a right to privacy.[159] Most of these provisions are phrased as broad affirmations of rights and are not limited, as similar federal guarantees, to infringement by the government.[160]

(2) They removed many traditional powers from the legislative branch to protect against special interest legislation. For example, the legislature was constitutionally prohibited from lending public money or credit to private companies,[161] from contracting out convict labor,[162] from authorizing lotteries or granting divorces,[163] or from passing any kind of "private or special" legislation involving taxes, highways, mortgages, corporate privileges, deeds and wills, interest rates, fines and penalties, adoptions, or civil and criminal actions.[164] Moreover, the constitution imposed structural restrictions on the legislative process, such as an openness requirement,[165] an anti-log-rolling provision that prohibits bills from embracing more than one subject,[166] and

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Setting, 42 PAC. N.W. Q. 277, 283-84 (1951); *see also supra* notes 139-41 and accompanying text.

152. Snure, *supra* note 139, at 675-76 (citing WASH. CONST. art. I).

153. *Id.* (citing WASH. CONST. art. I, § 23).

154. WASH. CONST. art. I, § 4.

155. Snure, *supra* note 139, at 676 (citing WASH. CONST. art. I, § 5).

156. WASH. CONST. art. I, § 11 (amended 1904, 1958, 1993).

157. WASH. CONST. art. I, §§ 3, 21, 22 (amended 1922), 26.

158. WASH. CONST. art. I, § 24.

159. WASH. CONST. art. I, § 7.

160. *See* Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment*, 8 U. PUGET SOUND L. REV. 157, 158 (1985).

161. WASH. CONST. art. XII, § 9; WASH. CONST. art. VIII, § 5.

162. WASH. CONST. art. II, § 29.

163. WASH. CONST. art. II, § 24 (amended 1972).

164. WASH. CONST. art. II, § 28.

165. WASH. CONST. art. II, § 11.

166. WASH. CONST. art. II, § 19.

specific prescriptions against bribery and corruption of government officials.[167]

(3) The framers of the Washington Constitution also provided for democratic checks on all three branches, including the direct election of both houses of the legislature,[168] popular election of judges,[169] and the separate election of all major offices in the executive branch, including the governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and the commissioner of public lands.[170] Direct democratic control of government was further enhanced by amendment 7 (1912), reserving to the people the power to directly legislate through the initiative and referendum processes,[171] and amendment 8 (1912), making all state-wide elected officials, except judges, subject to popular recall.[172]

(4) Finally, the framers included an entire article and a series of specific provisions that restrict private corporations.[173] These included constitutionally barring the formation of monopolies and trusts,[174] prohibiting transportation companies from discriminating in the rates that they charge customers,[175] prohibiting railroads from consolidating lines,[176] requiring stockholders to assume liability for corporate debts,[177] prohibiting companies from receiving public subsidies or credit,[178] and prohibiting the use of the government's eminent domain powers on behalf of private companies.[179] Furthermore, in one of the more unique provisions in a state constitution, they prohibited corporations from organizing, maintaining or employing an armed body of men.[180] This last restriction was the result of an event in 1888 when mining companies in Cle Elum and Roslyn employed armed strikebreakers to resolve a labor dispute.[181]

Aside from integrating several otherwise disparate provisions of the state

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167. WASH. CONST. art. II, §§ 30, 39.

168. WASH. CONST. art. II, §§ 4, 6.

169. WASH. CONST. art. IV, §§ 3 (amended 1995), 5.

170. WASH. CONST. art. III, § 1.

171. *See* WASH. CONST. art. II, § 1 (amended 1912, 1952, 1956, 1962, 1981); *see also* Act of Mar. 10, 1911, ch. 42, § 1, 1911 Wash. Laws 136 (1912).

172. *See* WASH. CONST. art. I, § 33 (adopted by Act of Mar. 17, 1911, ch. 108, § 1, 1911 Wash. Laws 504 (1912)).

173. *See* WASH. CONST. art. XII.

174. WASH. CONST. art. XII, § 22.

175. WASH. CONST. art. XII, § 15.

176. WASH. CONST. art. XII, § 16.

177. WASH. CONST. art. XII, §§ 4, 11 (amended 1940).

178. WASH. CONST. art. XII, § 9.

179. WASH. CONST. art. I, § 16 (amended 1920).

180. WASH. CONST. art. I, § 24.

181. Dolliver, *supra* note 135, at 143.

constitution into a more coherent framework, understanding the broad cultural motivations and concerns of the Olympia delegates should also force us to think differently about its particular provisions, even when those are analogous to provisions in the Federal Constitution. For example, in construing the free speech provisions of article I, section 5, the court in *Southcenter Joint Venture v. National Democratic Policy Committee*[182] faced the issue of whether the right to free speech applied to private as well as public exercises of power. To be sure, the language of the state provision, unlike the First Amendment, does not limit itself to government action abridging speech. Section 5 merely states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[183] Moreover, the committee that drafted the free speech provision had specifically deleted state action language from its finished product and indicated an intent to make the right applicable against private as well as public power.[184]

Despite differences in the language and history of section 5, the majority in *Southcenter* allowed federal free speech doctrine to influence its interpretation of the state provision and held that a "state action" requirement was implicit or inherent.[185] Writing for the court, former Justice Andersen stated:

> It follows that the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other.
>
> Consistent with the foregoing principles, it is, always has been, and remains basic constitutional doctrine that both the federal and state bills of rights, of which the right of free speech is a part, were adopted *to protect individuals against actions of the state.*[186]

The court's opinion dismissed the framers' explicit decision to remove words that would have limited the right by suggesting that the framers may have "viewed them as redundant and in the interest of simplicity . . . deleted them."[187] Yet, the court provided no historical evidence for its conjecture about the intent of the framers.

