State Constitutional Law Symposium in Honor of Justice Robert F. Utter

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- Justice Debra Stephens, Washington Supreme Court
- G. Alan Tarr, Rutgers University-Camden
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Symposium held Oct. 23, 2015
This symposium was organized to honor the late Washington Supreme Court Justice Robert F. Utter. The presentations, panel discussions and resulting papers included in this series focused on issues in state constitutional law of special concern to him.

Robert F. Utter
1930 - 2014

Robert F. Utter had a long and fruitful career as a jurist, as a law teacher in the United States and in developing democracies, and as a thinker and writer on state constitutional law. In all aspects of his work, Justice Utter showed an unswerving commitment to individual liberty; judicial accountability and independence; access to justice; and human rights. He also made striking contributions to the rediscovery and reestablishment of state constitutional jurisprudence in America, independent from federal constitutional interpretation but interacting positively with the development of law by the federal courts. The symposium was meant to honor Justice Utter’s life and work with discussions and essays that continue the growth of state constitutional jurisprudence.
For more on Justice Utter’s life and publications, see Gallagher Law Library’s memorial page,
https://lib.law.washington.edu/content/memorial/justiceutter
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UTTER LESSONS

Ronald K.L. Collins*

“Hello, friend.” Every time I saw Bob Utter he greeted me that way. Those two words reveal much about this wondrous man who held a seat on Washington State’s highest court. He was kind to a fault and humble in all ways, both professional and personal. In a manner only he could convey, Bob always graced a smile that welcomed you into his world. And what a world it was.

In an interview he did for The Olympian in February of 2014, Bob stressed that his father “was a humanitarian through and through—including with his family. . . . He certainly never gave up on us. I think he showed that in his life—he never gave up on people. He created a lot of deep friendships that way, and inspired a lot of people.” That was pure Bob Utter, just like his father—he truly cared about the human lot and improving its condition; he showed it through his generosity of spirit and his dedication to the rule of law tempered by equity. And as evidenced by the University of Washington Law School Symposium held during the fall of 2015 in his honor, he continues to inspire us.

Robert Utter—the lawyer, the judge, and the teacher—had a genuine commitment to freedom, a commitment at once passionate and informed. And it was that passion that first attracted him to the importance of state constitutions as bulwarks of freedom in our constitutional system. That passion led him to explore state constitutional law first as a novice, then as a scholar and teacher, and ultimately as a jurist. In the process, he became a major figure in the movement then known as the “New Judicial Federalism.” In that regard, it was not surprising that Justice Utter joined the cast of state court luminaries attending the landmark Williamsburg Conference held in March of 1985—the likes of Justices Shirley Abrahamson, Hans Linde,

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Stanley Mosk, and Stewart Pollock.\(^2\)

There are others here far more learned in the law and history of state constitutional law and of Justice Utter’s contribution\(^3\) to it than I. Professor Spitzer is one of them. But I have long since left that circle. Hence, it is fitting that I defer to them, and I am happy to do so. My remarks concerning my venerated friend point in a slightly different direction, in one more concerned with lawyering, social justice, and what young lawyers can learn from the life and legacy of Robert Utter.

Start here: If you would do your client and your cause justice, remember that government—be it state or federal—must do what it is legally ordained to do. Questions of the state’s lawful authority are antecedent to questions of rights. Thus, for example, if a state agent is statutorily or constitutionally barred to act, those actions are lawless. And as Justice Utter knew all too well, statutes limit the government’s police powers antecedent to and quite apart from whether they might also run afoul of constitutional norms. It seems obvious, which makes the lawyerly oversight all the more surprising. Too often, in the rush to vindicate some claim of constitutional right, lawyers skip over questions of the government’s duty to act or not act; they skip over questions of state law. To do so is folly.

It is as strange as it is true: Lawyers frequently prefer what is easiest for them to what is best for their clients. They prefer to follow than lead; they prefer the familiar to the unfamiliar; and they prefer to cut and paste the tests of cases than spend several moments of quiet solitude thinking how best to solve some riddle of the law. This explains why so many lawyers either ignore the law of state constitutions or are helpless to do anything with it. Since most are fed on federal constitutional law as law

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2. DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (B. McGraw ed. 1985). I was fortunate to be a part of that conference.

3. See, for example, his opinion in State v. Coe, 101 Wash. 2d 364, 373–74, 679 P.2d 353, 359 (1984) (“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 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.” (emphasis added)).
students, they lack both the will and the way to think outside of the box of federal law and into the treasure trove of state constitutional law.

As judge, scholar, and a teacher, Robert Utter made it his life mission to change all of this and to help usher in a new generation of lawyers committed to the rule of law—all the rules of law from mundane regulations and ordinances to majestic constitutional guarantees. In these ways and others, thinking was more important than memorizing, several arguments were better than one, researching history\(^4\) was more valuable than parroting hackneyed axioms, and formulating new ways of thinking about the law was nobler than remaining cabined within the confines of the law’s dead letters.

It is but a memory now, but a vivid one nonetheless: Many years ago, after a conference, I joined the Judge for dinner—just the two of us. In the course of the meal he asked me a question, to which I replied rather off-handedly: “Well, thus is our life in the law.” It was a throwaway answer, simply that. And then the Judge asked, with complete seriousness: “So what do you think it means to have a life in the law?” I must say I did not see that one coming. But come it did and we discussed the subject for most of the evening that followed. Imagine that—a law professor being prompted to think about what it means to live a life in the law. Think about it, and soon enough you will sense what it was like to be in Bob’s company.

If Justice Utter was a rebel, it was because he rebelled against the kind of mindsets that stifle freedom. If he was radical, it was because he railed against the conventions that sell social justice short. If he was unorthodox, it was because he truly valued diversity. If he was a dissident, it was because he dissented from the idea that wisdom was national rather than local. If he was a nonconformist, it is because he refused to conform to the notion that history is immaterial or that originality is impossible. And if there was a touch of Louis Brandeis in him, it is because he believed in freedom enough to preserve what is best in the old in order to foster what may become better in the new.

That was the measure of the man I knew; those were his ways; and those were his lessons, his Utter lessons.\(^5\) He wove all of that and much

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5. For a sampling of these lessons, see Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, in Developments in State Constitutional Law: The Williamsburg Conference, supra note 2, at 239; 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). For biographical information and a list of his articles, see Justice Robert French Utter,
more into the fabric of law. Take heed. But be mindful of the man behind the law, and why he did what he did.

If you would honor Justice Utter's memory, learn his lessons. Be kind, be learned, be attentive, be prepared, be creative, be comprehensive, and be all you can be as a lawyer committed to constitutional government, to humane government, and to a government of limited powers and unlimited possibilities. Let Utter's lessons become your creed. Remember, too, his words: "actions of ordinary people to show love and forgiveness and charity can truly affect people's lives." That was his gospel, both in law and in life.

And one more thing: Whenever you see fit, try to greet others with the salutation "hello friend."

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JUSTICE ROBERT UTTER, THE SUPREME COURT OF WASHINGTON, AND THE NEW JUDICIAL FEDERALISM: JUDGING AND TEACHING*

Robert F. Williams**

The structural integrity of our federal system depends upon state constitutions and state courts providing an independent guaranty of individual rights. While the system’s state constitutional component was in danger of being overwhelmed by its national counterpart, the danger has subsided with the recent rediscovery of the rich heritage and unique protections offered by our state constitutions. The trend towards development of a principled body of state constitutional law needs nurturing if it is to continue to spread and mature. Each component of a state’s legal system—state bar, law schools, and judiciary—bears a measure of responsibility for breathing life into a state constitution.

Practitioners, students, and law faculty each have a unique role to play in the rebirthing process.¹

– Justice Robert F. Utter and Sanford E. Pitler, Clerk to Justice Utter, Supreme Court of Washington

INTRODUCTION

Robert Utter was appointed to the Supreme Court of Washington in 1971, at age 41, after a successful career as a trial and intermediate

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* This is an expanded version of a talk given at a conference in Seattle, Washington organized by Professor Hugh Spitzer, an accomplished state constitutional law scholar, to honor the contributions of Justice Robert Utter to the field of state constitutional law, both in Washington State and the nation.

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appeals court judge. This was a period when state supreme courts were undergoing an important transformation in their workload. A detailed study of that transformation concluded, in 1977, that state supreme court justices: “have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change.”

A number of factors contributed to this change, including the fact that this generation of state judges had watched the Warren Court at work, and was freed up to accept only the most important cases after the advent of intermediate appeals courts.

The 1970s also brought on the “New Judicial Federalism,” a movement in which state supreme courts began to recognize that state constitutional rights provisions could be applied to provide more protection than recognized by the United States Supreme Court under the federal Constitution. This important element of American constitutionalism had always been true, but it began to be highlighted in academic writing in the 1960s. The most important factor was the 1977 Harvard Law Review article by Justice William J. Brennan, Jr., where he called on state court judges to “step into the breach” and interpret their state constitutions to protect individual liberties even as the United States Supreme Court became more conservative.

I have previously referred to this early chapter in the New Judicial

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2. CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 166 (1988) [hereinafter SHELDON, CENTURY OF JUDGING] (“Utter had not known the governor well and had not been active in party affairs, although a life-long Republican. Nonetheless, he had developed a reputation as an innovative and reform-minded judge. He began his judicial career as a commissioner for the King County Juvenile Court in 1959. Five years later he was elected to the Superior Court. His efforts on behalf of juvenile rehabilitation and reform were widely recognized.”); see also CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889-1991, at 333 (1992) [hereinafter SHELDON, HIGH BENCH] (short biography of Justice Utter).


5. This was true in Washington. See SHELDON, CENTURY OF JUDGING, supra note 2, at 227–28, 305–06.


Federalism as “The First Stage: The Thrill of Discovery.” Again, although the possibility of state constitutional rights above the national minimum standard of the Federal Constitution was a truism, there nevertheless was a feeling of the “thrill of discovery” during the 1970s and 1980s. Justice Utter’s many contributions to this discussion, both on and off the bench, were central to this development which Justice Brennan called the “most important development in constitutional jurisprudence in our times.” Together with state supreme court justices such as Stanley Mosk of California, Hans Linde of Oregon, Shirley Abrahamson of Wisconsin, Ellen Peters of Connecticut, and Stewart Pollock of New Jersey, Justice Utter provided the judicial seal of approval for this recently re-discovered phenomenon.

I. JUSTICE UTTER’S BROAD ACADEMIC IMPACT

Justice Utter served not only as a Supreme Court justice, but also as an important teacher for lawyers, judges, law professors, and political scientists about this new dimension of American constitutionalism. In fact, he taught Washington State’s first course on state constitutional law at the University of Puget Sound Law School (now Seattle University Law School), and later courses at the other two law schools in the state.
were directly modeled on his syllabus.\textsuperscript{18} He coauthored, with Hugh Spitzer, \textit{The Washington State Constitution: A Reference Guide},\textsuperscript{19} one of a fifty-state series. This became the go-to source for the history and judicial interpretation of the Washington State constitution.

When I was first seeking a publisher for my casebook on state constitutional law, now in its fifth edition, and seeking support for the idea, Justice Utter wrote to me in 1985:

\begin{quote}
One of the things I have observed is the lack of a textbook that would allow students and lawyers to view the subject in a systematic way. In a few states law review articles have been written which present a survey of that state’s law, but these states are in the minority and they would benefit, as well, by a national overview of the subject.

In short, I support the idea of your book wholeheartedly. I believe there is a demonstrated need for it, and that conditions have changed so much in the last three years that, what may have been a questionable need then, is no longer in question.\textsuperscript{20}

This kind of support from the state bench for a law school course book proved invaluable.

Justice Utter made a presentation to the 1983 Annual Fall Judicial Conference in Washington on state constitutional rights adjudication,\textsuperscript{21} refined the presentation for a national audience at the 1984 Williamsburg

\begin{quote}
of Rights to protect the private affairs of persons and, consequently, to place greater restrictions on the intrusions of the state into one’s privacy than the Bill of Rights of the U.S. Constitution requires with its absence of direct reference to the right of privacy.

On the other hand, his historical analysis of the meaning of the state constitution leads him to fear not only governmental but also private transgressions into individual freedom. State action is not a requisite for court intervention, according to justice’s version of the state’s fundamental law. Thus, his conservative intentionist reading of the constitution often leads to liberal results. Such an apparent confusion of ideological labels lends credence to Utter’s contention that when applied to him the labels are too confining because they don’t describe the dynamics of what you’re working with . . . . I believe that my views are really constantly evolving.”
\end{quote}

\textit{Id.} at 335.


\textsuperscript{20}. Letter to author from Robert F. Utter, Wash. State Supreme Court Justice (April 22, 1985) (on file with author). He knew I would attach his letter to my proposal to publishers.

conference, then published it in the *University of Puget Sound Law Review*, and finally included it in the published proceedings of the Williamsburg Conference. This work reached four different audiences, and presented an early survey of almost all of the issues that would occur in state constitutional rights adjudication. It was extremely prescient in anticipating all of the big issues in state constitutional law such as lockstepping, the state action doctrine, use of state constitutional convention records, the adequate and independent state ground doctrine, and many others. As always, he was well aware of the interaction of state constitutional law with the Federal Constitution.

This veritable explosion of state constitutional law scholarship continued in his next article. Echoing his plurality opinion in the important *Alderwood Associates v. Washington Environmental Council* case, this article is an early and deep analysis of the issue of free speech and association on private property, where federal First Amendment protections do not apply because of the absence of state action. The questions surrounding the requirement of state action, or a reduced level of state action, in state constitutional law are extremely important. Justice Utter also authored two exhaustive surveys of Washington State constitutional search and seizure law.

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24. See *DEVELOPMENTS IN STATE CONSTITUTIONAL LAW*, supra note 22.


While serving as the Distinguished Jurist-in-Residence at the Indiana University School of Law—Indianapolis in 1987, Justice Utter acquainted the law students of his wide knowledge of state constitutional law in a lecture and later Article aimed at practitioners and future practitioners. Five years later, he described the slow rise in awareness of state constitutional law in his State of Washington:

When I graduated from law school in 1954, there was no discussion of state constitutional law and only marginal discussion of the Bill of Rights. It was not until the late 1970s, some nine years after I first joined the Washington State Supreme Court, that parties in cases before us even began arguing for a principled basis for developing and discussing state constitutional law. . . . Even today, progress is slow. In Washington state, with three excellent law schools, there is still only one, University of Puget Sound Law School, that regularly offers a seminar course in state constitutional law. The two other law schools have interwoven portions of state constitutional law analysis into relevant classes, but offer no course focusing on state constitutional law theory and history.

In this same Article, Justice Utter joined the academic debate on the legitimacy of independent state constitutional rights adjudication, responding to the well-known challenge by Professor James Gardner, where he criticized state constitutional law cases as being without substance and state constitutions themselves as not really “constitutional.” He further provided a spirited defense of the Supreme Court of Washington’s “criteria approach” to state constitutional rights arguments when there is a similar federal constitutional provision in
State v. Gunwall. In the 1986 Gunwall case, the Court set forth factors that could help guide the courts and lawyers in applying independent state constitutional interpretations. Justice Utter strongly defended this approach in 1989 in Sofie v. Fibreboard Corp., a case relying solely on Washington’s constitution to overturn legislation diminishing the jury’s role in damage actions.

As with his in-depth analysis of free speech and expression on private property, Justice Utter also provided a very detailed analysis of church and state issues in Washington as well as in a national context. It was a vigorous call for protection of the free exercise of religion. He wrote convincingly about the role of judicial independence in state constitutional rights adjudication, and further contended that state courts should provide interpretations of federal constitutional rights even if they are basing their holdings on similar or identical state constitutional provisions. In all of his academic writings Justice Utter was careful to give credit to his law clerks and interns. He had clerked on the Washington State Supreme Court himself.

Taken together, Justice Utter’s academic writings could have formed the basis for an influential book that would still be useful today in Washington and across the country. In my teaching, scholarship and advocacy I return to his body of work often. For example, when I was working on an Article concerning “lockstepping,” where state courts interpret their state constitutional provisions as identical or

34. 112 Wash. 2d 636, 663, 771 P.2d 711, 725 (1989). I have been critical of the “criteria approach, even though it provides an excellent template for advocates, because it can be read to create a presumption that United States Supreme Court interpretations should be applied to state constitutions in the absence of one of the criteria.” WILLIAMS, supra note 6, at 146. Justice Utter made it clear that the Gunwall factors were “non exclusive” in his Sofie opinion. Sofie, 112 Wash. 2d at 663, 771 P.2d at 725.
35. Sofie, 112 Wash. 2d at 636, 771 P.2d at 711.
36. Utter, Right to Speak, supra note 25.
40. For a listing of Justice Utter’s law clerks, see SHELDON, HIGH BENCH, supra note 2, at 368–74.
“coextensive,” with the United States Supreme Court’s interpretations of the Federal Constitution,41 I quoted Justice Utter’s criticism of state court decisions purporting to link state and federal constitutional interpretation in the future (“prospective lockstepping”) as a virtual “rewrite” of the state constitution without a constitutional convention or the people’s consent.42 He had also said, more broadly:

In addition, one should be neither ignorant of nor intimidated by the case law and doctrines that may be cited by parties opposing independent interpretation. In most cases the problems they present can and should be overcome. For example, a number of Washington cases contain dicta, and sometimes actual holdings, to the effect that provisions of our constitution should be interpreted in exactly the same way that the federal courts interpret the federal Constitution, unless a very good reason for variance can be shown. While the Washington Supreme Court’s holdings must of course be followed unless overturned by that court, it is clear from a number of more recent cases that . . . supreme court pronouncements should be scrutinized to determine whether they constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid.43

II. JUSTICE UTTER’S STATE CONSTITUTIONAL LAW OPINIONS

Justice Utter’s 1981 plurality opinion in Alderwood Associates v. Washington Environmental Council provided a primer on the relationship between federal and state constitutional law in the area of free speech and association for the gathering of initiative signatures on private shopping mall property.44 There was an obvious connection between his writing on and off the bench,45 and he was teaching in both capacities. In Alderwood Associates, he made clear that there were good reasons for state courts to consider interpreting their constitutions to be more protective than the United States Supreme Court’s federal “floor”:

When the United States Supreme Court interprets the Fourteenth

43. Utter, Freedom and Diversity, supra note 21, at 507.
45. See, e.g., Utter, Freedom and Diversity, supra note 21.
Amendment, it establishes a rule for the entire country. . . . The court must thus establish a rule which accounts for all the variations from state to state and region to region. The rule must operate acceptably in all areas of the nation and hence it invariably represents the lowest common denominator.\footnote{Alderwood Assoc., 96 Wash. 2d at 242, 635 P.2d at 115 (citing Project Report: Toward an Activist Role for State Bills of Rights, 8 Harv. C.R.-C.L.L. Rev. 271, 290 (1973)).}

He continued by observing: “[f]ederalism prevents the court from adopting a rule which prevents states from experimenting.”\footnote{Id.} In holding that citizens could gather signatures for initiative petitions in private shopping malls, Justice Utter was careful to observe that this ruling was limited because “[i]f there were no limitations to their application, every private conflict involving speech and property rights would become a constitutional dispute.”\footnote{Id.}

Justice Utter’s colleague on the State Supreme Court, Justice Charles W. Johnson, had this to say about him:

Utter’s development of an independent interpretation of the State Constitution was probably as strong an influence on this court as could have been achieved by any individual. It was not a philosophy embraced by everyone because it’s not a comfortable philosophy. But the way Bob explained it in his writing was persuasive. As lawyers and judges, we’re most comfortable with the federal Constitution. That’s what we’re taught in law school. We’re not exposed to the State Constitution if we’re practicing law or judging at the lower court level. . . . What Bob Utter did before I came on the court was develop a language, or at least a foundation of the principles that explained not only what these words meant to the drafters but how they should be applied. And it made sense. . . . The door was not closed to the state constitutional interpretation because Bob Utter had kept it open.\footnote{Robert F. Utter: Justice’s Sailor, WASH. SECRETARY ST., https://www.sos.wa.gov/legacyproject/oralhistories/RobertUtter/ [https://perma.cc/8SSK-CG7S] (last visited Oct. 18, 2015) (internal quotation marks omitted).}

Justice Utter was called on to author opinions in a wide range of state constitutional law matters beyond individual rights.

Early in Justice Utter’s tenure on the Washington State Supreme Court he had occasion to inquire deeply into the inherent power of state high courts to order adequate funding for their constitutional
responsibilities. After thorough research and analysis he concluded that the Washington Court had such inherent power to defend itself, but expressed humility in the exercise of such power by finding that the heavy burden had not been met.

Justice Utter did not miss the circumstances where subconstitutional legal sources such as statutes might provide important rights protections. In State v. Wanrow, for example, after performing a detailed statutory interpretation, he concluded that a taped “private communication” had to be suppressed pursuant to statute. It is extremely important to remember that independent and state-specific rights guarantees can be found in a state’s statutory or common law.

In 1978 Justice Utter dissented from a decision upholding “lewd conduct” convictions for young women who had appeared topless in a public park. He disagreed with the majority’s rejection of a defense based on Washington’s Equal Rights Amendment, as well as its statutory interpretation, concluding:

If the convictions of these students are allowed to stand, these young women will carry with them throughout their lives a record of conviction for lewd conduct, yet, everyone concerned concedes that, but for the arbitrary definition of that crime which seems to have been adopted by the City of Seattle, the appellants neither acted nor intended to act in a “lewd” manner as that term is used in reference to the other acts specified. Such a criminal record, and the implication of a disposition to commit acts of extreme vulgarity which necessarily accompanies it, may do these appellants incalculable harm in future years.

In 1984 Justice Utter, interpreting both the Washington State and Federal Constitutions, held that a radio station could not be held in contempt for broadcasting tape recordings that had been played in open court. He enunciated a very early rationale for the primacy approach where state courts evaluate state constitutional claims first:

51. Id., at 250–52, 552 P.2d at 173–75.
53. Id. at 233–34, 559 P.2d at 555.
54. WILLIAMS, supra note 6, at 140–41.
56. WASH. CONST. art. XXXI, § 1.
57. Buchanan, 90 Wash. 2d at 611, 584 P.2d at 931.
Whether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution, for a number of reasons. 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 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 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.60

He also made sure to note that the decision was based on "'bona fide separate, adequate, and independent [state constitutional] grounds.'" Therefore, the Washington State Supreme Court decision was final and could not be taken to the United States Supreme Court because there was no federal question.

Finally, he articulated his "dual analysis" approach in which he analyzed federal constitutional law even though the case had already been decided on state constitutional grounds:

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

60. Id. at 373–74, 679 P.2d at 359; see also City of Seattle v. Mesiani, 110 Wash. 2d 454, 456, 755 P.2d 775, 776 (1988).
constitutional law also forbids a court to impose prior restraints on the publication of information lawfully obtained at public court proceedings. 62

When his colleagues on the Washington State Supreme Court struck down the use of state financial vocational assistance to a blind student who wished to study to be a pastor under the First Amendment, Justice Utter dissented both as a matter of federal constitutional law and also state constitutional law, providing an exhaustive analysis of Washington’s constitutional religion guarantees. 63 The Court’s federal constitutional ruling, however, was not based on an adequate and independent state ground and was reversed by the United States Supreme Court. 64 On remand, the Washington State Supreme Court reinstated its prior decision, but this time relied on the Washington Constitution’s religion provisions. 65 Again, Justice Utter dissented, first arguing that the majority had not performed a proper Gunwall analysis (the Court’s earlier articulated approach to state constitutional rights claims), 66 and then again delving very deeply into Washington’s constitutional religion provisions.

In Sofie v. Fibreboard Corporation, Justice Utter struck down a “tort reform” cap on noneconomic damages in personal injury or wrongful death litigation. 67 In this area, where the federal Seventh Amendment right to jury trial has not been applied to the states, 68 it is only state constitutions that protect the right to jury trial in civil cases. 69 Justice Utter provided a detailed analysis of the Washington Constitution’s jury trial guarantee, concluding that the challenged cap unconstitutionally deprived the jury of its authority to award damages. 70

In Foster v. Sunnyside Valley Irrigation Dist., 71 Justice Utter held that a voting scheme in a special irrigation district where certain property owners could not vote for the District’s board members violated the

62. Id. at 378, 679 P.2d at 361–62; see also Mesiani, 110 Wash. 2d 456–57, 755 P.2d at 777.
66. Id. at 373–74 (Utter, J., dissenting); see also supra notes 31–33 and accompanying text.
68. Id. at 644, 771 P.2d at 716.
70. Sofie, 112 Wash. 2d at 668–69, 771 P.2d at 728.
State constitution’s mandate of “free and equal” elections. This would have been permissible under the United States Supreme Court’s interpretation of the Federal Constitution, but, as Justice Utter pointed out, the federal Constitution does not contain a “free and equal” elections clause and, therefore, the “Washington constitution goes further to safeguard this right than does the federal constitution.” This kind of careful textual comparison of state and federal constitutional provisions has become a central feature of state constitutional analysis.

CONCLUSION

In 1995, after twenty-three years on the Washington State Supreme Court, and despite his obvious love for teaching and judging, Justice Utter resigned from the Court in protest of the continued use of capital punishment in Washington. His numerous dissenting opinions from the Court’s death penalty decisions had not proved to be enough for him; he believed he could no longer participate in the judicial imposition of capital punishment. Thus, we were all deprived of his likely future contributions to state constitutional law as a sitting justice. Still, he has left us a prodigious amount of highly influential material relating to virtually all of the key issues that will continue to influence the area of state constitutional law far into the future.

72. Id.
73. Foster, 102 Wash. 2d at 403–04, 687 P.2d at 846–47.
74. Id.
THE ONCE AND FUTURE PROMISE OF ACCESS TO JUSTICE IN WASHINGTON’S ARTICLE I, SECTION 10

Justice Debra Stephens*

INTRODUCTION

As a judge, I am committed to the idea that access to justice is a fundamental right. This right ensures a court system that is open, honest, and accessible to all. Courts and scholars have struggled in their attempts to uncover the historical roots of this right, to find its clear expression in the provisions of our state and federal constitutions, and to give it effect in concrete situations. This paper does not add to the existing scholarship in terms of historical research or new theory. I am not a historian, nor an academic. What I hope to set out in these pages is a sufficient “working knowledge” of the provenance of the right of access to courts to justify reliance on Washington’s article I, section 10 as an expression of this right. More broadly, I consider whether courts might better effectuate access to justice by focusing less on article I, section 10 as an individual right and more on its systemic, institutional value.

Part I reviews the adoption of article I, section 10 in the 1889 Washington State Constitution, tracing its origins to Magna Carta in 1215 and to legal philosophies well known to the drafters of our federal and state constitutions. Part II considers judicial interpretations of article I, section 10 relevant to access to justice principles. Finally, Part III ponders whether we might better effectuate the promise of article I, section 10 by looking beyond the dominant individual rights focus of most cases and appreciating that access to justice also expresses a collective or systemic value in our democratic system. This Part returns to a theme identified in the first Washington State Supreme Court case to cite article I, section 10, which recognized it as a mandatory obligation of government. Focusing greater attention on access to justice in its collective expression emphasizes the special role courts play in

*Justice, Washington State Supreme Court. I owe a debt of gratitude for their insights and assistance to Thomas Glassman, William Goodling, Diego Rondón Ichikawa, Judy Vandervort, Devra Cohen, and Hugh Spitzer.
preserving democracy, and the special claim they have on public confidence and resources.

I. A BRIEF REVIEW OF ARTICLE I, SECTION 10 AND ITS ORIGINS

When Constitutional Convention delegate, Allen Weir, delivered a proposed bill of rights to the Washington State Constitutional Convention on July 11, 1889, article I, section 8 read:

No court shall be secret but justice shall be administered openly and without purchase, completely and without delay, and every person shall have remedy by due course of law for injury done him in his person, property or reputation.1

This open courts clause was a verbatim copy of the Oregon Constitution at the time.2 Fourteen days later, the Committee on Preamble and Bill of Rights presented new language3 to the Committee as a whole, which adopted it.4 Article I, section 8 was moved to article I, section 10:

Administration of Justice: Justice in all cases shall be administered openly, and without unnecessary delay.5

There is no indication as to why the language was changed.6 Some have surmised that the truncated language denotes a truncated right.7

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2. See OR. CONST. art. I, § 10.
3. JOURNAL, supra note 1, at 19. A group which included Messrs. Warner, Hicks, Comegys, Henry, Dallam, Kellog, and Sohns but did not include Mr. Weir, who had originally delivered the language fourteen days earlier.
4. Id. at 154. It was not only the open courts clause that changed, but the entire Bill of Rights. Further, it was stretched from twenty-five sections to thirty-one.
5. WASH. CONST. art. I, § 10. This is the language as it stands today. See JOURNAL, supra note 1, at 499.
6. Janice Sue Wang, State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies, 64 WASH. L. REV. 203, 215 (1989) (quoting JOURNAL, supra note 1, at 51). The verbatim notes of the Constitutional Convention have been lost or destroyed. Further, a search of the Washington State Archives revealed only two saved documents, both handwritten, from the committee on Preamble and the Bill of Rights, neither of which offer any explanation for the textual changes. No other documents relating to the preamble or bill of rights exist at the Washington State Archives. The minutes, contained on microfiche at the Washington State Law Library and printed in Rosenow’s book, do not reveal any of the committee discussion on the Washington State Bill of Rights but rather only the votes and the initial and final versions of article I, section 10.
7. See, e.g., Gregory C. Sisk, The Constitutional Validity of the Modification of Joint and Several

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Indeed, in *Shea v. Olson* in 1936 the Washington State Supreme Court stated that Washington’s constitution, unlike the constitutions in Oregon and some other states, contains no right-to-access remedy provision.\(^8\) Notably, the court in *Shea* made no mention of article I, section 10. Given the absence of any stated intent, however, it seems unwise to read too much into the particular language. A purely textual approach fails to account for the historically-grounded meaning of clauses such as article I, section 10, which was quite familiar to the framers of the Washington State Constitution.

Article I, section 10 expresses principles traceable to chapters 39 and 40 of the original Magna Carta of 1215. This document, recognized as embodying the “rule of law,” emerged out of the conflict between King John and rebellious barons who insisted on putting to paper a declaration of fundamental rights “that had heretofore been vaguely understood,” to “make it more difficult for the king to ignore or evade them.”\(^10\) The original language read:

No freeman shall be taken or imprisoned or disseised or exiled or in any other way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice (translated from Latin to English).\(^11\)

The Magna Carta was reissued several times, and eventually chapters 39 and 40 reemerged as chapter 29 of the charter published in 1297:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, Liability in the Washington Tort Reform Act of 1986, 13 U. Puget Sound L. Rev. 433, 449 n.75 (1990) (“It is a quantum leap from that ‘open access’ provision to guarantee a right to a particular tort remedy or substantive rule of law.”). But see Wang, supra, note 6, at 225–26 (article I, section 10 of the Washington State Constitution “can also become a guarantee of the right to a remedy, protecting tort victims from future inroads by the legislature into their right to recover”).

8. 185 Wash. 143, 53 P.2d 615 (1936).

9. *Id.* at 160–61, 53 P.2d at 622 (“In this state, the Constitution contains no such [remedy] provision, but only the general ‘due process’ and ‘equal protection’ clauses. There is, therefore, no express, positive mandate of the Constitution which preserves such [tort] rights of action from abolition by the Legislature.”). But see King v. King, 162 Wash. 2d 378, 388, 174 P.3d 659, 664 (2007) (“We have generally applied the open courts clause in one of two contexts: ‘the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered.’” (citing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (G. Alan Tarr ed., 2002)).


11. *Id.* at 350 (quoting generally accepted translation, based on William S. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 49 (2d ed. 1914)).
or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.\(^{12}\)

In his Second Institute, Lord Edward Coke found that chapter 29 of the 1297 Magna Carta was the root from which “many fruitfull [sic] branches of the law of England have sprung.”\(^{13}\) One such branch grew into modern due process, while another is seen as the seedling for a right of all citizens to a remedy in their private relations with one another.\(^{14}\) The link between the words of the Magna Carta and article I, section 10 was established by Coke, who described chapter 29 as confirming that:

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\text{[E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, . . . or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay . . . . [J]ustice must have three qualities; it must be . . . free; for nothing is more odious than justice let to sale; full, for justice ought not to limp, or be granted piece-meal; and speedily, for delay is a kind of denial; and then it is both justice and right.}\(^{15}\)

It is well recognized that Lord Coke’s teachings were highly influential in the American colonies, and his view of chapter 29’s meaning prevailed among the drafters of colonial and state charters.\(^{16}\) More broadly, the philosophy of natural rights or natural law also resonated with constitutional framers, including the delegates to the Washington State Constitutional Convention.\(^{17}\) Certainly by 1889, Sir


\(^{13}\) Id.