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182. 113 Wash. 2d 413, 415, 780 P.2d 1282, 1283 (1989).

183. WASH. CONST. art. I, § 5.

184. The first version of section 5 read: "That *no law shall be passed* restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject." Utter, *supra* note 160, at 172 (quoting *The Bill of Rights*, DAILY LEDGER (Tacoma), July 13, 1889, at 4 (alteration in original)).

185. *Southcenter Joint Venture*, 113 Wash. 2d at 420-24, 780 P.2d. at 1286-88.

186. *Id.* at 422, 780 P.2d at 1286-87.

187. *Id.* at 424, 780 P.2d at 1288.

Given the framers' fear of private power, as well as their clear understanding of the state action doctrine in the federal context, the *Southcenter* court's explanation for the decision to remove state action language from section 5 is highly implausible.[188] Concurring in the result only, Justice Utter succinctly explained:

> Ultimately, however, the majority's "inherent state action" approach does not address the federalist assumptions behind the original development of state action in Fourteenth Amendment jurisprudence: that states would protect rights against private actors. Further, the approach ignores the relevance of section 5's plain language in light of these assumptions. Although it offers "explanations," the majority's position is that it was mere coincidence that the framers specifically dropped state action language from section 5 a few short years after the United States Supreme Court developed the state action doctrine. In the era of dual sovereignty, such an omission could not have been so fortuitous.[189]

However, the real problem with the court's decision is not its specific conclusion about the history of the language in section 5, but rather its insistence on understanding the Washington Constitution against the back-drop of the motives, attitudes and structure of the Federal Constitution. The different political context of 1889, the different concerns of the framers of the Washington Constitution, their different understanding of popular sovereignty, and their fear of private power as the single greatest threat to liberty, should lead the court to a different set of assumptions about the rights provisions of the state constitution. Where one might reasonably assume an implicit state action requirement in the rights provisions of the Federal Constitution, such an assumption is incongruous with the history and political milieu of the framing of the Washington document. Of course, it might still be argued that even in the face of that history and political context, the framers intended the free speech right to apply only against governmental restrictions on expression.[190] The point is that this should be the focus of debate, not the very different question of how the framers of the Federal Constitution understood their rights provisions and constitutional structures.

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188. *See id.* at 438-40, 780 P.2d at 1295-97 (Utter, J., concurring in result); Snure, *supra* note 139. *But see* James M. Dolliver, *The Washington Constitution and "State Action": The View of the Framers*, 22 WILLAMETTE L. REV. 445 (1986).

189. *Southcenter Joint Venture*, 113 Wash. 2d at 448-49, 780 P.2d at 1300 (Utter, J., concurring in result).

190. *See* Dolliver, *supra* note 188.

B. *Constitutional Structure and Purpose*

A second major factor that can shape a theory of the Washington Constitution and distinguish it from the federal document is its general structure and purpose. Constitutions can either be *sources of political power* or *limitations on political power*.[191] It is well known that the framers of the Federal Constitution conceived themselves as creating a government of enumerated powers, and, as a result, the language of the document is interpreted as granting specific powers and authority to the national government.[192] Of course, our understanding of this structural feature has evolved over time and generated some of the Supreme Court's most momentous decisions.[193] However, notwithstanding the development of judicial doctrines that have greatly expanded federal powers,[194] it is still a fact that when Congress wishes to regulate it must find a specific or implicit grant of constitutional authority (a task that is becoming more difficult under the Rehnquist Court's recent federalism decisions).[195]

The opposite is true of state constitutions. State governments have historically been understood "to possess plenary legislative powers—that is," all powers not specifically removed from them by the Federal Constitution.[196]

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191. For a discussion of these differences in the U.S. context, see TARR, *supra* note 10, at 6-9.

192. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 153 (1988).

193. Literature on the Court's role in the expanding federal power is vast. Some of the more interesting discussions include: JOHN R. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS: 1789-1957 (1958); Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984); Robert Charles Brighton, Jr., Note, *Separating Myth from Reality in Federalism Decisions: A Perspective of American Federalism-Past and Present*, 35 VAND. L. REV. 161 (1982); A.E. Dick Howard, *The States and the Supreme Court*, 31 CATH. U. L. REV. 375 (1982); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81 (1982); Paul Revere Benson, Jr., The Supreme Court and the Commerce Clause: 1937-1968 (1969) (unpublished Ph.D. dissertation, Indiana University).

194. The commerce power has been a prime source for the expansion of federal regulatory power. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that the public accommodations provisions of the Civil Rights Act of 1954 are valid under the commerce clause); Wickard v. Filburn, 317 U.S. 111, 124-29 (1942) (holding that a marketing quota applied to farmer growing a very small amount of wheat for local sale only because it affected interstate commerce).

195. *See, e.g.*, City of Bourne v. Flores, 521 U.S. 507, 536 (1997); United States v. Lopez, 514 U.S. 549, 566-68 (1995).

196. *See* TARR, *supra* note 10, at 6-9.