\(^{15}\) Id. at 1320–21 (translating portions of Latin in COKE, supra note 12, at 55).

\(^{16}\) See Edward S. Corwin, The “Higher Law” Background of American Constitutional Law, 42 HARV. L. REV. 149, 175–76 (1928); David Schuman, Oregon’s Remedy Guarantee: Article I, Section 10 of the Oregon Constitution, 65 OR. L. REV. 35, 39 (1986) (“While commentators generally agree that Coke’s interpretation of the Magna Carta is more enthusiastic than accurate, no one doubts its influence, particularly in America.” (citation omitted)).

\(^{17}\) See James A. Bamberger, Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State, 4 SEATTLE J. SOC. JUST. 383, 392–93, 427 n.28 (2005) (explaining natural law theory expressed in Washington State Constitution); Id. at 424 n.43 (referencing influence of non-delegate W. Lair Hill, whose contemporaneous writings in the Oregonian newspaper confirm the natural rights philosophy embraced by the framers); W. Lair Hill,
William Blackstone’s commentaries were widely read and accepted.\textsuperscript{18} Blackstone described the right to a remedy drawn from the Magna Carta as a critical portion of his triune rule for absolute rights: “The right of personal security, the right of personal liberty, and the right of private property.”\textsuperscript{19} He distinguished these rights from “relative” rights which arose only through a free society where people have relationships with others.\textsuperscript{20} “But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment.”\textsuperscript{21} Absolute rights “could not be protected simply by declaratory law; individuals required means of vindicating them” including the “right to a remedy.”\textsuperscript{22}

Recognizing the theory of law embraced by Washington’s constitutional framers, and the direct lineage connecting article I, section 10 to chapter 29 of the 1297 Magna Carta, it is difficult to justify a crabbed reading of this provision. We should not focus so narrowly on the precise phrasing that we miss the significance of the framers’ insistence upon including this well-understood statement in the first place. In fact, the framers altered and deleted much of the language proposed in the initial July 11 draft of the bill of rights. For example, changes were made to article I, section 1 which originally read:

All men are possessed of equal and unalienable natural rights, among which are life, liberty and the pursuit of happiness. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness; and they have at all times the right to alter or reform the government as they may think proper.\textsuperscript{23}

No one would suggest that because the delegates saw fit to remove the

\textit{Washington: A Constitution Adapted to the Coming State, MORNING OREGONIAN, July 4, 1889, at v–vi.}

\textsuperscript{18}. See Koch, \textit{supra} note 10, at 357–65.

\textsuperscript{19}. 1 \textit{WILLIAM BLACKSTONE, COMMENTARIES *129}. Blackstone’s commentaries were published between 1765 and 1769.

\textsuperscript{20}. \textit{Id.} at *422.

\textsuperscript{21}. \textit{Id.} at *140–41.

\textsuperscript{22}. Phillips, \textit{supra} note 14, at 1321–22; see \textit{BLACKSTONE, supra} note 19, at *141–44. In his third volume of commentaries, Blackstone observed: “for it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.” 3 \textit{BLACKSTONE, supra} note 19, at *109; see also \textit{Marbury v. Madison}, 5 U.S. 137, 163 (1803) (citing 3 \textit{BLACKSTONE, supra} note 19) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

\textsuperscript{23}. \textit{JOURNAL, supra} note 1, at 51.
clause that all men are possessed of “equal and unalienable natural rights” this signified their rejection of the natural rights theory. 24 Applying this logic to the removal of other provisions such as the “right to alter or reform the government” or that Washington was “an inseparable part of the American Union” is nonsensical. 25 No one would suggest this intimated a separatist movement was afoot.

Additional confirmation that the drafters did not intend to diminish rights by trimming the wording of particular bill of rights provisions can be found in article I, section 30, which expressly recognizes that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.” 26 The State Supreme Court understood this early in Washington’s history:

[T]he expression that the declaration of certain fundamental rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others not expressed, which inherently exist in all civilized and free states. Those expressly declared were evidently such as the history and experience of our people had shown were most frequently invaded by arbitrary power, and they were defined and asserted affirmatively. Consistently with the affirmative declaration of such rights, it has been universally recognized by the profoundest jurists and statesmen that certain fundamental, inalienable rights under the laws of God and nature are immutable, and cannot be violated by any authority founded in right. 27

Further evidence of the framers’ commitment to natural rights and natural law theory is their decision to include article I, section 32: “Fundamental principles: A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” 28

This cursory overview barely scratches the surface of what is known about the meaning and origins of Washington’s article I, section 10 and comparable provisions in other state constitutions. 29 Many excellent

24. See id. at 51, 154.
25. The “right to alter or reform the government” and “The State of Washington is an inseparable part of the American Union” were removed. Id.
26. WASH. CONST. art. I, § 30; see also id. art. I, § 1 (noting “governments . . . are established to protect and maintain individual rights”).
29. Most notably, I do not address the significant movements in history beyond the Magna Carta
works provide a far more thorough review.\textsuperscript{30} For one thing, they confirm that, by most counts, forty states have parallel provisions traceable to chapter 29 of the 1297 Magna Carta.\textsuperscript{31} The interpretation of these provisions by state courts varies greatly, not generally based on textualist approaches, and sometimes even among decisions within a single state.\textsuperscript{32} Moreover, the concepts embodied in article I, section 10 are not easily compartmentalized, as they encompass notions of due process, privileges and immunities, equal protection, the right to trial by jury, and more generally the very role of a justice system.\textsuperscript{33}

Despite the fact that many unanswered questions remain, I resist the suggestion that courts should hold back in attempting to broadly effectuate an access-to-courts principle because we know too little.\textsuperscript{34} The origin of article I, section 10 reveals quite a lot, not the least of which is and its interpretation by Lord Coke and Blackstone that shape our modern legal understanding. Themes drawn from American political history and thought, and more broadly the experience of effectuating natural rights in a democratic society, all help shape our present understanding of the interconnected principles expressed in part in article I, section 10 and related provisions. See generally Judith Resnik, Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture, 56 ST. LOUIS U. L.J. 917 (2012).


31. Phillips, supra note 14, at 1310; see FRIESEN, supra note 30, at 6-65 to 6-67 (separating different versions of article I, section 10 type clauses). For a recently prepared appendix of state provisions, see Resnik, supra note 29, at 1021–54 (appendix).

32. See Phillips, supra note 14, at 1326–39 (reviewing various approaches); id. at 1314 (“There is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it.”); Bauman, supra note 30, at 244 (noting varying interpretations of identical texts); see, e.g., Hale v. Port of Portland, 783 P.2d 506, 518 (Or. 1989) (Linde, J., concurring) (observing the Oregon Supreme Court “has written many individually tenable but inconsistent opinions” about the right to a remedy); Koch, supra note 10, at 436 (suggesting one explanation for the plurality of state court interpretations is “the absence of the unifying effect of the United States Supreme Court decisions supplying the states with a convenient decision-making paradigm”).


34. See Hoffman, supra note 30, at 1005 (positing history to date can confirm only original intent of chapter 29 Magna Carta clause was to protect against the king’s interference with local courts). I agree, however, with the author’s conclusion that courts should clearly articulate the grounds, historical or otherwise, for the analysis of open courts clauses.
the interconnectedness of the constitutional principles emanating from chapter 29 of the 1297 Magna Carta. For a sense of how these principles shape the promise of access to justice in Washington, it is helpful to briefly consider the areas in which article I, section 10 has been addressed in Washington State Supreme Court decisions.

II. SOME THOUGHTS ON JUDICIAL INTERPRETATION OF ARTICLE I, SECTION 10 RELEVANT TO ACCESS TO JUSTICE PRINCIPLES

Washington appellate decisions have cited article I, section 10 hundreds of times, most often with respect to the right to open, public court proceedings and records. It is now well established that article I, section 10 secures this right for the general public as well as individual litigants. And, there is a recognized link between this aspect of article I, section 10 and the First Amendment to the United States Constitution, as well as the public criminal trial guarantees in article I, section 22 and the Sixth Amendment to the United States Constitution. This aspect of article I, section 10 is also reflected in the Judiciary article of the Washington Constitution, providing that courts will remain open except on nonjudicial days.

A separate line of decisions considers whether article I, section 10 guarantees an individual a right to meaningfully participate in litigation, including to seek particular substantive remedies. In this vein, decisions have largely involved challenges to legislative changes to remedial mechanisms or court processes, with Washington cases arising in areas familiar to other state courts. Importantly, these decisions are not limited to consideration of open courts clauses, but also involve, among others, constitutional guarantees of due process, equal protection, privileges and immunities, jury trial, vested rights and the principle of


38. WASH. CONST. art. IV, § 2 (Supreme Court of Washington); id. § 6 (superior courts).

separation of powers. Commentators often group them according to the type of legislation challenged or the test devised by the court to measure constitutional compliance. Thus, it is possible to compare decisions considering the abolition of common law actions in favor of workers compensation laws, the abolition of heart balm actions, the validity of guest/host statutes, enactment of statutes of repose in the construction field, and waves of legislative reform affecting product liability and medical malpractice actions.

As commentators recognize, access to courts per se has not always been the guiding principle in these cases. Notions of due process, equal protection and “vested rights” may shape the particular lens for judicial review, which has been largely deferential to the legislative prerogative to make policy. Thus, Washington decisions have sustained the legislative abolition of rights of action if an adequate substitute remedy is given, or if the legislation is justified by substantial public necessity. These decisions, implicating access to justice, whether under article I, section 10 or other constitutional provisions, bring into stark relief the inherent tension between recognition of an individual right to litigate and the legislative prerogative to make policy.


41. See Phillips, supra note 14, at 1335–39 (noting groups of cases across states); Wiggins et al., supra note 40, at 226–54 (analyzing tort reform provisions under various constitutional tests).

42. See State ex rel. Fletcher v. Carroll, 94 Wash. 531, 162 P. 593 (1917); Wiggins et al., supra note 40, at 211–12.

43. See Phillips, supra note 14, at 1331; Rotwein v. Gersten, 36 So. 2d 419 (Fla. 1948) (upholding repeal of action for alienation of affections).

44. See Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).


47. See Wiggins et al., supra note 40, at 196–204 (overview). Ironically, Washington boldly proclaimed a “right of access to the courts” based on article I, section 4 in Carter v. University of Washington, 85 Wash. 2d 391, 398, 536 P.2d 618, 623 (1975), only to reverse itself the next year in Housing Authority v. Saylors, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976), which recognizes “[a]ccess to the courts is amply and expressly protected by other provisions,” but does not say which provisions. See Wiggins et al., supra note 40, at 201–02.

48. See Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975); Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 423, 63 P.2d 397, 408–09 (1936); State ex rel. Fletcher v. Carroll, 94 Wash. 531, 162 P. 593 (1917); Kluger v. White, 281 So. 2d 1 (Fla. 1973) (leading case holding that legislation must either provide a substitute remedy or be justified by overpowering public necessity).

49. The decision in 1519-1525 Lakeview Boulevard Condominium Ass’n is illustrative. There, the
This tension necessarily implicates separation of powers concerns, as the individual right translates into the duty and prerogative of the judicial branch to declare what the law is. The looming shadow of separation of powers seems to shrink when the challenge at issue concerns a statute directly affecting court procedures. In such instances, the Washington State Supreme Court has not hesitated to recognize a right of access to courts under article I, section 10 that prohibits the legislature from denying certain litigants their ability to litigate. For example, in Doe v. Puget Sound Blood Center the Court recognized that the broad right of a litigant to discovery under the court rules cannot be legislatively abrogated because it “is necessary to ensure access to the party seeking the discovery.” The Court eloquently observed:

[J]ustice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rests all of the people’s rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights.

The Court returned to this theme in Putman v. Wenatchee Valley Medical Center, P.S., invalidating a medical malpractice “certificate of merit” statute as violating both access to courts under article I, section 10 and separation of powers. Two authorities sufficed to justify the Court’s conclusion that the statute infringed on the plaintiff’s right of access to courts challenge to a builders’ statute of repose, RCW 4.16.310. Lakeview, 144 Wash. 2d at 581, 29 P.3d at 1255. Noting that Shea was not dispositive because it did not address article I, section 10, the Court adopted what it described as the view of the Oregon Supreme Court, recognizing the “‘proper function of legislatures to limit the availability of causes of action by the use of statutes of limitation so long as it is done for the purpose of protecting a recognized public interest.’” Id. (quoting Josephs v. Burns, 491 P.2d 203, 207 (Or. 1971), abrogated on other grounds, Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001)). The Court concluded: “Because we recognize that the legislature has broad police power to pass laws tending to promote the public welfare, we decline at this time to determine whether article I, section 10 of the state constitution guarantees a right to a remedy.” Id.

50. This underscores the recognized connection between the right to a remedy principle expressed in open courts clauses and expressed more globally as inherent in the role of courts, as in Marbury v. Madison, 5 U.S. 137, 163 (1803).
52. Id. at 782, 819 P.2d at 376.
53. Id. at 780, 819 P.2d at 375.
54. 166 Wash. 2d 974, 216 P.3d 374 (2009).
55. Id. at 979–85, 216 P.3d at 376–80.
access: Puget Sound Blood Center and Marbury v. Madison. Subsequently, in Lowy v. Peacehealth, the Court again relied on Puget Sound Blood Center to conclude that a litigant’s ability to conduct discovery is protected by the right of access under article I, section 10. This constitutional principle supported a narrow construction of a hospital quality improvement statute to refer only to external review and not internal review of medical errors.

The limited reach of these decisions is clear from the cautionary passage in Puget Sound Blood Center. The Court did not announce a broad right to a substantive remedy, nor suggest any retreat from its earlier decisions recognizing the power of the legislature to restrict, modify or eliminate causes of action entirely based on providing a substitute remedy or demonstrating a strong public necessity to do so. This is not to say that the Court has failed to appreciate the interest of litigants in seeking a remedy for injury or in asserting common law defenses. However, it has not to date relied on this interest as sufficient to impose an absolute limit on the legislature’s prerogative to modify the common law.

This brings us to the question of money, or more precisely, the Court’s response to claims that the expense of litigation denies access to justice. In this vein, the Court has observed: “Our cases on the right of access are somewhat perplexing.”

A brief flurry of activity arose

56. Id. at 979, 216 P.3d at 377 (“Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs’ right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people.”); see Marbury v. Madison, 5 U.S. 137, 163 (1803).
57. 174 Wash. 2d 769, 776, 280 P.3d 1078, 1082 (2012).
58. Id. at 776–90, 280 P.3d at 1082–89.
59. Doe v. Puget Sound Blood Ctr., 117 Wash. 2d 772, 781, 819 P.2d 370, 375 (1991) (“It is important to note that our consideration here is of the right of access. We are not here considering the validity of a theory of recovery. We are not considering legislative or judicial creation or abolition of a cause of action. We are not considering the abrogation or diminishment of a common law right. These are all issues for other cases.” (citing Wiggins et al., supra note 40)).
60. For example, in Hunter v. North Mason High School, the Court held: “The right to be indemnified for personal injuries is a substantial property right.” 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975); see also Puget Sound Blood Ctr., 117 Wash. 2d at 782, 819 P.2d at 375 (citing Hunter).
61. See 1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp., 144 Wash. 2d 570, 29 P.3d 1249 (2001) (refusing to invalidate state of repose as violating article I, section 10); c.f., Godfrey v. State, 84 Wash. 2d 959, 530 P.2d 630 (1975) (applying due process vested rights analysis and refusing to invalidate statute modifying common law to remove plaintiff’s contributory negligence as a bar to recovery).
following *O’Connor v. Matzdorff*\(^{63}\) where the Court waived a filing fee to secure access for indigent litigants.\(^{64}\) Then in *Iverson v. Marine Bancorporation*,\(^{65}\) the Court acknowledged the prohibitive costs incident to an appeal, and said: “The administration of justice demands that the doors of the judicial system be open to the indigent as well as to those who can afford to pay the costs of pursuing judicial relief.”\(^{66}\) Neither of these cases expressly relied on article I, section 10. And, as noted, a subsequent plurality decision pinning the “right of access to the courts” on article I, section 4 was disowned within a year.\(^{67}\) In *Housing Authority v. Saylors*\(^{68}\) the court expressed no doubt that a right of access to courts is protected by the Washington State Constitution, but it did not identify article I, section 10 as the source.\(^{69}\)

The big push for recognizing that the right of access to courts requires committing resources to assist poor civil litigants came in *King v. King*.\(^{70}\) There, the Court considered whether a litigant in a dissolution proceeding involving custody of children was entitled to counsel at public expense under various constitutional provisions, including article I, section 10.\(^{71}\) While the Court acknowledged its statement in *Bullock v. Roberts*\(^{72}\) that, “[f]ull access to the courts in a divorce action is a fundamental right,”\(^{73}\) it refused to extend this right beyond the requirement of courts to remove physical barriers to court access or to waive court fees.\(^{74}\) *King* highlights the difficulty courts face when considering the right of access to justice as a mandate for public spending on private civil litigation. Even when their own essential

\(^{63}\) 76 Wash. 2d 589, 458 P.2d 154 (1969).

\(^{64}\) Id.

\(^{65}\) 83 Wash. 2d 163, 517 P.2d 197 (1973).

\(^{66}\) Id. at 167–78 (“Consistent with our affirmative duty to keep the doors of justice open to all with what appears to be a meritorious claim for judicial relief, we hold that the plaintiff is entitled to the relief requested [waiver of appellate fees and costs].”).


\(^{68}\) 87 Wash. 2d 732, 557 P.2d 321 (1976).

\(^{69}\) Id. at 742, 557 P.2d at 327; see also *Doe v. Puget Sound Blood Ctr.*, 117 Wash. 2d 772, 782, 819 P.2d 370, 375 (1991) (saying of *Saylors*, “[u]nfortunately, the court did not explore the rationale for its conclusion”).


\(^{71}\) Id. at 381, 174 P.3d at 661.


\(^{73}\) Id. at 104 (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

\(^{74}\) *King*, 162 Wash. 2d at 390, 174 P.3d at 665–66 (“It is more than an insignificant linguistic leap to equate that barrier to access with a right to publicly funded legal representation.”).
funding is at issue, courts express reluctance to announce a broad right of access and are careful to respect the prerogative of legislative bodies to allocate public resources.\textsuperscript{75}

This brief overview of Washington case law offers an opportunity to pause and consider the path forward. Apart from a handful of statements in cases addressing the public trial aspect of article I, section 10, descriptions of the access-to-courts principle to date generally frame it as an individual right. More precisely, cases recognize it as a legitimate interest of individual litigants. However, I believe there is value in broadening this focus, and reconsidering article I, section 10 in its collective, communal sense. In this sense, it expresses not simply an individual right or interest in court processes or remedies, but also a societal commitment to an open and meaningful system of justice.

III. SEEING THE GREATER GOOD IN ACCESS TO JUSTICE UNDER ARTICLE I, SECTION 10

The first Washington State Supreme Court decision to cite article I, section 10 was \textit{Rauch v. Chapman}\textsuperscript{76} in 1897.\textsuperscript{77} I have previously relied on \textit{Rauch} for the proposition that article I, section 10 is mandatory.\textsuperscript{78} But, until musing on the themes in this Essay, I had not fully appreciated its teachings.

\textit{Rauch} involved an action by a taxpayer in Klickitat County to enjoin the county treasurer from paying certain warrants, including for juror fees, witness fees in criminal matters, and sheriff’s fees for serving process.\textsuperscript{79} The taxpayer complained that paying these bills required the county to exceed its debt limit under article VIII, section 6 of the Washington State Constitution. The Court rejected this argument, holding the debt limit was not intended to restrict the county’s ability to provide for “certain necessary fundamental functions of government.”\textsuperscript{80} Quoting article I, section 10 and other bill of rights provisions implicated

\textsuperscript{75} See, e.g., \textit{In re Juvenile Dir.}, 87 Wash. 2d 232, 552 P.2d 163 (1976). This decision, notable in recognizing the inherent power of the judiciary to compel the legislature to expend funds for court operations, makes no mention of article I, section 10. Based solely on a separation of powers analysis, the Court adopted a deferential standard requiring clear, cogent and convincing proof that court action is needed.

\textsuperscript{76} 16 Wash. 568, 48 P. 253 (1897).

\textsuperscript{77} Id. at 574, 48 P. at 255.


\textsuperscript{79} \textit{Rauch}, 16 Wash. at 568–69, 48 P. at 253.

\textsuperscript{80} Id. at 574, 48 P. at 255.
by the county warrants, the Court explained:

All these provisions of their organic law are alike declared to be mandatory. It would make these various provisions of the constitution contradictory, and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view.81

The Court’s holding conveys more than the simple reality that government costs money, though that is certainly the bottom line.82 Rauch recognizes the higher law embodied in the constitution, which is “‘[d]esigned for [the people’s] protection in the enjoyment of the rights and powers which they possessed before the constitution was made.’”83 It articulates the vision of ordered society the framers embraced—with meaningful access to the courts at its center. For me, the discussion in Rauch underscores the word in article I, section 10 that has been the least emphasized in our cases: “Justice in all cases shall be administered openly, and without unnecessary delay.”84

Inherent in this concept of justice is both an individual and a collective, systemic right. Both are important, and focusing on individual rights helps underscore the plurality of ways constitutional rights are experienced in daily life. A unique value in litigating individual rights lies in the repetition of similar stories involving different players. Judith Resnik has argued that “[t]he redundancy produced by litigants raising parallel claims of rights enables debate about the underlying legal rules. The particular structural obligations of trial level courts have advantages for producing, redistributing, and curbing power in a fashion that is generative in democracies.”85

But, returning to the themes in Rauch, it is also important to recognize the collective right of access to justice secured by article I, section 10.

81. Id. at 575, 48 P. at 255.
82. See Duryee v. Friars, 18 Wash. 55, 60, 50 P. 583, 585 (1897) (saying of Rauch: “And with that holding we are well content; for that the maintenance of its government is of paramount importance needs no argument, and it cannot be done without money, or resorting to the county’s credit in some way”).
83. Rauch, 16 Wash. at 572, 48 P. at 253 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868)).
84. WASH. CONST. art. I, § 10 (emphasis added).
85. Resnik, supra note 29, at 938.
The promise that justice shall be administered openly and without undue delay describes a particular system of justice, i.e. a court system. As the Court recognized in *Rauch*, the framers plainly understood the open administration of justice to be an obligation of government, as essential to its functions as any part of government. In this sense, article I, section 10 differs from other, liberty-oriented bill of rights provisions. This aspect of article I, section 10 does not speak to freedoms citizens may exercise but to an institution the government must maintain.\(^86\)

Article I, section 10 is different from individually-focused bill of rights provisions in another way. A court’s obligations under this provision do not depend on individual litigants asserting their rights. In the public trial context, Washington case law has long recognized that article I, section 10 imposes an independent duty on courts to engage in a careful analysis before closing any proceeding, regardless of whether the parties before the court object to closure.\(^87\) This precedent is built in part on the understanding that article I, section 10 is more than an individual trial right; it speaks to rights held by the public as a whole.\(^88\) A natural corollary is that article I, section 10 requires the maintenance of a justice system consistent with its values.

The core value at the heart of article I, section 10 is open, impartial justice. It has long been recognized that access to courts is “conservative of all other rights.”\(^89\) It is essential to the maintenance of civil society.\(^90\)

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\(^86\) There is, of course, a collective notion inherent in the recognition of individual rights generally, though it is often overlooked. Many provisions in early colonial charters and state constitutions use express language to make this point. See, e.g., PA. CONST. of 1776 art. VIII (“That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto . . . .”); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 22 (Neil H. Cogan ed., 1997) (guaranteeing that all inhabitants “may from Time to Time, and at all Times, freely and fully have and enjoy his and their Judgments and Consciences in matters of Religion throughout the said Province, they behaving themselves peaceably and quietly, and not using this Liberty to Licentiousness, nor to the civil Injury or outward disturbance of others”) (quoting CONCESSION AND AGREEMENT OF THE LORDS PROPRIETORS OF THE PROVINCE OF NEW CAESAREA, OR NEW-JERSEY (1664)). There is a good example in the Washington State Constitution. WASH. CONST. art. I, § 5 (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”). But, with or without such language, few would argue that the recognition of individual rights is intended to elevate individual autonomy to the demise of the greater social good.


\(^90\) See The Amy Warwick, 67 U.S. 635, 667 (1862) (noting “the true test” of the existence of civil war is “[w]hen the regular course of justice is interrupted by revolt, rebellion, or insurrection,
This recognition should inform the way courts interpret article I, section 10, so that its application in particular contexts remains true to its focus. The failure of article I, section 10 to gain judicial acceptance as an individual right to substantive remedies should not be regarded as fatal to its effectiveness. Article I, section 10 remains an important expression of a central tenet of our social order.

We must recognize that access to justice defies absolutism in practice. No government has yet found the resources to fully fund all the promises of justice made in state and federal constitutions. And we must not be tempted to embrace an interpretation of a fundamental principle such as access to courts without some sense of proportionality and purpose, lest this constitutional right be made to carry the seeds of its own destruction.

We have far to go to secure the promise of article I, section 10, but focusing first and foremost on its collective promise of a meaningful system of justice can help emphasize the central place the courts occupy in our democratic society.

CONCLUSION

Article I, section 10 expresses the fundamental right of access to justice in Washington. While it may not be possible to explicate its precise origins, or to fully define its parameters, we have a sufficient working knowledge of its themes and provenance to justify reliance on this provision to improve our justice system. To this end, I encourage courts and commentators to reconsider the collective and systemic value the right expresses. Without discounting its significance as an individual right, we would do well to embrace article I, section 10’s collective value as a constitutional mandate to develop and maintain a more open and accessible justice system.

so that the Courts of Justice cannot be kept open”

91. See Resnik, supra note 29, at 973–78 (surveying efforts to fund courts and improve access for litigants).

92. See id. at 994 (“[C]ourts have a distinctive claim for public support as well as for public regulation because governments need the infrastructure that courts provide, and democracies need the opportunities for the multi-party interactions that adjudication entails. Courts offer links between individuals and government, and hence have a special claim on resources. Diminution of opportunities to use open courts impoverishes the status of individuals and diminishes the effectiveness of government.”).
POPULAR CONSTITUTIONALISM AND ITS ENEMIES

G. Alan Tarr*

INTRODUCTION

Chief Justice Robert Utter was acutely aware of the delicate place occupied by judges in the American system of government. Although their responsibilities of office obliged them to “say what the law is” in resolving cases, even controversial cases, doing so often required them to address bodies of law, such as state constitutions, that were relatively unexplored and that might yield new principles and unexpected conclusions. Chief Justice Utter recognized that legal counsel could play an important part in assisting judges in this task, and so in advising attorneys how to frame state constitutional arguments, he admonished them to avoid a lazy reliance on federal interpretations of similar provisions and instead to be aware of “the historical mandates contained in their state bill[s] of rights.” Such well-framed state constitutional arguments, he argued, could assist justices in developing “a principled, independent state jurisprudence,” which was essential because “state courts should be judged on whether they have created a principled body of state law based on their own independent analysis and interpretation.”

Yet Chief Justice Utter also recognized that “the ultimate power of the courts comes not just from laws and the Constitution but from the expectation[s] of the public.” These public expectations included, at a

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3. Utter & Pital, Comment on Theory and Technique, supra note 2, at 652, 676.

minimum, judicial impartiality, resulting in decisions “without restriction, improper influence, inducements, pressures, threats or interference[—]direct or indirect.” The people expected a judicial commitment to the rule of law, i.e. deciding cases based not on the judges’ personal views but on what the law requires. More generally, the people were concerned with the substance of the legal principles courts announced, as well as with the courts’ overall role in the political system. Chief Justice Utter acknowledged “the ideal of democratic accountability of the public servant no matter what the position of power” and the danger that “the more the judiciary is independent of popular pressures, the greater the risk of the judiciary straying from strongly-held popular values.” However, he also cautioned that public expectations should not interfere with the rule of law: “the more the judiciary is accountable to popular pressures, the greater the risk it may lose its role of independent protector of nonmajoritarian interests and rights.” Rather, what judicial accountability required was that “state judges [be] aware of the need to be sensitive to public concerns and to carefully explain [how the] value choices that must be made in decisions are chosen.”

Such explanations were crucial because, as Chief Justice Utter noted, “state courts typically are democratically accountable” in ways that federal courts are not. Most state judges serve limited terms of office rather than during good behavior, and roughly ninety percent of state judges stand for election at some point; therefore citizens can register their disapproval of judicial decisions by voting the offending judges out of office. In addition, most state constitutions are relatively easy to amend, so voters may overturn disfavored rulings by constitutional amendment. This of course cuts two ways. If decisions were relatively

5. Id.
7. Id.
8. Id. at 48.
9. Id. at 20.
11. See Book of the States 2013: Chapter 1: State Constitutions, COUNCIL ST. GOV'TS (July 1, 2013, 12:00 AM), http://knowledgecenter.csg.org/kc/content/book-states-2013-chapter-1-state-
easy to overturn, then the failure to overturn them could be viewed as popular approval of those rulings. Thus Chief Justice Utter pointed to the failure of state voters to overturn most “new judicial federalism” rulings as evidence of “overall support of rights beyond those required by the federal constitution.” In fact, the ready availability of mechanisms for overturning state court decisions may actually encourage judicial creativity. If democratic means exist for overturning judicial rulings and if judges themselves are electorally accountable, then the familiar arguments about the undemocratic character of judicial review and about the need for judicial restraint lose much of their force.

Chief Justice Utter’s comments on the place of the judiciary in the American system of popular government give us much to ponder. In the pages that follow I continue the discussion that he started by looking at the debate over judicial review and popular constitutionalism. More specifically, I explore popular constitutionalism at both the federal and state levels. The decision to do so is rooted in part in the simple fact of dual constitutionalism. The decision is also rooted in the very different constitutional experience at the federal and state levels. The distinctiveness of the federal and state constitutional experiences is crucial for understanding popular constitutionalism in the United States.

What role have the people played, and what role should they play, in American constitutionalism? That these questions are raised at all may seem odd. After all, the preambles of the United States Constitution and of American state constitutions confirm that “We the People” have the authority to establish the fundamental law under which we will live. These documents in turn draw upon the Declaration of Independence, which proclaims “the Right of the People to alter or to abolish [an existing government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”

constitutions [https://perma.cc/KB2A-UL8W].

12. Robert F. Utter, Don’t Make a Constitutional Case of It, Unless You Must, 73 JUDICATURE 146, 149 (1989).


15. See, e.g., N.Y. CONST. pmbl. (“We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS
Yet the founding documents do not conclude the matter, because more is involved in the constitutional enterprise than merely the creation of a government; and the popular role in that broader enterprise—both what the people have done and what they can and should do—has been debated throughout much of the nation’s history. Indeed, it remains controversial today. For even if there is a consensus on the right of the people to create constitutions and replace existing constitutions, this does not resolve how frequently the people should do so and whether constitutional arrangements should encourage or discourage such recourse to the people. Nor does it address whether the people likewise have or should have a monopoly on instituting less fundamental constitutional changes or whether other institutions can and have initiated such changes. Nor does it clarify what role, if any, the people have played and should play—either directly or through institutions accountable to them—in interpreting or influencing the interpretation of their constitutions or in protecting the fundamental law against misinterpretation or evasion of its mandates. Yet these are crucial questions for American constitutionalism, as they are in any constitutional regime. Moreover, the answers to these questions may well vary both over time and depending on whether one is looking at the federal Constitution or at its state counterparts. To understand the role of the people in American constitutionalism, it is useful to begin with the current debate over popular constitutionalism.