Members of the Washington high bench have also understood this difference, as former Justice Andersen observed in *Gunwall*:

> As this court has often observed, 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, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.[197]

This is where the idea of "state police powers" originates, a type of power that the federal government does not possess. The framers of early state constitutions understood this difference well, which is one reason why state constitutions are much more detailed in the restrictions placed on legislative authority.[198]

This structural difference between the state and federal constitutions has several implications. First, when the constitutionality of a statute is involved, the central object of inquiry is "not whether the act is authorized by the constitution, but whether it is [specifically or implicitly] prohibited."[199] In contrast to the federal level, where the burden rests with the government to find authority for its statute, the burden at state level falls squarely on those challenging a statute to find a clear and specific restriction on state authority.[200] Second, unlike the federal level where judges may have good reason to interpret grants of government authority expansively (such as the Court's modern commerce clause jurisprudence), "grants of authority" or constitutional specifications at the state level often act as limitations on government power.[201] In a constitution of plenary legislative authority, an authorization to pursue one course of action or a specification of one type of activity may by negative implication preclude others that were otherwise available in the absence of the "grant" or specification.[202]

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197. State v. Gunwall, 106 Wash. 2d 54, 66, 720 P.2d 808, 815 (1986); *see also* State *ex rel.* Distilled Spirits Inst., Inc. v. Kinnear, 80 Wash. 2d 175, 181, 492 P.2d 1012, 1015 (1972) ("[T]he legislative power is absolute unless expressly or by fair implication limited in the constitution.").

198. *See* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution—Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 964-71 (1994).

199. TARR, *supra* note 10, at 7 (quoting State *ex rel.* Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978)).

200. *See generally id.* at 6-9; Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 966 (1968).

201. TARR, *supra* note 10, at 8-9.

202. *See id.* at 7-9.

Finally, this structural difference between state and federal constitutions may persuade us to construe rights provisions in the state constitution more broadly than similar provisions of the Federal Constitution. The Federalists argued that the absence of specific grants of government authority in the Federal Constitution acts as an implicit protection of individual liberty.[203] At the state level, however, protection from legislative power is found solely in positive constitutional affirmations of individual liberties.[204] Because state power is plenary in nature, state governments have always posed a greater threat to individual liberties than the federal government.[205] As Justice Utter pointed out in his *Southcenter* opinion:

> In our scheme of federal government, an individual state, because it remains a sovereign, retains plenary power. This power is limited only by the state's own constitution, the federal constitution, and federal laws and treaties. Accordingly, the state has direct power to regulate, within these limits, the behavior of private individuals within its own borders. The federal government, on the other hand, enjoys only those powers granted to it in the federal constitution. Therefore, the power of the federal government to regulate private behavior is theoretically less than that of the individual states.[206]

However, if the structure of state constitutions should lead judges to construe restraints on state power more broadly in order to protect some rights, it will lead in the opposite direction for the protection of others. When speaking of the Federal Constitution, commentators often describe individual rights as "trumps" against the exercise of governmental power.[207] This is because the

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203. In arguing against the necessity of a bill of rights in the Constitution, Hamilton argues in Federalist No. 84:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitutions but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.

THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

204. *See generally* Fritz, *supra* note 198, at 964-71.

205. *See generally* Grad, *supra* note 200, at 966.

206. Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 443, 780 P.2d. 1282, 1297 (1989) (Utter, J., concurring in the result) (citation omitted).

207. For a classic statement of this view, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). *But see* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings,*

rights found in the Federal Bill of Rights are generally "negative" in nature, prohibiting government from taking certain actions. State constitutions, by contrast, often contain "positive" rights provisions or broad normative goals and aspirations that *require*, rather than *prohibit*, government action.[208] For example, most state constitutions require the establishment of free public education, a prevailing wage rate for public construction projects, or require the state to provide social services to the poor.[209] When state constitutions mandate specific positive actions or goals, they impose an obligation on state governments to act. "So understood, positive rights not only restrain the government's exercise of power, but also compel its exercise," and judicial review may "serve to ensure that the [state] government is doing its job and moving policy closer to the constitutionally prescribed end."[210]

Of the thirty-five sections in Washington's Declaration of Rights, only two were expressed in the negative form, as limitations on the power of government.[211] The others are phrased as general affirmations of rights where the state is compelled to act in the observance of those rights and not simply refrain from breaching them as in the federal scheme. Moreover, the Washington Constitution contains several provisions that expressly confer rights to some form of government action or resource. Often these provisions use the command verb "shall," rather than the discretionary verb "may," when directing government. For example, article II, section 35, provides: "The legislature *shall* pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health . . . ."[212] Likewise, article XIII, section 1, provides that educational, reformatory and penal institutions, as well as state mental hospitals and institutions for blind, deaf and disabled youth "*shall* be fostered and supported by the state."[213] While article IX, sections 1 and 2, declare, "It is the paramount duty of the state to make *ample provision* for the education of all children residing within its borders. . . . The legislature *shall* provide for a general and uniform system of public schools."[214] Moreover, article I, section 29, declares

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Expressive Harms, and Constitutionalism, 27 J. LEGAL STUD. 725, 727-29 (1998) (criticizing Ronald Dworkin's view of rights as inappropriately "excluding appeals to the common good").

208. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999).

209. *Id.* For a competing view of whether state courts should seek to enforce such rights, see Talmadge, *supra* note 80.

210. Hershkoff, *supra* note 208, at 1138.

211. *See* WASH. CONST. art. I, §§ 12, 23.

212. WASH. CONST. art. II, § 35 (emphasis added).

213. WASH. CONST. art. XIII, § 1 (amended 1988) (emphasis added).

214. WASH. CONST. art. IX, §§ 1, 2 (emphasis added).

that all "[t]he provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."[215] This last provision appears to remove any common law distinction that might otherwise lead judges to treat negative and positive rights provisions differentially.[216] Indeed, shortly after the adoption of the constitution, former Justice Theodore Stiles, himself a delegate of at the Olympia convention, noted:

> There have been some excellent provisions in the constitution from which the people have had no benefit, because they depend for operation upon action by the legislature, and that body has neglected to do its duty in the premises. Considering that by section 29 of the first article every direction contained in the constitution is mandatory unless expressly declared to be otherwise, it is at least surprising that in some instances no attempt has been made whatever to set these provisions at their legitimate work.[217]

In the landmark case *Seattle School District No. 1 v. State*,[218] a divided high court interpreted the "paramount duty" clause of article IX, which requires the legislature to fund education, to require a higher level of funding than the state legislature had allocated. The court held that by not adequately funding education, the state had breached its constitutional duty to ensure a "basic education" to all Washington students.[219] In general, however, Washington courts have been reluctant to enforce the positive rights provisions of the state's charter, usually premising their reluctance upon the doctrines of separation of powers doctrine and judicial restraint imported from the federal constitutional context.[220] Such doctrines are, however, usually inappropriately applied in the

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215. WASH. CONST. art. I, § 29.