I. POPULAR CONSTITUTIONALISM

James Madison observed of the United States Constitution that “[a]s the instrument came from [the Convention] it . . . was nothing more than the draught of a plan, nothing but a dead letter, until life and validity

CONSTITUTION.”). Similar language is found in the preambles of all state constitutions, and some—for example, the preamble to the Massachusetts Constitution—further specify that “the people have a right to alter the government” when it fails to serve the purposes for which it was created. MASS. CONST. pmbl. Several early state constitutions included portions of the Declaration of Independence in their lengthy preambles.

were breathed into it by the voice of the people, speaking through the several State Conventions.” 17 Few would quarrel with that. But proponents of popular constitutionalism maintain that the people are not merely constitutional legislators for a day. Even after a constitution’s adoption, the people exercise active and ongoing control over its revision, interpretation, and implementation—they are both the supreme creators and the supreme expositors of constitutions. 18 This is, for popular constitutionalists, simultaneously a proposition in political theory, a description of American political practice, and a normative claim. It is also highly controversial, with skeptics challenging whether popular constitutionalism was dominant at the American founding, whether it has continued throughout American constitutional history or has been replaced by judicial supremacy in the interpretation and implementation of American constitutions, whether popular constitutionalism remains viable today, and whether, even if it is viable, it is desirable. After all, as L.A. Powe has observed: “The fact that Americans used certain institutions and procedures before the Civil War is hardly an argument for using them today.” 19

The preeminent contemporary exposition of popular constitutionalism is Larry Kramer’s The People Themselves. According to Kramer, prior to the Revolution, Americans “took for granted the people’s responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm so widely shared and deeply ingrained that specific expression in the constitution was unnecessary.” 20 Likewise well-established was the repertoire of mechanisms by which such unmediated popular intervention could occur. These included voting, petitioning public officials, public denunciation of unconstitutional acts in speeches and pamphlets, and various forms of quasi-legal or illegal direct action. Sometimes this

17. KRAMER, THE PEOPLE THEMSELVES, supra note 16, at 78 (second alteration in original) (quoting James Madison, Speech on the Jay Treaty in the Fourth Congress (April 6, 1796), in 6 THE WRITINGS OF JAMES MADISON 263 (Galliard Hunt ed., 1906)). Several other delegates to the Philadelphia Convention likewise stressed that popular ratification was crucial. For pertinent quotations, see FRITZ, AMERICAN SOVEREIGNS, supra note 16, at 139.

18. KRAMER, THE PEOPLE THEMSELVES, supra note 16, at 52–53. Kramer’s claim, like much of his theory, harkens back to Jean-Jacques Rousseau, who wrote in The Social Contract: “The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of the members of parliament. As soon as they are elected, slavery overtakes it; and it is nothing.” JEAN JACQUES ROUSSEAU, 3 THE SOCIAL CONTRACT 83 (1762).


direct action took the form of a refusal of the *posse comitatus* to apprehend violators of unconstitutional laws, a refusal of grand juries to indict the violators, and a refusal of petit juries to convict them through jury nullification.\(^{21}\) But, in the years preceding the Revolution, it increasingly included “mobbing” and other forms of resistance by “the crowd” against authority. As Gordon Wood observes: “Beginning with the revolutionary movement (but with roots deep in American history), the American people came to rely more and more on their ability to organize themselves and to act ‘out of doors,’ whether as ‘mobs,’ as political clubs, or as conventions.”\(^{22}\) Yet whatever the means employed, the underlying assumption was that the people had the central responsibility for safeguarding the Constitution against its violation by governmental officials.

Formal opportunities for popular participation in constitutional affairs multiplied after independence with the establishment of governments responsive to the people and with the adoption of written constitutions that provided for constitutional change by the people. Early state constitutions, for example, institutionalized the people’s constitutional role through devices such as the extension of the right to vote, the power to instruct representatives, rotation in office, and procedures for constitutional amendment. In some constitutions, such as Maryland’s in 1776, the right to change the government was couched in language that seemed to countenance a constitutional right to revolution:

> Whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power or oppression, is absurd, slavish, and destructive of the good and happiness of mankind.\(^{23}\)

The shift to republican government, by making it easier for the people to enforce accountability and influence the choices of officials, made it less necessary to resort to extra-legal means to ensure that the public voice was heard and heeded. It also subtly changed the people’s relation to their constitutions. Whereas the people before 1776 could defend the customary constitution against violation, after 1776 they could in


\(^{22}\) Id. at 319.

addition change the written fundamental law through constitutional amendment and revision, becoming “an agent capable of ongoing, collective self-government and, when necessary, radical constitutional reform.”

But what did not change, Kramer insists, were the means available to the people for making effective their constitutional views. Some High Federalists may have contended that the creation of institutions answerable to the people delegitimized unmediated popular constitutionalism. Benjamin Rush, for example, argued that

[i]t is often said that “the sovereign and all other power is seated in the people.” This idea is unhappily expressed. It should be—‘all power is derived from the people.’ They possess it only on the days of their elections. After that, it is the property of their rulers, nor can they exercise it or resume it, unless it is abused.

But this was a minority sentiment. The creation of republican governments may have established channels for the operation of popular constitutionalism, but according to some popular constitutionalists these served to supplement, not displace, other forms of popular action. Thus, amendment provisions might provide “an easier, more orderly mechanism for changing” constitutions, thereby reducing how frequently unmediated popular action might be needed, but they did not foreclose such action. Popular constitutionalists contend that the sovereign people understood that they retained the authority to act directly to ensure constitutional fidelity and to resolve constitutional disputes.

This aspect of popular constitutionalist thought deserves particular emphasis. Popular constitutionalists contend that the use of direct action, even against a popularly elected government, is not necessarily revolutionary or extra-constitutional. The people can legitimately act outside the rules that they themselves have established. They may have invested governing authority in their agents, but they did not thereby cede ultimate authority over the Constitution nor give up their power and responsibility to maintain and defend it against unconstitutional actions by those in government. Nor did they agree to use only government-sanctioned procedures in mounting the defense. Illustrative of popular

26. For a description of the High Federalist argument, see id. at 128–35.
27. Id. at 128–29 (emphasis in original).
28. Id. at 52–53.
29. Id. at 53.
30. Id. at 110–18.
constitutionalism’s understanding of the continuing role of the people “out of doors” even after the adoption of written constitutions are the vignettes with which Kramer approvingly opens *The People Themselves.* In the first, a jury exercises its power of nullification to acquit a defendant who had made a constitutional argument, even though the judges instructed the jury that his argument was legally frivolous. In the second, a crowd hooted down Alexander Hamilton and other Federalist speakers defending the Jay Treaty, after they had argued that the treaty’s constitutionality was a matter to be resolved by the President and the Senate rather than by the people. In the third, he describes a series of public meetings denouncing the Alien and Sedition Acts as unconstitutional, with militia companies indicating that they would not enforce such laws. What unites these events, at least in Kramer’s mind, is a popular rejection of the proposition that government officials—whether the President, the Senate, or judges—have ultimate authority over the meaning of the Constitution and a popular assertiveness in proposing their own interpretations of the Constitution and acting upon them. Yet these popular actions were not meant to overthrow government. Rather the people were voicing their constitutional complaints and rising up against official authority as a prelude to—or an impetus toward—institutional efforts to redress popular concerns. In fact, even popular actions that scared mightily many of the founding generation, such as Shays’ Rebellion and the Whisky Rebellion, can on close inspection be understood as involving popular constitutionalism.

31. *Id.* at 3–5. A skeptical reader might question whether the twelve jurors or the crowd that booed Hamilton or those denouncing the Alien and Sedition Acts are really “the people” or can even claim to represent them. After all, the Jay Treaty and the Alien and Sedition Acts had supporters as well as opponents—indeed, several state legislatures rejected Virginia’s call that they condemn the Alien and Sedition Acts. In such circumstances, how does one identify what the popular understanding is on a constitutional question? Kramer himself does not adequately answer that question. For a fuller attempt to grapple with how to identify when the people are acting, see *Frank, Constituent Movements,* supra note 24, at 67–101.


33. *Id.* at 4.

34. *Id.* at 4–5.

35. *Id.* at 6.

36. Christian Fritz argues persuasively that separatist movements within the states in the 1780s, the Whiskey Rebellion, and Shays’ Rebellion can all be understood as involving popular constitutionalism. *See Fritz, American Sovereigns,* supra note 16, at 1–80. Regarding Shays’ Rebellion, he notes:

For Regulators, court closings did not overthrow the Massachusetts government but legitimately interposed the authority of the people—as the ruler—to temporarily suspend policies that were inherently wrong if not unconstitutional. They sought a moratorium during which the legislature could finally grant needed relief. Such dramatic intervention would alert the legislature—which was not the sovereign—to the discontents of the people that could be
Kramer traces the operation of popular constitutionalism throughout American history, but his emphasis is on the founding and the antebellum era, given his concern to disprove that judicial supremacy is constitutionally inevitable and that it has been largely unchallenged from the very outset. He shows that figures as diverse as Thomas Jefferson, James Madison, James Wilson, and John Randolph all endorsed popular constitutionalism in the decades following independence, and he documents how political practice coincided with these pronouncements.\(^{37}\) Even as judicial review gained acceptance, its exercise prompted popular threats to judicial independence and officially sanctioned defiance of judicial decrees.\(^{38}\) During the first half of the nineteenth century, the rise of political parties created new vehicles by which the people could influence constitutional interpretation and implementation, and Kramer acknowledges that the rise of party politics in effect “swallowed up” popular politics, encouraging greater reliance on the newly established forms for popular participation and less on unmediated popular action.\(^{39}\) Thus the impetus for constitutional defense and constitutional change would typically move from the people, from the political grassroots, to the party leadership and then to those holding political office. Insofar as the people had more opportunities to act through political institutions, this tended to efface—or at least narrow—the distinction between popular constitutionalism and departmentalism.

Kramer characterizes the years between Reconstruction and the New Deal as “a period of judicial expansion . . . [but] also a kind of golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.”\(^{40}\) Populists and Progressives proposed a variety of measures designed to check what they perceived as judicial domination of the political process on behalf of entrenched interests. These included the requirement of extraordinary majorities on courts to strike down laws, the recall of judges, and the recall of judicial decisions.\(^{41}\) None of these proposals were endorsed nationally, but this

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\(^{38}\) TARR, WITHOUT FEAR OR FAVOR, supra note 10, at 8–67.
\(^{40}\) Id. at 215.
\(^{41}\) TARR, WITHOUT FEAR OR FAVOR, supra note 10, at 58–63.
did not prevent some states from adopting them.\textsuperscript{42} The rather limited success of these proposals led Chief Justice Taft in 1923 to dismiss “the so-called radicals [as] vastly more noisy than they are important.”\textsuperscript{43} But Taft was only partially correct. The political reformers’ “advocacy of various quixotic proposals to curtail judicial power often was intended merely to dramatize their grievances and remind the courts that an angry public possessed the means of curbing judicial power.”\textsuperscript{44} Once the rulings of the courts shifted, once they ceased invalidating social and labor legislation, the reformers lost interest in the very reforms they had championed.\textsuperscript{45} This underscores the political character of the conflict over popular constitutionalism and judicial supremacy. Those opposing the courts’ rulings are typically concerned about the substance of those rulings, what they see as judicial misinterpretations of the fundamental law, not the fact that the rulings emanated from the judiciary. Once the judicial obstacle to the action they favor has been removed, they no longer have any quarrel with the courts.

The New Deal precipitated a direct clash between President Franklin Roosevelt and a United States Supreme Court that adamantly opposed the expansion of national power that Roosevelt sought in order to deal with the Great Depression. Despite the strong personal mandate Roosevelt received in the 1936 presidential election, his proposal to reconstitute the United States Supreme Court aroused fierce opposition not only from Republicans but from many Democrats as well.\textsuperscript{46} Proponents of popular constitutionalism have tended to view the outcome of the Court battle as a victory: The Supreme Court had been humbled, its constitutional rulings had changed, and a series of judicial retirements and Roosevelt appointees ensured a Court that shared the President’s—and the people’s—constitutional perspective.\textsuperscript{47} But opponents of popular constitutionalism can celebrate the outcome as well. An institutional challenge to the judiciary had been defeated, and the Supreme Court’s authority to strike down laws had survived the

\textsuperscript{42} Id. at 56.


\textsuperscript{44} William G. Ross, \textit{A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937}, at 20–21 (2014).

\textsuperscript{45} Id.

\textsuperscript{46} See Jeff Sheshol, \textit{Supreme Power: Franklin Roosevelt vs. The Supreme Court} (1st ed. 2010).

conflict, even if it would—at least for a while—no longer give serious scrutiny to economic regulations. As the jurisprudence of the Warren and Burger Courts showed, this left considerable opportunity for judicial activism in dealing with rights questions. Although some of the justices’ rulings were unpopular in the states, their activism was largely unchallenged by the President and Congress because the Court was for the most part serving as a faithful member of the dominant Democratic coalition.  

Yet according to Kramer, the New Deal and the *Carolene Products* settlement, under which courts subjected laws affecting individual rights to strict scrutiny but gave laws affecting congressional power and the structure of government a less exacting examination, ultimately led to judicial supremacy and a juricentric constitutionalism. The Supreme Court carved out an ambitious role for itself as the constitutional expositor in rights cases, a position vigorously supported by opinion leaders and the legal profession, and the people and their representatives largely acquiesced in the transfer of interpretive authority to the judiciary. Once this occurred, it eroded support for judicial restraint in dealing with other matters, such as the scope of congressional powers (the Rehnquist Court’s New Federalism) or the outcome of presidential elections. Thus Kramer traces the origins of contemporary judicial activism and the accompanying rhetoric supporting judicial supremacy to recent developments rather than to something intrinsic to the Constitution itself.

Having provided a historical account of popular constitutionalism, Kramer returns to advocacy. He suggests that in the present day popular constitutionalism involves not revolutionary acts or constitutional revision but “some idea that the people retain authority in the day-to-day administration of fundamental law.” The people will play such a role, however, only if their understanding of what their role can be and should be changes. But this shift will only take place if the people have mechanisms through which they can act. Kramer thus concludes:

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51. A similar development occurred in the states in the 1970s with the rediscovery of state bills of rights by state supreme courts, a phenomenon commonly known as the new judicial federalism. See TARR, UNDERSTANDING, supra note 14, at 161–70.
If there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional.... We should... be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.54

II. ALTERNATIVES

A. Judicial Review

Some proponents of popular constitutionalism reject judicial review altogether as incompatible with a robust popular constitutionalism. They deride those who want judges to decide fundamental political issues as “today’s aristocrats” and view their reliance on judicial authority as rooted in a “deep-rooted fear of voting” and a disdain for popular rule that is fundamentally anti-democratic.55 They see this distrust of popular judgments on matters of political principle as particularly dominant in academia, but its deleterious effects have spread so widely that “already it is difficult for many, whether in or out of the academy, even to imagine any alternative.”56 Instead, “Americans [have come] to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”57 Kramer’s point is not a lack of popular engagement but rather the sense, encouraged by legal professionals, that the Constitution is a document only legal professionals can understand. This development is unfortunate, popular constitutionalists insist, because reliance on the judiciary hardly guarantees that constitutional issues will be correctly resolved. Judicial review furthers constitutional fidelity only if judges decide on the basis of law rather than their own predilections and do not err in their interpretation of that law. Yet intra-court divisions raise questions about


56. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 2 (1989). Thus, Roberto Unger observes that one of the “dirty little secrets of contemporary jurisprudence” is “its discomfort with democracy.” ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72 (1996).

whether judges’ legal training really gives them a privileged insight into constitutions, and decades of research connecting judges’ votes to their political ideologies further undermines the claim that their rulings are insulated from politics.\footnote{See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2003).} Popular constitutionalists insist that reliance on the people instead of on their elected executives and representatives is more compatible with the democratic character of the regime and just as likely, if not more likely, to yield correct constitutional interpretations.\footnote{Kramer, The People Themselves, supra note 16, at 249–53.}

Yet the claim that there is a fundamental incompatibility in principle between popular constitutionalism and judicial review cannot withstand close analysis. A key element of popular constitutionalism is that the people have the right to choose the constitution under which they will live, and this includes the right to place constraints on what they and their representatives can do. The government thus created may be less simply democratic than it could be, but that does not render it less legitimate. So if the people have chosen to institute judicial review—admittedly, a contested question—then this exercise of popular constitutionalism is by definition compatible with popular constitutionalism. Any doubts on this point come from confusing who is choosing and the substance of what they are choosing. This, of course, does not prove that the American people have authorized judicial review or, more particularly, the form of judicial review that currently exists in the United States. Nor does it suggest that, if they have, they should not reconsider that choice. Nonetheless, this shifts the grounds of the debate from what historically the American people have chosen to whether their choice continues to be a wise one.

Furthermore, as is perhaps often the case, at least some critics of judicial review seem motivated less by principled opposition than by their disagreement with current rulings of the Supreme Court. Mark Tushnet is quite candid about this; one suspects he is not alone.\footnote{See Tushnet, Taking the Constitution Away, supra note 16, at 129–53.} If this is true, then the current enthusiasm for popular constitutionalism may be merely the most recent manifestation of liberal distrust of judicial power, similar to what prevailed pre-1937 and remained a potent element in liberal thought until the rise of the Warren Court. So one may expect that should the orientation of the United States Supreme Court shift, some of the current support for popular constitutionalism would wane.

More importantly, Alexander Hamilton’s classic defense of judicial review in The Federalist No. 78 suggests a way to reconcile judicial...
review with democracy and popular constitutionalism. Hamilton argues that judges are obliged to follow the will of the people that is expressed in the Constitution rather than the will of the people’s representatives. In exercising judicial review, they are merely serving as an intermediary for the people, acting to prevent the people’s representatives from exceeding their constitutional authority.\textsuperscript{61} “Only the People can change the Constitution, and the judges must prevent Congress from making basic changes unilaterally.”\textsuperscript{62} Or, put differently, one set of the people’s agents is helping ensure that another set of their agents is complying with the limits the people have set on them. Judges, therefore, have exactly the same authority as do the other branches of government: Namely, to make constitutional judgments when constitutional issues come before them. The Federalist No. 78 argument thus affirms the authority of the people’s will enshrined in the Constitution without claiming that the interpretation of that will is exclusively a judicial prerogative. It does not deny that the people should interpret the Constitution or use their authority to call their agents, including judges, to account should they misinterpret its provisions.

\textbf{B. Judicial Supremacy}

Most contemporary proponents of popular constitutionalism frame their position as an alternative to judicial supremacy: The idea that the United States Supreme Court and its counterparts in the states are the final authority in matters of constitutional interpretation.\textsuperscript{63} According to advocates of judicial supremacy, the Court’s constitutional rulings are final not only in the sense that they resolve the particular dispute at issue and that there is no appeal from their rulings, but also in the sense that these rulings provide the authoritative interpretation of the Constitution: an interpretation binding on the federal government, the states, and the people. As Justice Joseph Story framed it in his famous Commentaries on the Constitution of the United States: “it is the proper function of the judicial department to interpret laws, and by the very terms of the

\textsuperscript{61} The Federalist No. 78 (Alexander Hamilton).

\textsuperscript{62} 1 Bruce Ackerman, \textit{We the People: Foundations} 192 (1991).

\textsuperscript{63} For convenience, given the fact that most authors have addressed themselves exclusively to the United States Supreme Court and its claims of judicial supremacy, I will concentrate my analysis on that Court and its authority; but the same arguments apply to state supreme courts and the authority of their interpretations. However, at the state level there is more opportunity—and willingness—to overturn judicial rulings via constitutional amendment. See generally John J. Dinan, Foreword: Court-Constraining Amendments and the State Constitutional Tradition, 38 Rutgers L.J. 983 (2007).
constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the department of the federal government, and upon the whole people." Indeed, this judicial preeminence requires the elected branches “not only to obey that ruling but to follow its reasoning in future deliberations,” and this deference is required “even when other governmental officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review.” Thus political opposition to the Court’s rulings or its authority is interpreted as a challenge to the Constitution and to the judicial independence necessary to safeguard constitutional values.

In recent decades the United States Supreme Court has become increasingly outspoken in proclaiming its supremacy as constitutional interpreter. Thus in *Cooper v. Aaron*, a unanimous Court asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution . . . . [A]nd Art. VI of the Constitution makes [its rulings] of binding effect on the States.” In *Nevada Department of Human Resources v. Hibbs*, the Court confirmed that “it falls to this Court, not Congress, to define the substance of constitutional guarantees,” and in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality opinion depicted the Supreme Court as leading a people “who aspire to live according to the rule of law” and as “invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.” It would not be hard, although perhaps tedious, to multiply the examples.

One can of course oppose judicial supremacy without rejecting judicial review—indeed, the Epilogue of *The People Themselves* is

64. 1 Joseph Story, *Commentaries on the Constitution of the United States* 357 (1833). Modern formulations are similar: “[T]he courts in general and the Supreme Court in the last analysis have the power to decide for the government as a whole what the Constitution means . . . .” Ronald Dworkin, *Law’s Empire* 356 (1986). Not every Supreme Court justice has shared Justice Story’s exalted understanding of the Court’s authority. Thus, Justice Robert Jackson wrote in *Brown v. Allen*, “[w]e are not final because we are infallible, but we are infallible only because we are final.” 344 U.S. 443, 540 (1953).


67. Id. at 18.
69. Id. at 728.
71. Id. at 868.
entitled “Judicial Review Without Judicial Supremacy.” Yet, as the record of the United States Supreme Court and other courts over the last several decades reveals, the claim of judicial supremacy itself encourages judicial activism (and perhaps vice versa). For if it is the responsibility of the judiciary “to speak before all others for [the nation’s] constitutional ideals,” then it seems only appropriate that judges should put forth their own constitutional understanding rather than deferring to the constitutional understanding of the other branches of government. A presumption of constitutionality for congressional enactments or presidential actions makes no sense. Moreover, if “it falls to this Court, not Congress, to define the substance of constitutional guarantees,” then there is a temptation to embrace—or even to create—opportunities to proclaim what the Constitution means rather than seeking to avoid constitutional questions. Thus judicial supremacy encourages judges, whether state or federal, to interpret restrictions—such as the political question doctrine, mootness, and the requirement of standing to sue—narrowly, lest these restrictions prevent them from addressing constitutional issues. It may also lead judges to view disputes as raising constitutional questions, questions which they should decide, rather than as involving matters on which the Constitution is silent and which should therefore be resolved by the political process.

Some proponents of judicial supremacy trace its origins to the American founding, to The Federalist No. 78 and to Marbury v. Madison, highlighting in particular Chief Justice John Marshall’s statements in Marbury that the Constitution is “the fundamental and paramount law of the nation” and that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” However, as Justice Robert Jackson tartly notes: “The Constitution nowhere provides that it shall be what the judges say it is,” and in fact there is a “basic inconsistency between popular government and judicial

73. See That Eminent Tribunal: Judicial Supremacy and the Constitution (Christopher Wolfe ed., 2004).
74. Planned Parenthood, 505 U.S. at 868.
75. 5 U.S. 137 (1803).
supremacy.”

It is true that “by the late 1790s the argument that courts were peculiarly responsible for constitutional interpretation, that their words ought indeed to be final, had become part of the Federalist canon.” But this was a partisan position, put forth by a party that saw itself losing power in electoral politics, rather than a universally accepted view; and even Federalists did not consistently defend that position. Thus, in a letter to Samuel Chase composed a year after *Marbury*, Chief Justice Marshall himself contemplated allowing Congress to overturn the Court’s rulings by a two-thirds majority, fearful that an insistence by the United States Supreme Court on judicial supremacy would risk impeachment of the justices.

The spread of judicial review in the nineteenth century encouraged claims of judicial supremacy, especially as judicial review became assimilated to legal interpretation more generally. Such claims were most often advanced by the judges themselves and by their allies in the emerging legal profession. But this took time, because judicial review itself advanced slowly: The United States Supreme Court struck down

77. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS vii, 3 (1941) [hereinafter JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY]. Larry Kramer insists that “when our Founding Fathers wrote no one had yet imagined anything even remotely like modern judicial supremacy,” and Keith Whittington concurs that “[j]udicial supremacy did not emerge as a fully formed and politically dominant constitutional theory at the time of the Founding or in the early years of the nation’s history.” KRAMER, THE PEOPLE THEMSELVES, supra note 16, at 250; see also WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, supra note 43, at 10. Akhil Amar notes that claims that the Supreme Court was the ultimate constitutional interpreter “never appeared in the United States Reports until the second half of the twentieth century.” AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 237 (2012).


79. Marshall’s proposal came in a letter to Samuel Chase in which he wrote: “I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.” JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, supra note 77, at 28.

80. On the changing understanding of judicial review during the late eighteenth and early nineteenth centuries, see generally SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

81. Thus in his Commentaries on the Constitution of the United States Justice Joseph Story wrote:

[It is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by, that constitution.

STORY, supra note 64, at 357.
only two congressional statutes prior to the Civil War, and state high
courts likewise invalidated few statutes until the 1850s.82 Chief Justice
Marshall attempted to reinvigorate the idea of judicial supremacy in
McCulloch v. Maryland,83 claiming that “[o]n the Supreme Court of the
United States has the constitution of our country devolved this important
duty” to settle disputes over the “constitution of our country, in its most
interesting and vital parts.”84 His ruling provoked intense controversy,
but not because of its insistence on judicial supremacy, which was
largely ignored.85

This is not to deny that in practice a sort of pragmatic judicial
supremacy may have operated, even if principled claims for judicial
supremacy were rejected. Courts often made the final and determinative
decision in constitutional disputes, operating in a zone of political
indifference. They struck down politically inconsequential laws without
incurring political repercussions, and some of their rulings enjoyed
broad political support. Nonetheless, most scholars have concluded that
until recent decades judicial claims of interpretive supremacy arose
episodically rather than constantly, that those claims were almost always
contentious, a matter of political dispute rather than unquestioning
acceptance, and that particularly in the nineteenth century, both federal
and state officials were willing to ignore rulings with which they
disagreed or to deny their finality.86

82. The two statutes invalidated by the United States Supreme Court were a section of the
Judiciary Act of 1789, struck down in Marbury v. Madison, 5 U.S. 137 (1803), and the Missouri
Compromise of 1820, struck down in Scott v. Sandford, 60 U.S. 393 (1857). The justices were
somewhat more active in striking down state statutes—for data, see WHITTINGTON, POLITICAL
FOUNDATIONS OF JUDICIAL SUPREMACY, supra note 43, at 107. For data on judicial review in the
states during the antebellum period, see Jed Handelsman Shugerman, Economic Crisis and the Rise
of Judicial Elections and Judicial Review, 123 HARV. L. REV. 1061, 1115–42 (2010). The results of
state-specific studies of judicial review during the antebellum period are summarized in TARR,
WITHOUT FEAR OR FAVOR, supra note 10, at 26–30.
83. 17 U.S. 316 (1819).
84. Id. at 400–01.
85. On the debate engendered by McCulloch, in which Marshall himself participated, see JOHN
MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969). Kramer notes
that “[j]udicial supremacy was a small point even in the essays of Marshall and his adversaries” and
that “[p]ublic inattentiveness to the issue was mirrored as well in the new treatises on constitutional
law that seemed suddenly to be pouring from the presses.” KRAMER, THE PEOPLE THEMSELVES,
supra note 16, at 156.
86. On the political controversy over the development of judicial supremacy, see Mark A. Graber,
The Problematic Establishment of Judicial Review, in THE SUPREME COURT IN AMERICAN
POLITICS: NEW INSTITUTIONALIST PERSPECTIVES (Cornell Clayton & Howard Gillman eds., 1999);
James Stoner, Who Has Authority over the Constitution of the United States?, in THE SUPREME
COURT AND THE IDEA OF CONSTITUTIONALISM (Steven Kautz et al. eds., 2009); the essays collected
in THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe
Some proponents of judicial supremacy justify it based on its substantive effects rather than its historical pedigree. They argue first of all that judicial supremacy fills a need for the authoritative resolution of constitutional disputes: Indeed, the decisional finality judicial supremacy provides is essential for maintaining the authority of the Constitution and the rule of law. As Justice William Johnson put it:

Once admit that the decisions of that tribunal which the Constitution has established to pronounce on the validity of Congressional enactments, is not to be regarded as final—is not to bind, definitively, the will of States, as well as of individuals, (and I understand you as going the full length of this,) and no barrier is left against mutual encroachments, mutual dissentions, and civil war. The very cement of the Union is gone.  

More recent commentators have echoed Johnson’s sentiments. For example, Larry Alexander and Frederick Schauer insist that absent a “single authoritative interpreter,” there would be “interpretive anarchy” and that the law can serve its settlement function only if other institutions defer to the judgments of the courts.

Other judicial supremacists contend that judicial supremacy promotes more just, as well as more constitutionally correct, outcomes. They maintain that judicial review, enhanced by judicial supremacy, provides a valuable check on majoritarian tyranny and democratic excesses and that it protects the rights of minorities, citing judicial interventions on behalf of racial and religious minorities to bolster their case. Although eschewing claims of judicial infallibility, these judicial supremacists argue that the judges’ insulation from political influences, their training, and their insight into political principle enables them to better resolve contentious constitutional controversies. In making this argument, they


88. Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1379 (1997). As Mark Tushnet observes, their argument may establish that there is a need for a final authoritative decision-maker but not that the Supreme Court should perform that function. See TUSHNET, TAKING THE CONSTITUTION AWAY, supra note 16, at 27–31.

89. See, e.g., Erwin Chemerinsky, In Defense of Judicial Review: A Reply to Professor Kramer, 92 Calif. L. Rev. 1013, 1013 (2004) ("[A]s I read Professor Kramer’s stunning new book about popular constitutionalism, I kept thinking about what his theory would mean for civil rights and civil liberties litigation. The answer is chilling. Popular constitutionalism would mean that courts would be far less available to protect fundamental rights. The rights of minorities would be largely left to the whims of the political majority with severe consequences for racial, ethnic, sexual orientation, and language minorities as well as criminal defendants, public benefits recipients, and others.").
typically portray the public as lacking an understanding of or attachment to constitutional principles or as ready to jettison those principles in the heat of the moment. “Popular constitutionalism,” they argue, “flirts with replacing the restraints of constitutionalism with a freewheeling reconsideration of all constitutional boundaries at the behest of popular majorities.”

Finally, proponents of judicial supremacy assert that judicial resolution of disputes over abortion and other contentious issues helps reduce divisions within the body politic and thereby contributes to the political health of the polity.

Unsurprisingly, popular constitutionalists dispute these claims. They argue that the idea that there must be a final interpretive authority for constitutional disputes confuses constitutional law with the dispute resolution that occurs in ordinary law. Constitutional rulings resolve disputes between the contending parties, just as non-constitutional rulings do, but they go much further. They establish the law that will govern the society, and in so doing they impinge on popular self-government. As Abraham Lincoln put it in his First Inaugural Address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Furthermore, popular constitutionalists deny that historically the judiciary has been particularly protective of rights or attentive to the just claims of racial or religious or political minorities. For every Brown v. Board of Education that can be celebrated, they note, there is a Dred

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93. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), http://avalon.law.yale.edu/19th_century/lincoln1.asp [https://perma.cc/7QJS-GJW9]. Yet Lincoln’s understanding of judicial authority was more nuanced than this frequently quoted statement seems to suggest. Thus in 1857, Lincoln stated: “We think [the Supreme Court’s] decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided by that instrument itself.” BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 117 (2009) [hereinafter FRIEDMAN, THE WILL OF THE PEOPLE].

Scott v. Sandford\textsuperscript{95} and a Plessy v. Ferguson;\textsuperscript{96} for every New York Times v. Sullivan,\textsuperscript{97} a Gitlow v. New York\textsuperscript{98} and a Dennis v. United States;\textsuperscript{99} and it was the political branches that took the lead in safeguarding the rights of workers, women, and the disabled. In addition, they note that many judicial supremacists favor not merely judicial protection of rights but—flying under the banner of non-interpretivism, a “moral reading of the Constitution,” or other formulations—espouse judicial revision, adaptation, and expansion of rights, a quite different proposition.\textsuperscript{100}

Popular constitutionalists also deny that courts are more competent to decide constitutional issues, insisting that it rests on a cynically stereotypical view of the people and their representatives and a romanticized view of judicial decision-making. Kramer puts the point starkly: “The modern Anti-Populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy-headed, and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite.”\textsuperscript{101} Insofar as the people or their representatives are uninterested in constitutional matters, popular constitutionalists maintain, the blame may lie with judicial supremacy itself, because it curtails opportunities for popular involvement and thereby discourages popular interest.\textsuperscript{102} In so arguing, they are consciously aligning themselves with Thomas Jefferson, who wrote:

I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of constitutional power.\textsuperscript{103}

Give the people the opportunity to make constitutional judgments, they

\textsuperscript{95} 60 U.S. 393 (1857).
\textsuperscript{96} 163 U.S. 537 (1896).
\textsuperscript{97} 376 U.S. 254 (1964).
\textsuperscript{98} 268 U.S. 652 (1925).
\textsuperscript{99} 341 U.S. 494 (1951).
\textsuperscript{100} For examples of such approaches to constitutional interpretation, see RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996), and MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).
\textsuperscript{101} KRAMER, THE PEOPLE THEMSELVES, supra note 16, at 242.
\textsuperscript{102} Id. at 241–43.
argue, and the people will be motivated by constitutional principles, although, as Mark Tushnet cautions, “[o]f course it is a fact that the people are not committed to the Constitution’s principles as the courts have understood them.” Ultimately, though, “[t]he people’s claim to rule . . . is most persuasively put . . . not in terms of what the people know but in terms of who they are. They are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers.”