216. *See* Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 500, 585 P.2d 71, 85 (1978); *see also* State *ex rel.* Anderson v. Chapman, 86 Wash. 2d 189, 192, 543 P.2d 229, 230-31 (1975); State *ex rel.* O'Connell v. Slavin, 75 Wash. 2d 554, 557-59, 452 P.2d 943, 945-46 (1969); State *ex rel.* Swan v. Jones, 47 Wash. 2d 718, 743, 289 P.2d 982, 997 (1955) (Donworth, J., dissenting).

217. Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 WASH. HIST. Q. 281, 286 (1913).

218. 90 Wash. 2d 476, 585 P.2d 71 (1978).

219. *Id.* at 510-14, 585 P.2d at 90-93.

220. For a discussion of the application of such doctrines to the Washington state constitutional context, see Talmadge, *supra* note 80, at 724. The courts' disinclination to enforce positive rights stretches back to at least Gottstein v. Lister, 88 Wash. 462, 493-94, 153 P. 595, 607 (1915). For a more recent judicial explanation of how separation of powers concerns constrain judicial enforcement of positive rights or government spending, see *Washington State Coalition for the Homeless v. Department of Social & Health Services*, 133 Wash. 2d 894, 945-46, 949 P.2d 1291, 1317-18 (1997) (Durham, C.J. dissenting), *Hillis v. State*, 131 Wash. 2d 373, 389-90, 932 P.2d 139, 147-48 (1997); *Seattle School District No.*

Washington setting. In the latter context, positive rights are specifically granted under the constitution: judges are democratically accountable, the power of judicial review was a firmly entrenched constitutional doctrine since 1889, and article I, section 29 can reasonably be construed as removing any distinction between judicial treatment of the constitution's positive and negative rights provisions.[221]

Of course, recognizing that state constitutions establish certain rights to governmental services is not the same as establishing the exact extent of the judiciary's role in enforcing those rights.[222] Even in the *Seattle School District* case, the court refused to intrude upon responsibilities properly belonging to the elected branches.[223] The court explained: "While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty [to provide adequate basic education], the general authority to select the *means* of discharging that duty should be left to the Legislature."[224] However, while there may be good reasons, either prudential or constitutional, to give broad deference to the elected branches when enforcing positive rights provisions, such reasons must be drawn from the structure and restrictions of Washington's Constitution and cannot simply be imported from the federal context.[225] Broad declarations that the separation of powers leaves decisions about taxing, spending and government resources to the determination of the elected branches alone, while possibly accurate at the federal level, are simply not appropriate with respect to the structure and history of the state constitution.

I v. State, 90 Wash. 2d 476, 577-78, 585 P.2d 71, 127 (1978) (Rosellini, J., dissenting), and *In re Salary of Juvenile Director*, 87 Wash. 2d 232, 237-38, 552 P.2d 163, 167 (1976). *See also* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 425, 780 P.2d 1282, 1288 (1989) (rejecting a state role in protecting free speech against private intrusion) ("Furthermore, and much more importantly, the question of whether the state free speech provision requires 'state action' also directly implicates the separation of powers doctrine.").

221. *See* Hershkoff, *supra* note 208, at 1156. For a discussion of the constitutional establishment of judicial review in Washington, see Charles H. Sheldon & Michael Stohr-Gillmore, *In the Beginning: The Washington Supreme Court a Century Ago*, 12 U. PUGET SOUND L. REV. 247, 248-50 (1989). *See also* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 422-24, 780 P.2d 1282, 1287 (1989) (interpreting Washington Constitution article I, section 5 in accordance with constitutional doctrine in 1889).

222. *See Gottstein*, 88 Wash. at 493-94, 153 P. at 606-07 (recognizing that legislative and executive branches are constitutionally charged with enforcing constitutional rights).

223. *Seattle Sch. Dist. No. 1*, 90 Wash. 2d at 518-19, 585 P.2d at 95.

224. *Id.* at 520, 585 P.2d at 96 (citing Newman v. Schlarb, 184 Wash. 147, 153, 50 P.2d 36, 39 (1935)).

225. For a discussion of this point, see Hershkoff, *supra* note 208, at 1137-38.

C. *The Diversity and Fluidity of the State Constitution*

Washington's Constitution, like other late-nineteenth-century state constitutions, contains not only statements of very broad principle but also a range of other provisions of varying detail and specificity, including many that resemble statutes or regulations. Of course, the Federal Constitution contains a variety of constitutional provisions, but the problem is more serious at the state level. Contrast, for instance, the language of article I, section 32 ("A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."), a provision that clearly implicates broad questions of natural justice,[226] with article III, section 14, setting the salary of the Governor at $4,000 annually,[227] or with article XII, section 16, which prohibits railroads from merging with competitors.[228] Or, compare article XVIII, describing in detail what the state seal shall look like,[229] with article XXXI, section 1 which provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."[230] While some provisions intend to express broad principles or fundamental law, others clearly do not.