These dueling quotations do not, of course, resolve the issue. For present purposes, it suffices to point out what is missing in the discussion of judicial supremacy. If during the eighteenth and early nineteenth centuries judicial supremacy was not widely accepted, how and why did that situation change? Keith Whittington’s *Political Foundations of Judicial Supremacy* masterfully traces the uneven advance of judicial supremacy, and I shall not attempt to summarize his analysis here, except to note that the judges lacked the power to impose judicial supremacy on a reluctant people and their representatives. As Whittington notes, “The American judiciary has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been politically beneficial to others.” Politicians—and the people they represent—are thus not simply the victims of judicial supremacy. They have helped create it to serve their own ends, with some presidents among the primary supporters of judicial supremacy. Indeed, some popular constitutionalists acknowledge this. Larry Kramer observes that “[e]xcept in the most abstract sense, ‘We the People’ have—apparently of our own volition—handed over control of our fundamental law over to what Martin Van Buren in an earlier era condemned as ‘the selfish and contracted rule of a judicial oligarchy.’”

C. Departmentalism

In the message accompanying his veto of the bill establishing the Second National Bank, President Andrew Jackson provides the classic definition of departmentalism:

104. TUSHNET, TAKING THE CONSTITUTION AWAY, supra note 16, at 70 (emphasis in original).
106. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, supra note 43, at 27.
107. Id. at 292. For an analysis of the benefits that politicians in general and presidents in particular may derive from judicial supremacy, see id. at 82–229.
The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.\(^{109}\)

Under this theory, then, there is no single authoritative voice in interpreting the Constitution, for to elevate one branch above the others would destroy the balance among them. Each branch of the federal government can reach its own conclusions on constitutional matters and act on them, but those conclusions do not bind the other coequal branches—they are obliged to accept the conclusions only if they find the reasoning supporting them persuasive. In particular, departmentalism denies the judiciary a special institutional authority to say what the Constitution means, rejecting the claimed “transubstantiation whereby the Court’s opinion of the Constitution . . . becomes very body and blood of the Constitution.”\(^{110}\) Thus for Andrew Jackson, the fact that a unanimous Supreme Court in *McCulloch v. Maryland* had upheld the constitutionality of the bank did not settle the question; nor did congressional authorization of the First Bank of the United States from 1791–1811 and of the Second Bank of the United States from 1816 onward. The constitutional positions taken by other branches and the arguments marshalled in support of them are entitled to respectful consideration, but that is all. If differing constitutional understandings develop, they might be resolved by dialogue between the branches or, ultimately, by the people, who directly or indirectly select the officials who serve in those branches.

It should be noted that departmentalism only pertains to the distribution of interpretive authority within a single government, whether federal or state. Because it is focused on separation-of-powers concerns, it does not address who should resolve constitutional conflicts between nation and state. The states have throughout American history disputed the correctness or authority of United States Supreme Court rulings, and in some instances they have successfully defied federal mandates. This happened most often when they were able to find political support in Congress or the President. Andrew Jackson’s oft-
reported comment—“Well, John Marshall has made his decision, now let him enforce it”—may be apocryphal, but the practice is not.111 Nevertheless, the legitimacy of federal judicial review of state law is clear, rooted as it is in the supremacy of federal over state law, and thus state defiance is simply that, defiance. James Madison and Andrew Jackson, both of whom were departmentalists at the federal level, nonetheless rejected state nullification of federal constitutional pronouncements.112 Although they acknowledged that states can mobilize public opinion or use other forms of political action to oppose perceived misinterpretations of the federal Constitution, they nevertheless maintained that, pace John C. Calhoun, individual states could not nullify federal action.113

Proponents of departmentalism believe that it encourages interbranch dialogue on constitutional questions, replacing destructive attacks on the judiciary by the President and Congress with constructive debate over the meaning of the Constitution. In making this argument, they assume that such virulent attacks on the judiciary arise from frustrations rooted in impotence: one complains loudly when, under a system of judicial supremacy, that is all one can do. In addition, departmentalists suggest that the fact that other departments may put forth competing constitutional arguments may serve to improve the judges’ constitutional rulings by requiring them to advance persuasive constitutional arguments in order to prevail. This more frequent interbranch dialogue on constitutional issues, in turn, can be expected to promote a heightened popular consciousness about and involvement with constitutional issues. Finally, departmentalists view their position as more democratic, in that it gives the power to make authoritative constitutional interpretations to branches more directly answerable to the people and more likely to act as the agents of the popular will.114

It is this potentially popular character of departmentalism that most


112. For overviews of the nullification crisis, including Jackson’s and Madison’s positions and roles in its resolution, see generally WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY CRISES IN SOUTH CAROLINA (1965) and THOMAS E. WOODS, JR., NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY (2010).


114. My account of the advantages and disadvantages of departmentalism draws on SUSAN R. BURGESS, CONTEST FOR POLITICAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 1–27 (1992) [hereinafter BURGESS, CONTEST FOR POLITICAL AUTHORITY].
troubles its critics: they fear that the legislature and the executive will base their interpretations on what is politically popular rather than on what is constitutionally required and that this lack of commitment to the Constitution may jeopardize rights. In addition, they point out that departmentalism removes a vital check on the legislature and the executive, allowing self-interested interpretations that undermine the rule of law and the interbranch distribution of power. Opponents of departmentalism further complain that conflicting constitutional understandings among the various branches promotes confusion about what legal standards apply and undermines the rule of law, which requires a final determiner of legal questions.

Several of the arguments against departmentalism resemble those against popular constitutionalism. This is hardly surprising, for there are important connections between those two views. Indeed, some commentators have suggested that since the people usually cannot directly advance their constitutional views, they must rely on the other branches of the federal government to do so. Even Kramer, in responding to his critics, seems to endorse this understanding. He notes that “[m]obs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.” Rather, he describes his “goal” as “restor[ing] a true departmental system” as proposed by Madison and Jefferson.

Most proponents of departmentalism, however, situate their analysis in the context of the separation of powers, rather than popular constitutionalism, perhaps recognizing that there are problems viewing departmentalism as a form of domesticated popular constitutionalism. First, departmentalism places ultimate constitutional authority in the hands of the various branches of the government, whereas popular constitutionalism insists that the people have the final say over constitutional interpretation. As Saikrishna Prakash and John Yoo put it:

Kramer’s popular constitutionalism is a theory about the external relationship between the federal government and the polity; the people decide the Constitution’s meaning for all three branches. Departmentalism is a theory about the internal relationship between the three branches of the federal government in interpreting the Constitution. Departmentalism, whatever its merits, cannot have grand populist pretensions, for

115. See, e.g., supra note 82 and accompanying text.
116. See BURGESS, CONTEST FOR POLITICAL AUTHORITY, supra note 114, at 1–27.
117. Kramer, Response, supra note 54, at 1175.
118. Id. at 1180.
it says absolutely nothing about the people’s constitutional role.\(^{119}\)

Second, in advancing their constitutional interpretations the legislative and executive branches may be acting independently of the people, in order to protect their institutional prerogatives or for other purposes. Departmentalism in such instances involves constitutional activity that is not opposed to popular constitutionalism but that occurs outside of, or in addition to, popular constitutionalism.

Third, the legislative and executive branches are, under this formulation, speaking for the people and acting as agents of the people. Although they may make such a claim, their faithfulness to the popular will cannot be presumed—the legislature and/or the executive may depart from the popular will to pursue corrupt or misguided policies. Indeed, lack of fidelity to the popular will may be consistent with representative government as understood by the founders—consider Madison’s emphasis on the “cool and deliberate sense of the community”\(^{120}\) and on the importance of a senate that could stand against popular whims or factions. Beyond that, a variety of institutions can make the claim to be speaking on behalf of the people, even as they express different perspectives. As Bruce Ackerman notes: “By multiplying perspectives, Publius deflates the claims of normal officials sitting either in Washington or in the states to speak for the People. Each official effort is just one of a number of competing representations.”\(^{121}\)

Fourth, when combined with the development of political parties, the system may lead to popular subjection to the initiatives of the branches of government and of the political parties that organize and dominate the departments. At best, then, departmentalism may be a means—but only one of several—by which the people can exert their influence over the interpretation of their constitutions. In a federal system the people may use one level of government to organize and transmit popular opposition to constitutional initiatives at another level of government. The Virginia and Kentucky Resolutions of the late eighteenth century are a well-known example. And as an analysis of state constitutions will show, there are opportunities for unmediated popular influence on constitutions even in the twenty-first century.


\(^{120}\) THE FEDERALIST NO. 63 (James Madison).

\(^{121}\) ACKERMAN, supra note 62, at 185 (emphasis in original).
III. POPULAR CONSTITUTIONALISM: MUCH ADO ABOUT NOTHING?

The debate over popular constitutionalism, like many scholarly debates, has been marked by hyperbolic claims and shrill denunciations. (My personal favorite comes from Larry Alexander and Lawrence Solum, who write: “*The People Themselves* is a book with the capacity to inspire dread and make the blood run cold.”122) Yet some scholars question what all the fuss is about. Popular constitutionalists and judicial supremacists may differ over who should interpret American constitutions, but the substantive law that results may not vary significantly regardless of who exercises ultimate interpretive authority. For even though judges proclaim judicial supremacy, judicial rulings tend to reflect popular constitutionalism. Thus Barry Friedman maintains:

Ultimately, it is the people (and the people alone) who must decide what the Constitution means. Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values. It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.123

The argument of Friedman and his compatriots is that on those issues on which the people are indifferent or on which they lack strong views, their diffuse support for the Supreme Court—or for courts in general—leads them to accept judicial rulings as final and authoritative. Indeed, absent extreme rulings that adversely affect large groups of people or


challenge their beliefs, the people are more likely to accept judicial interpretations than to rise up and challenge them, even if they are constitutionally suspect. Most court rulings do not so much reflect popular constitutional views as operate in the absence of such views. But on those high-salience issues on which the people have strong views, Friedman insists that “constitutional doctrine tends to track public opinion.”

Similarly, a standard history of the Supreme Court concludes: “In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.” Or as a humorist put it long ago: “[T]he Supreme Court follows the election returns,” typically issuing constitutional rulings that fall within the political mainstream. Perhaps because of this, public opinion polls document a high level of support for the United States Supreme Court. Similarly, in judicial elections in the states, where the people can directly register their satisfaction or dissatisfaction with judicial rulings, incumbents are regularly returned to office. Thus, if one equates popular constitutionalism with popular outcomes, one could conclude that it is alive and well, notwithstanding the rise of judicial supremacy. As Larry Alexander and Lawrence Solum pointedly ask: “If

124. Tom Donnelly, Making Popular Constitutionalism Work, 2012 WIS. L. REV. 159, 162. Another major study, in addition to those in the preceding note that minimizes the importance of the popular constitutionalism/judicial supremacy debate is: Powe, supra note 19.


126. FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1938). This may coincide with popular expectations of the political process. Consider this regard Franklin Roosevelt’s description of American government as:

a three horse team provided by the Constitution to the American people so that their field might be plowed . . . . Two of the horses [Congress and the executive] are pulling in unison today; the third is not . . . . It is the American people themselves who are in the driver’s seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.


127. On the idea of diffuse institutional support and its importance for public views of the United States Supreme Court, see Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 AM. J. POL. SCI. 635, 635–64 (1992). For analysis of data relating to support for the United States Supreme Court, including consideration of how it compares with public support for constitutional courts in other countries, see James L. Gibson et al., On the Legitimacy of National High Courts, 92 AM. POL. SCI. REV. 343, 343–58 (1998).

the people have, by fifty years of tacit endorsement, given the Supreme Court pride of place among the people’s agents, who is Kramer to object?"129

The compatibility between public opinion and judicial rulings is hardly coincidental. In some instances it may reflect a conscious choice by justices to take account of public opinion in their rulings. Thus Barry Friedman depicts Justice Sandra Day O’Connor as “splitting the difference” between left and right and thereby arriving at solutions that aggrandized the Supreme Court while cutting off debate in the citizenry.130 Other scholars have documented the justices using their discretion in reviewing cases to avoid unnecessarily inflaming public opinion.131 In some instances, too, one can detect a popular feedback effect, with “the resolution [of crises involving popular dissatisfaction with judicial rulings] tend[ing] to restore a circumstance of equilibrium between judicial action and popular preferences.”132 Even more important, the U.S. Constitution creates a system of federal judicial selection that ensures that over time “judicial understandings of the Constitution are likely to be broadly convergent with political understandings” and no judicial interpretation can long survive the mobilized and protracted opposition of the people.133

Put differently, Article III ensures a certain form of popular constitutionalism. The President appoints federal judges, and so the

129. Alexander & Solum, supra note 122, at 1602. Barry Friedman concurs: “For positive scholars, the whole debate [over popular constitutionalism] is overplayed; they believe that constitutional law typically reflects popular values, albeit at some ill-understood remove.” Barry Friedman, The Politics of Judicial Review, 84 Tex. L. Rev. 257, 322 (2005). Popular constitutionalists deny this equivalence and, in any event, are concerned with the manner in which constitutional law gets made as much as with its content.


131. Thus the Supreme Court avoided addressing the constitutionality of bans on interracial marriage in the years immediately following Brown v. Board of Education and waited for a case that did not provoke public outrage before extending the right to counsel to state criminal trials in Gideon v. Wainwright. See RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 32–33 (9th ed. 2014).

132. See John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. Cal. L. Rev. 353, 384 (1999). The idea that the popular indifference toward most rulings does not preclude strong reactions to disapproved ones finds support in studies of voter scrutiny of political events more generally. Scholars have analogized voters as operating more like fire fighters than police officers, i.e., instead of exercising constant surveillance, they react only when an alarm indicates something is wrong. See PETER F. NARDULLI, POPULAR EFFICACY IN THE DEMOCRATIC ERA: A REEXAMINATION OF ELECTORAL ACCOUNTABILITY IN THE UNITED STATES, 1828–2000, AT 6–10 (2007).

appointees are likely to reflect the political and constitutional views of the Oval Office, albeit discounted perhaps by the necessity of obtaining Senate approval of his choices. Indeed, some presidential candidates have made the selection of judges a major theme in their campaigns, pledging to appoint judges who better reflect popular views, and others have made ideological compatibility their highest priority, painstakingly seeking out the views of potential nominees. Should presidents be perceived as having failed to ensure that their nominees hold the correct political and constitutional views, the presidents’ own party may revolt, as occurred when political conservatives forced the withdrawal of Harriet Miers, whom President George W. Bush had nominated for the Supreme Court. The result of presidents’ emphasis on the political and ideological compatibility of appointees, together with turnover on the Supreme Court, has meant that with only a short time lag, the Supreme Court has been allied with the popularly elected branches rather than a strong constraint upon them. From the President’s point of view that, more than theoretical arguments about judicial supremacy, is what is important.

One can observe a similar dynamic in the states. In appointing justices to the state supreme court, either because the state has an appointive system or because they are filling mid-term vacancies, governors overwhelmingly appoint members of their own political party—more than ninety percent share the governor’s political affiliation. This is true even under the system of so-called merit selection, in which nominating commissions provide governors with a list of qualified candidates from which they must appoint—more than seventy-five percent of appointees are of the governor’s party. In systems in which justices initially reach the bench via election, most justices share the party affiliation of the governor and/or the political majority in the state legislature. This is particularly true in states with partisan judicial elections, because partisan affiliation serves as an important voting cue in low-visibility races. For example, as Alabama and Texas went from Democratic to


136. Thus an early study found a 0.84 correlation between the percentage of the vote received by the gubernatorial candidate and by the supreme court candidate of the same party. See Phillip L. Dubois, From Ballot to Bench: Judicial Elections and the Quest for Accountability 74–75 (1980). Later studies have reported comparable results—see, for example, Lawrence Baum, Judicial Elections and Judicial Independence: The Voter’s Perspective, 64 Ohio St. L.J. 13, 26
Republican states in the last decades of the twentieth century, the partisan affiliation of their justices shifted accordingly. There may be some time lag in this, because elections for other offices occur more frequently than those for supreme court justices. But over time, if one party dominates state government, this tends to be reflected in the composition of the state bench as well, with predictable consequences for the substance of the courts’ rulings.\footnote{137}

Although there is some truth to the idea of a judiciary conforming to the constitutional views of the prevailing political majority, ultimately this is too simple a picture. For one thing, the account rests on a problematic understanding of judicial decision-making. Judges are not simply the agents of those who elevate them to the bench, and their decisional independence, together with their developing understanding of the law, may frustrate the hopes of those who selected them. Among recent Supreme Court justices, Blackmun, Kennedy, O’Connor, and Souter might all have been judged “failures” on this basis.\footnote{138} For another thing, this switch in constitutional direction on the bench occurs only if there is a political coalition that remains in power over an extended period of time and can appoint several justices. Yet at the national level at least, this has not been the case in recent years. There has been no dominant political coalition for more than half a century, with divided government the rule rather than the exception. The presidency has alternated between political parties since 1952, with a party only once (1981–1993) controlling the presidency for more than two consecutive terms, and most presidents have confronted a Congress controlled in whole or in part by the opposing party for at least part of their tenure. This has led to situations in which the majority in one branch of government or one governmental institution disagrees with the majority in another branch or institution, with each having a plausible claim to speak for the people. When those majorities differ on constitutional matters, as they have with abortion and same-sex marriage among other matters, how can one say whether or not judicial rulings are following public opinion?