Much of the detail in the Washington Constitution reflects the fact that it is a *limiting* rather than an *empowering* document. It also reflects the framers' distrust of corrupt legislators and their strong belief in popular sovereignty and constitutional-level policymaking.[231] Whatever its sources, the Washington Constitution is much longer, more detailed, and more diverse in the nature of the concerns it addresses than is the Federal Constitution. The state document contains thirty-two articles and 92 amendments,[232] as compared to seven articles and twenty-seven amendments in the federal document.[233] Its provisions range from relatively clear and specific commands, to extremely open, textured clauses that require pure political judgement to interpret.[234] This diversity and detail alone make a uniform interpretive approach to various constitutional provisions impossible.

More problematic for interpreters of Washington's Constitution, however, is that it has undergone a process of continual and frequent amendment —92

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226. WASH. CONST. art. I, § 32; *see also* Snure, *supra* note 139, at 673-74.

227. WASH. CONST. art. III, § 14.

228. WASH. CONST. art. XII, § 16.

229. WASH. CONST. art. XVIII, § 1.

230. WASH. CONST. art. XXXI, § 1.

231. *See* Snure, *supra* note 139, at 670-71.

232. *See* WASH. CONST.

233. *See* U.S. CONST.

234. This problem confronts interpreters of most state constitutions, *see* TARR, *supra* note 10, at 191.

times in the 110 years since its adoption.[235] The Federal Constitution, by contrast, has been amended a mere twelve times during this same period.[236] As with the provisions of the original constitution itself, the amendments vary greatly in detail, specificity and subject matter. The subject area calling forth the most amendments, by far, is public expenditure, taxation, and finance—more than twenty-eight separate amendments.[237] Other areas in which there have been multiple amendments include: courts and judges (thirteen);[238] local governments (nine);[239] voter qualifications (five);[240] filing vacancies in elective offices (four);[241] and alien land ownership (three).[242] Since 1980 alone, the constitution has been changed twenty-two times by amendments that cover a range of topics: judicial qualifications and elections, legislative powers, the initiative and referendum process, special revenue financing, the census and redistricting process, public investment, agricultural commodity assessment, judicial misconduct, salaries for public officials, limitations on levies, taxes, voter qualifications, victims of crime, educational and reformatory institutions, energy and water conservation, and the employment of state chaplains.[243] Even this partial listing of the subject area of amendments is enough to give a sense of the state constitutions diversity and malleability. In all, seventy-eight of the constitution's original 247 separate sections, nearly one-third of the entire document, have been added, repealed or deleted by amendment, and twenty-six of the these amendments were themselves subsequently amended or repealed.[244]

Moreover, unlike the Federal Constitution, there is no clear pattern of tectonic constitutional change or periods of major constitutional reconstruction in Washington history.[245] Thus, while it is possible to speak of the federal constitutional tradition as embodying periods of political coherence, or what Bruce Ackerman has called "constitution moments" where the entire

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235. For a discussion of historical periods of amending the Washington Constitution, see Paul L. Beckett & Walfred H. Peterson, *The Constitutional Framework*, *in* POLITICAL LIFE IN WASHINGTON: GOVERNING THE EVERGREEN STATE 19, 25-32 (1985).

236. *See* U.S. CONST. amends. XVI-XXVII.

237. *See* WASH. CONST. amends. 1, 3, 11, 14, 17, 18, 19, 20, 27, 35, 43, 44, 45, 47, 48, 51, 53, 54, 55, 57, 59, 60, 64, 73, 78, 79, 81, 90.

238. *See* WASH. CONST. amends. 25, 28, 38, 41, 50, 54, 65, 71, 77, 80, 85, 87, 89.

239. *See* WASH. CONST. amends. 12, 21, 22, 23, 40, 52, 54, 57, 58.

240. *See* WASH. CONST. amends. 2, 5, 46, 63, 83.

241. *See* WASH. CONST. amends. 6, 13, 32, 52.

242. WASH. CONST. amends. 24 (repealed 1966), 29, 42.

243. *See* WASH. CONST. amends. 71-92.

244. A complete list of sections altered and amendments is found in the index to the *Washington State Constitution*, maintained and published by the Office of the Code Reviser, State of Washington. 0 STATUTE LAW COMM., STATE OF WASH., 2000 REVISED CODE OF WASH. 100, 100-02 (2000) (Index to the State Constitution).

245. *See* Beckett & Peterson, *supra* note 235, at 32-33.

architecture of the document was realigned (such as the Civil War period or the New Deal era),[246] it is impossible to identify similar coherence in changes made to Washington's Constitution.

There have been several unsuccessful political efforts to fundamentally alter the state constitution. In 1918, less than thirty years after its adoption, the legislature recommended calling a constitutional convention, but the proposal failed by a state-wide vote of 52 percent to 48 percent.[247] During the Depression era of the 1930s, Governor Clarence Martin created an Advisory Constitutional Revision Commission, which recommended nine sweeping reforms, including a move to a unicameral legislature.[248] None of the reforms were enacted.[249] In 1965, the legislature created a Constitutional Advisory Council, which again made a series of proposals, less sweeping in nature than those of the 1935 commission, but still no action was taken.[250] Finally, Governor Daniel Evans, a strong advocate of constitutional reform, created a Constitutional Revision Committee in 1967, a Constitutional Revision Commission in 1968, and a Commission on Constitutional Alternatives in 1975.[251] Although these bodies worked to study alternatives and proposed major constitutional changes, including the call for a "gateway amendment" which would make future constitutional amendments easier to enact, none of their efforts bore direct fruit either.[252]

The ninety-two amendments to the Washington Constitution therefore stand as individual, haphazard alterations. Some parts of the constitution have remained relatively, or entirely, unchanged since 1889 (articles V, X, XIV, XVII-XXII, and XXV-XXVI have never been amended),[253] while others have been altered on a regular basis (article II has been amended eighteen separate times,[254] article IV amended twelve times,[255] and article VII amended twelve times).[256]

Theorizing about the Washington Constitution thus forces us to consider the fact that different constitution-amenders most likely had different motivations and distinct understandings of constitutionalism when adding,

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246. *See* ACKERMAN, *supra* note 15, at 40-41.

247. Beckett & Peterson, *supra* note 235, at 29.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 30-31.

252. *Id.* at 30-32.

253. WASH. CONST. arts. V, X, XIV, XVII-XXII, XXV-XXVI.

254. WASH. CONST. amends. 7, 13, 18, 24, 26, 29, 30, 32, 35, 36, 39, 42, 52, 56, 68, 69, 72, 74.

255. WASH. CONST. amends. 25, 28, 38, 41, 50, 65, 71, 77, 80, 85, 87, 89.

256. WASH. CONST. amends. 3, 14, 17, 19, 47, 53, 55, 59, 64, 79, 81, 90.

deleting or changing parts of the constitution. While some portions of the existing document may embody a principled and coherent constitutional perspective, others—as a result of the continual amendment process—may contain key provisions reflecting distinct and perhaps inconsistent constitutional perspectives and values.

The fluidity of the state constitution's provisions has two implications for constitutional theory. First, a judge or a lawyer seeking constitutional coherence in interpreting parts or provisions of the constitution that have undergone frequent amendment may likely confront the task of *construction* rather than *discovery*. Second, to the extent the state constitutional provisions do not embody a single or consistent set of political perspectives, "an interpreter cannot always look to the whole to illuminate the meaning of its various parts."[257]

Professor Alan Tarr, a leading expert on state constitutions, has argued that these problems in state constitutional theory necessitate a "clause-bound" interpretive approach, where respect is given to each provision's unique character rather than forcing them into a uniform interpretive process.[258] Although I have argued that many of the individual provisions of the Washington Constitution can be brought into a coherent interpretive approach, one rooted in the structure and purposes of the document, it is clear that many of its provisions cannot. A theory of the Washington Constitution should therefore not expect to attain interpretive consistency, or even the same level of integration found in approaches to the Federal Constitution, which is much shorter, less diverse, and more static in nature.

The contentious 1998 term limits case, *Gerberding v. Munro*,[259] exemplifies some of the problems that constitutional diversity and fluidity create for those seeking interpretative coherence over Washington's Constitution. In striking down Initiative 573, which imposed term limits on the governor, lieutenant governor and members of the legislature, the court held that placing term limits on state-wide offices unconstitutionally added new office-holding qualifications to those already specified in article II, section 7 ("No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.") and article III, section 25 ("No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office.").[260]

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257. TARR, *supra* note 10, at 194. For a discussion of these problems in state constitutional interpretation see *id.* at 189-94.

258. *See id.* at 194.

259. 134 Wash. 2d 188, 949 P.2d 1366 (1998).

260. *Id.* at 201-02, 944 P.2d at 1372-73; WASH. CONST. art. II, § 7; WASH. CONST. art. III, § 25.

In his dissent, Justice Sanders argued that the "negative" constitutional language of these provisions set only a minimum level of qualifications, not an exclusive set of maximum qualifications.[261] Thus, the legislature or the people, through the initiative process, could add additional qualifications for office-holding. Criticizing the majority's interpretive approach, he argued that an exclusive reading of the language in articles II and III could not be consistently applied to similar provisions elsewhere in the constitution.[262] For example, a similar construction of the language in article IV, section 17 ("No person shall be eligible to the office of judge of the supreme court, or judge of a superior court, unless he shall have been admitted to practice in the courts of record of this state, or of the Territory of Washington.") would bring it into conflict with section 31(5) of the same article (The "supreme court may remove or suspend [a] judge or justice 'and that person is ineligible for judicial office until eligibility is reinstated by the supreme court.'").[263]

Whatever merits are found in other criticisms lodged by the dissent, this particular objection to the majority's interpretive approach is highly problematic. Article IV, section 31 created the Commission on Judicial Conduct and was added to the constitution in 1980 by amendment 71.[264] Its provisions have been since modified by two subsequent amendments— amendment 77, in 1986, and amendment 85, in 1989.[265] However, there have been no changes made to articles II or III that would similarly alter the office holding provisions of officers in the executive and legislative branches.[266] Thus, whatever might be said about the meaning of the office-holding provisions regarding judges in article IV, it bears little on the meaning of similar provisions in articles II and III. Given the effect of amendments, the majority's implication that the office-holding provisions embedded in the three articles could be separately and independently construed was perfectly appropriate.

Ultimately, the objection raised in the *Gerberding* dissent aspires to a level of interpretive consistency that is impossible for a document so diverse and fluid. A theory of the Washington Constitution must account for its diversity and fluidity, seeking consistency and coherence where practical, but not demanding a level of integrity that is impossible.

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261. *Gerberding*, 134 Wash. 2d at 213-14, 949 P.2d at 1378-79 (Sanders, J., dissenting).

262. *Id.* at 213 n.2, 949 P.2d at 1378 n.2 (Sanders, J., dissenting).

263. *Id.*; WASH. CONST. art. IV, § 17; WASH. CONST. art. IV, § 31(5).

264. *See* WASH. CONST. art. IV, § 31 (amended 1986, 1989).

265. *See* WASH. CONST. amends. 77, 85.

266. See Washington constitution article III, section 25 which was amended in 1956 by amendment 31, but the only change made was to remove a specific restriction on making the state auditor ineligible for two successive terms. WASH. CONST. art. III, § 25 (amended 1956).

D. *The Problem of Constitutional Pluralism*

A final factor that needs to be considered in constructing a theory of the Washington Constitution is the fact that the framers operated self-consciously in a context of constitutional pluralism.[267] They did not draft the constitution from scratch but borrowed heavily, and in some cases borrowed outright, from other constitutions.[268] Of course, all of the delegates at the state convention were familiar with the Federal Constitution and its influence on both the structure and language of the state document is clear. Not only did they copy structural features such as a separation of powers into three branches and a bicameral legislature, but several provisions, such as article I, section 3 ("No person shall be deprived of life, liberty, or property, without due process of law"), were taken nearly verbatim from the federal charter.[269] The Washington Constitution has been influenced even by developments at the federal level which never became formal parts of the Federal Constitution. For example, article XXXI, added by amendment 61 in 1972, was modeled directly on the failed Federal Equal Rights Amendment.[270]

Far more important to the convention delegates, however, was the influence of other state constitutions. While the absence of a complete record of the convention in Olympia makes it difficult to know with precision what the framers thought as they debated various provisions, records of other late-nineteenth century constitutional conventions make clear that participants often saw themselves as being engaged in a scientific, comparative process of constitution building.[271] Indeed, many participated at other constitutional conventions before moving out West.[272] By learning from past constitutional experimentation in other states (a process greatly accelerated after the Civil

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267. *See* Sheldon & Stohr-Gillmore, *supra* note 221, at 250-52.

268. *See id.*

269. U.S. CONST. amend. V; WASH. CONST. art. I, § 3.

270. *See* Darrin v. Gould, 85 Wash. 2d 859, 870-74, 540 P.2d 882, 889-91 (1975) (discussing the adoption of amendment 61 and its relation to the Federal Equal Rights Amendment); *see also* Patricia L. Proebsting, Comment, *Washington's Equal Rights Amendment: It Says What It Means and It Means What It Says*, 8 U. PUGET SOUND L. REV. 461, 462-65 (1985). On the influence of the Federal Equal Rights Amendment on other states, see G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 923-24 (1982); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1212-14 (1985).

271. *See* Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L. REV. 969, 982 (1995) (reviewing DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-90 (1992)).

272. *Id.* at 983.

War when southern states were all forced to adopt new constitutions and as territorial expansion led to the creation of new states in the West), these late-nineteenth century constitutional delegates engaged in systematic comparative analysis of other constitutions, borrowing freely from the provisions they thought successful.[273] Often, the latest constitutions acquired a special reputation because they were thought to have captured the latest state-of-the-art thinking on constitutional design.[274] This natural tendency of delegates to be guided by other state constitutions was made possible by the widespread use of a particular genre of political science literature during the late-1800s—compilations of existing state constitutions. One of the most popular compilations was *The American's Guide*,[275] which contained copies of the Federal Constitution, the Declaration of Independence, the Articles of Confederation, and the latest state constitutions. Another compilation was *The Freeman's Guide*,[276] which also contained copies of the Federal Constitution and state constitutions (with amendments). According to one study, "Over seventy different editions of state constitutional compilations appeared between 1781 and 1894," and they were in wide use at state constitutional conventions during this period.[277]

This spirit of comparative constitutional experimentation clearly infected the delegates in Olympia.[278] Scarcely any of the provisions in the Washington Constitution can claim originality. Perhaps one of the more obvious examples is article IV which established the state judicial system and is lifted nearly entirely from the California Constitution of 1879.[279] In addition, nearly all the other provisions—from the various provisions in the Declaration of Rights in article I, to the restrictions placed on corporations under article XII, to the design of the executive branch and the titles given various state officers in article III, to the structure and electoral procedures for the legislature in article II—also appeared in previous constitutions of other states.[280] Indeed, prior to the convention, W. Lair Hill, a "former territorial judge (1870-71) and ex-reporter for the *Portland Oregonian* [newspaper], was commissioned . . . to draft a model constitution" that was distributed to delegates at the convention.[281] Hill's draft, which was modeled on California's Constitution of

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273. *Id.* at 982.

274. *Id.*

275. THE AMERICAN'S GUIDE (Phila., M'Carty 1813).

276. THE FREEMAN'S GUIDE (Charlestown, Brega 1812).

277. Fritz, *supra* note 271, at 981 n.62.

278. *See* Sheldon & Stohr-Gillmore, *supra* note 221, at 252.

279. *See* STATE OF WASH., 1985-86 LEGISLATIVE MANUAL 357 (1985-86) (Forty-Ninth Legislature).

280. WASH. CONST. arts. I, II, III, XII; STATE OF WASH. *supra* note 279, at 357.

281. Sheldon & Stohr-Gillmore, *supra* note 221, at 251-52.

1879, eventually provided the exact wording for fifty-one sections, and similar wording for forty-six sections, of Washington's Constitution.[282] In all, the California Constitution provided complete wording for at least forty-five provisions, Oregon's Constitution accounted for twenty-three provisions, Wisconsin's for twenty-seven, and Indiana's for seven.[283]

This process of constitutional eclecticism raises several concerns about constructing an interpretive theory of Washington's Constitution. We already discussed the many problems of interpretive sequence and deference that the existence of analogous provisions in the Federal Constitution pose. Borrowing from other states raises problems too. By copying phrases or provisions from other states, does the Washington Constitution also adopt the interpretive traditions of those phrases and provisions? Does it matter if the other state's interpretation occurred prior to or preceding adoption of the language in Washington?

In *Southcenter*, for example, Justice Utter's concurrence chastised the majority's adoption of a "state action" doctrine as ignoring the fact that other states rejected the doctrine when interpreting similarly phrased free speech provisions in their constitutions.[284] In particular, the Supreme Court of California, whose free speech provision served as a model for article I, section 5, rejected such an interpretation.[285] Indeed, inferences can be drawn even when the framers chose not to use the language of other state constitutions. In *Gerberding*,[286] for example, Justice Sanders' dissent argued that the office-holding provisions of articles II and III were intended to be non-exclusive because states wanting exclusive qualifications had explicitly so stated in their constitutions:

> Drafters of our constitution had every reason to be well aware of the difference between negative and exclusive phraseology. In 1889, when our constitution was drafted, several states had recently included exclusive qualifications for holding office in their constitutions. For example, North Carolina's second constitution, written in 1868, included a provision clearly stating that citizenship and voter status shall be the sole requirements for

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282. *Id.*; STATE OF WASH., *supra* note 279, at 356.

283. STATE OF WASH., *supra* note 279, at 356.

284. Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 449-52, 780 P.2d. 1282, 1300-01 (1989).

285. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

286. Gerberding v. Munro, 134 Wash. 2d 188, 949 P.2d 1366 (1998).

> public office and that the legislature cannot add qualifications thereto. . . . *Several other state constitutions used similarly exclusive language. Ours did not but our majority rewrites it under the guise of construing it.*[287]

Using this type of comparative constitutional analysis to shed light on the framers' motivations is appropriate, even laudable, but using it as a more general guide for interpretation may be problematic. For the same reason state judges should avoid the reflexive importation of federal interpretive doctrines into the state context, they should also avoid reflexive importation of doctrines and approaches from other states. Although state constitutions are more similar in structure to one another than they are to the Federal Constitution, they still embody unique histories, traditions, goals, and purposes. If interpretive approaches draw upon a larger theory of the constitution itself, as I have argued, then it should matter little how other states have interpreted similarly worded provisions. An interpretation of a constitutional provision must be intrinsic to the constitutional context within which it is embedded, not to some other constitutional context.[288]

One example serves to illustrate the point. When the Washington high court first construed the Washington Equal Rights Amendment (amendment 61, article XXXI), it may well have followed other state courts that had interpreted similar constitutional provisions as elevating sex to a suspect classification and requiring strict scrutiny from the courts.[289] Instead, in *Darrin v. Gould*,[290] the court pointed out that under Washington law, sex already had been elevated to a suspect class.[291] Thus, the court concluded that article XXXI must have sought to provide an even more stringent level of protection to sex equality within the Washington context.[292] In so doing, the court recognized that the constitution is not just its language and text (in which case interpretive approaches would be transportable from one state to another) but also the unique tradition and body of decisions within which they are embedded.[293]

The problems raised by constitutional eclecticism are ultimately best resolved by recognizing that different constructions of the same language are

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287. *Id.* at 220-21, 949 P.2d at 1382 (Sanders, J., dissenting) (emphasis added) (citations omitted).

288. For a more detailed discussion of this point, see TARR, *supra* note 10, at 208-09.

289. *See generally* Darrin v. Gould, 85 Wash. 2d 859, 868-69, 540 P.2d 882, 888 (1975).

290. 85 Wash. 2d 859, 540 P.2d 882 (1975).

291. *Id.* at 868, 540 P.2d at 888.

292. *Id.* at 868 n.7, 540 P.2d at 888 n.7.

293. *See generally id.* at 871, 540 P.2d at 889. Professor Tarr uses this same case to illustrate a similar point regarding a constitution's relationship to prior constitutions of the same state. *See* TARR, *supra* note 10, at 201-02.

perfectly acceptable, even desirable, outcomes in a system of constitutional pluralism. Washington courts should be free to craft solutions to legal problems unique to the state and its constitutional scheme. Such freedom would permit courts to learn from the mistakes made in other jurisdictions (whether federal or state) and experiment in the way envisioned by Justice Brandeis when he heralded states as laboratories of democracy.[294] Former Justice Utter recognized this much in his *Southcenter* concurrence:

> This court can dispute the clarity of the historical record surrounding the drafting and passage of section 5. Ultimately, however, we must determine what is presently most appropriate for the jurisprudence of this state. The federal state action doctrine is fraught with contradictions. . . .
>
> . . . .
>
> This court, however, need not adopt such contradictions. Federalism allows the states to operate as laboratories for more workable solutions to legal and constitutional problems. As part of our obligation to interpret our state's constitution, we have the opportunity to develop a jurisprudence more appropriate to our own constitutional language.[295]

Unfortunately, Justice Utter's vision has yet to be fully and consistently embraced by Washington's high bench.

V. CONCLUSION

The new judicial federalism is here to stay. As with other major constitutional developments, its life is linked to broader political and economic changes that have forced contemporary Americans to rethink the locus and forms of governmental power. Citizens of states will continue to turn to their state courts to guarantee freedoms and rights when federal courts fail to do so. The question of whether any particular exercise of state judicial power in this new rights jurisprudence is legitimate ultimately turns on the content and purposes of individual state constitutions. It matters little whether the language of a particular provision has been borrowed from another source—whether federal or from another state charter. The question is not what other courts have said of similar provisions, but *what is the best interpretation of the provisions of Washington's Constitution.*

Such an approach may or may not lead Washington judges to adopt interpretations of constitutional provisions that are similar to those adopted by

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294. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

295. Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 455, 460, 780 P.2d. 1282, 1303, 1306 (1989) (Utter, J., concurring) (citation omitted).

federal courts or the courts of other states. But it will require Washington courts to take more seriously the process of building a theory of the Washington Constitution.

In the end, questions of interpretive legitimacy must always be resolved by appeals to a theory of the substantive values of the constitution. The challenge confronting the Washington high bench then is not how to justify deviations from federal constitutional doctrines, but rather to articulate the values and purposes that undergird the state's constitution. This remains both the problem and the promise of a system of dual constitutionalism. Edward S. Corwin observed some time ago: "one of the greatest lures to the westward movement of population was the possibility which federalism held out to the advancing settlers of establishing their own undictated political institutions, and endowing them with the generous powers of government for local use."[296]

296. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 22 (1950).