Even if one focuses exclusively on the presidency, recent history has involved an alternation of temporary political majorities, and this has affected judicial selection, with Democratic presidents appointing liberals to the Supreme Court, and Republican presidents appointing

\footnote{137. See TARR, WITHOUT FEAR OR FAVOR, supra note 10, at 68–89.}
\footnote{138. See SEGAL & SPAETH, supra note 58.}
conservatives. This in turn has led to sharp divisions on the Court, with justices seeking to steer the Court in different directions. Divided government has also made it difficult for the political branches to oppose judicial activism, because if judicial rulings are attacked by one of the political branches, they may find supporters in another. Whatever the reason, instead of aligning with and supporting the political branches, the Supreme Court under Chief Justices Rehnquist and Roberts has struck down more congressional enactments than did any preceding Supreme Court. 139

Finally, the idea that judges reflect public opinion assumes a one-way relationship, with the courts responding to public opinion. But in actuality the relationship is far more complex. 140 In some instances, popular opposition to judicial rulings may induce judges to change course. For example, the United States Supreme Court backed away from earlier rulings dealing with congressional investigations of Communists and with busing to achieve school desegregation after the people’s representatives made clear their displeasure with those rulings. 141 Similarly, the California Supreme Court reversed course and regularly upheld death sentences on appeal after three justices were defeated in retention elections because of rulings perceived as based on their personal opposition to the death penalty. 142 Yet in other instances, judges may refuse to reconsider unpopular positions they have taken, and public opposition may eventually recede or opinion may even shift toward the court’s position. For example, the United States Supreme Court held firm on prayer in the schools and on most of its rulings extending the rights of defendants despite strong popular opposition, and

139. KECK, supra note 48. Altogether forty-two of the 176 congressional statutes struck down by the United States Supreme Court by 2013 were invalidated by the Rehnquist or Roberts courts. For a listing of congressional statutes struck down by the Supreme Court, see Congressional Research Service, The Constitution of the United States, CONGRESS.GOV, https://www.congress.gov/constitution-annotated [https://perma.cc/X8TG-GZK5] (last visited Feb. 23, 2016).

140. For an excellent treatment of these complexities, see Michael McCann, How the Supreme Court Matters in American Politics: New Institutionalist Perspectives, in SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Cornell Clayton & Howard Gillman, eds., 2007).


the Massachusetts Supreme Judicial Court did the same despite criticism of its ruling on same-sex marriage. In still other instances, the public may accept judicial rulings as authoritative even on issues on which it has strong opinions—consider, for example, Bush v. Gore, in which the Supreme Court decided the 2000 presidential election—perhaps because of popular respect for the Court as an institution or because of a perception that the Constitution assigns the Court the responsibility to decide the issue. In addition, it is no more appropriate to equate popular quiescence with popular approval of judicial rulings than it would be to claim popular support for a political regime because the people are not in open revolt. The people may not be aware of some rulings, they may be indifferent to others, they may disagree with rulings but find the costs of opposition greater than the costs of acquiescence, or they may not perceive any way to oppose the Court and enforce popular constitutional understandings. Yet insofar as judicial interpretation of the Constitution does not simply lead to constitutional rulings reflecting public opinion, something remains at stake in the popular constitutionalism vs. judicial supremacy debate.

Finally, popular constitutionalists insist that it is not enough that the courts’ high-salience rulings track popular views. Aggressive judicial review, combined with claims of judicial supremacy, tends to discourage popular interest in and involvement with constitutional matters, because they seem to suggest that the people have no role to play on such matters. In this, the popular constitutionalists echo the concern of James Brady Thayer, who complained more than a century ago that “[t]he tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”

Popular constitutionalism is valuable, according to its advocates, because it

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144. 531 U.S. 98 (2000).
145. Bush v. Gore, 531 U.S. 98 (2000). Of course, the popular perception that the Supreme Court was doing nothing extraordinary underscores the effect that experience with judicial activism and claims of judicial supremacy have on public understandings. For a popular constitutionalist like Larry Kramer, Bush v. Gore was a usurpation of popular authority. For a broader context, see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).
146. JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901).
involves citizens in the discussion and resolution of constitutional matters, because it encourages that “frequent recurrence to fundamental principles”147 without which government by “We the People” cannot long survive. Insofar as judicial rulings dominate constitutional interpretation and thus short-circuit this popular participation, something valuable is lost.

CONCLUSION

If the case of popular constitutionalism is persuasive—and I am inclined to think that it is—then an agenda suggests itself. This agenda is organized around the constitutional tasks or functions that are involved in the creation, maintenance, and operation of polity. These include: (1) the creation of the constitution; (2) the revision (replacement) of an existing constitution by a new constitution; (3) constitutional change that involves less than complete replacement, whether by constitutional amendment or other means; (4) the interpretation of the constitution; (5) the protection of the constitution against misinterpretation or evasion by governmental authorities; and (6) the implementation of the constitution in everyday political life. Thus, the first and second tasks are associated with the creation or re-creation of the constitutional order; the third, fourth, and fifth with constitutional maintenance and constitutional change; and the sixth (and to some extent the fourth) with making the constitution an effective instrument of governance. Scholars and political activists alike need to consider what opportunities exist for a robust popular constitutionalism in the performance of these tasks. Some scholars, such as Sanford Levinson and Steven Griffin, have already begun to explore these possibilities, but much more needs to be done to empower and energize “We the People.”148

147. VA. DECLARATION OF RIGHTS § 15 (1776).
INTRODUCTION

When the delegates to Washington’s constitutional convention borrowed a clause from Florida’s 1868 Reconstruction constitution to introduce Washington’s 1889 education article, they little could have guessed that the “paramount duty” would become the most expensive phrase in state fiscal history, committing future taxpayers to support state K-12 education obligations that likely exceed $20 billion per fiscal biennium. In the landmark Seattle School District v. State case, the

1. “It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.” FLA. CONST. of 1868 art. XII, § 1. Florida’s 1885 anti-Reconstruction constitution removed “paramount duty” and “ample” in favor of the less expansive “liberal maintenance.” FLA. CONST. OF 1885 art. XII, § 1.

2. In the 2015–2017 biennial budget, State Near-General Fund plus Opportunity Pathways (NFGS + Op Path) appropriations for K-12 education totaled $18.156 billion. This equals 47.5% of the total appropriations of $38.2 billion from these accounts. (The NGFS consists of the state General Fund (GFS) and the Education Legacy Trust Account, plus the Opportunity Pathways Account.) STATE OF WASHINGTON, LEGISLATIVE BUDGET NOTES: 2015–17 BIENNIAL & 2015 SUPPLEMENT 277 [hereinafter BUDGET NOTES], http://leap.leg.wa.gov/leap/budget/lbns/2015LBN.pdf [https://perma.cc/UFG5-847J]; see infra note 150 and accompanying text (describing nature of shortfall in state salary allocations). Estimates of the additional state funding necessary to address the shortfall in state salary allocations vary. Working from the assumption that ninety percent of actual average statewide district compensation payments to employees in the state-funded salary base is properly the state’s responsibility, the 2015 House budget chair published an estimate of an additional $3.5 billion per biennium. Ross Hunter, McCleary Phase II, ROSS HUNTER (Aug. 24, 2015), http://s48595026.onlinehome.us/2015/08/mccleary-phase-ii/ [https://perma.cc/MW3A-MFLG]. A bipartisan solution advocated by state senators in the 2015 legislative session also assumed a salary allocation funding gap of approximately that amount. Editorial, Capital Gains Tax Is Best Plan to Fund Senate Bipartisan Plan on Education, SEATTLE TIMES, Jun. 14, 2015, at A20. The McCleary plaintiffs suggest that the additional state funding required is $10 billion per
Washington State Supreme Court first interpreted the “paramount duty” clause of the Washington State Constitution to create a corresponding “true” or “absolute” right on the part of the state’s school children to receive an amply funded education. In his concurring opinion in Seattle School District, Justice Robert. F. Utter urged a conciliatory judicial response to the Legislature’s efforts, recommending that the Court respect the Legislature’s policy-setting processes by affirming the reforms the Legislature had enacted to respond to that lawsuit.

In McCleary v. State, the Washington State Supreme Court reaffirmed Seattle School District, and it initially appeared to consider Justice Utter’s earlier caution, offering deference to the Legislature’s endeavors by endorsing recently enacted legislation as a “promising reform package” which, “if fully funded,” would remedy school funding deficiencies. But, in a crucial departure from Seattle School District, the McCleary Court retained jurisdiction to monitor legislative progress toward article IX implementation. Building on McCleary’s renewed and expanded positive rights jurisprudence, the Court’s subsequent enforcement actions have resulted in a confrontation between the state’s legislative and judicial arms, a showdown in which the Court claims extraordinary authority to scrutinize the adequacy of the Legislature’s school funding decisions.

In this two-branch game of “Chicken,” the Court has thrice ordered
the Legislature to provide the Court with a specific, multi-year plan for phasing in a constitutionally adequate system of school finance, and the Legislature, though it has substantially increased school funding under the statutory plan endorsed by the Court in its original ruling, has thrice failed to provide the Court with a document dubbed a “plan.” So far, the confrontation has escalated to an unprecedented judicial declaration: the Legislature’s failure to legislate to the Court’s satisfaction puts the State in contempt of Court. In August of 2015 the Court sanctioned the State for this contempt by imposing a fine of $100,000 per day. Looming ahead is the 2018 deadline, a due date designated by the Legislature for specific statutory reforms and by the Court for ultimate article IX compliance.

This Article is intended to bring a new institutional perspective to the state constitutional dialogue on positive rights—a viewpoint from an advocate for the branch that must enact the state’s policy and fiscal

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13. The Court declared that “[w]e have no wish to be forced into . . . as some state high courts have done, holding the legislature in contempt of court.” Order of Jan. 9, 2014 at 8, McCleary, 173 Wash. 2d 477, 269 P.3d 227. According to the Attorney General, research uncovered no other case in which a state high court had held a state legislature in contempt. State of Washington’s Opening Brief Addressing Order to Show Cause at 10, McCleary, 173 Wash. 2d 477, 269 P.3d 227, http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7_McCleary_OpeningBrief_20140711.pdf [https://perma.cc/K5VP-FGDM]; see also Kirk Johnson, Governor Seeks New Taxes as a Court Order Looms, N.Y. TIMES, Jan. 14, 2015, at A13 (noting that legal scholars could not remember another example of a state high court holding an equal branch of government in contempt); cf. Spallone v. United States, 493 U.S. 265, 279–80 (1990) (indicating that judicial enforcement of contempt sanctions directly upon a legislative body conflicts with legislators’ First Amendment rights as well as common-law legislative immunity).


responses to judicial interpretations of the constitution. It will consider a specific aspect of the McCleary showdown: positive rights enforcement. Judicial enforcement of positive constitutional rights qualitatively differs from other constitutional enforcement in its effect on legislative policy-setting and the public fisc, but the Court has not expressly declared any limitations on its authority to define the scope of positive rights. This Article concludes that fiscal limits in the so-called “disfavored constitution” establish separation of powers principles that constrain the judiciary’s positive enforcement orders targeted at the political branches.

Part I of this Article summarizes two distinctive aspects of state constitutions. First, it discusses constitutional affirmative duty clauses and associated scholarship which argues that these duties create judicially enforceable positive rights. Second, it outlines fiscal restraints in the so-called “disfavored constitution.” Commentators label these obscure tax and expenditure restrictions “disfavored” not because they are any less a part of state constitutions, but because courts and scholars often deem them mere technicalities rather than statements of important constitutional norms.

Next, Part II discusses development of Washington’s positive education right in the Seattle School District and McCleary rulings. Then Part III briefly identifies unique separation of powers risks that could arise from the McCleary Court’s enthusiastic embrace of positive rights theories. Given the apparent absence of jurisprudential limits, judicial enforcement of positive rights against the Legislature could create an unquenchable public fiscal obligation—an obligation beyond the control of legislators and the voters who elect them.

Part IV of this Article concludes that outer boundaries of judicial authority to enforce positive constitutional rights are already found

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16. Again, as previously noted, the author’s views are her own.


19. See id.
within the constitutional text—in the “disfavored constitution.” Part IV argues that these fiscal controls are more than technical provisions—rather, they are part of the electoral bargain, declaring affirmative separation of powers principles designed to protect the people and their relationship with the government to which they delegated political power.  

20 Under the constitutional terms of this delegation, only the people’s elected representatives have the authority to levy taxes and to authorize the expenditure of the revenues thereby raised.  

22 The disfavored constitution’s structural safeguards for the public fisc declare principles that stand on equal footing with other constitutional provisions. To the extent that Washington’s Constitution creates a positive education right, then these equally mandatory constitutional provisions counterbalance that right, requiring the Court to recognize textual restraints on judicial enforcement of positive rights.

I. POSITIVE DUTIES AND “DISFAVORED” FISCAL RERAINTS ARE TWO DISTINCTIVE ASPECTS OF STATE CONSTITUTIONS

A. In State Constitutionalism, Textual Affirmative Duties Give Rise to Positive Rights Theories

The renaissance in state constitutionalism that began in the 1970s embraced many interrelated concepts of state constitutional independence. Justice Brennan’s call to action in his influential 1977 article urged state courts to take a fresh, autonomous look at the way state constitutions could provide greater protections for civil liberties, ultimately resulting in the New Federalism movement.  

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

22 “No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” WASH. CONST. art. VII, § 5.

23 “No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . .” WASH. CONST. art. VIII, § 4. Under article VII, section 6, all state tax revenues must be deposited in the treasury. Ergo, state tax revenues may not be spent without an appropriation in law. See discussion infra Section IV.A.2.

manner, after *San Antonio School District v. Rodriguez* rejected higher-level scrutiny for state education rights under the federal Constitution’s Equal Protection Clause, school advocates turned to state constitutions’ equal protection clauses to find stronger safeguards for educational equity, eventually persuading many state courts that the education articles of state constitutions established substantive, judicially enforceable duties to provide an adequately defined and funded education. Finally, in a large body of academic commentary, scholars called for state court judges to emerge from the shadow of federal rationality review, recognize the inherent differences between state and federal judicial powers, and interpret state constitutions to provide “positive rights” to state taxpayer-funded services such as education, welfare, and health care.

1. *Within the Distinctive Structure of State Constitutions, Constitutional Texts Contain Affirmative Duties*

In an important contrast to federal constitutional content and structure, state constitutions contain duty language that directs states to enact specified types of laws or provide particular services.

The federal Constitution does not confer a positive right to state government services. Instead, the federal Constitution is a “charter of

25. *Id.*
28. DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989) (noting that Fourteenth Amendment duties arise only where the state has first restrained an individual, which is
negative liberties”\textsuperscript{29} or a “series of governmental ‘thou shalt nots,’”\textsuperscript{30} intended to shield individuals against government conduct without obligating the government to provide any particular services or protections to individuals.\textsuperscript{31} This characterization of the federal Bill of Rights as a charter \textit{against} government is confirmed by doctrinal principles that limit federal courts’ ability to decide and enforce disputes that focus on government’s resource allocation decisions.\textsuperscript{32}

In contrast, a state constitution may establish a different, more intimate relationship\textsuperscript{33} between the government and its citizens. Structurally, state constitutions function as a limitation of the otherwise plenary power of state legislatures, whose law-making power is restricted only by the state and federal constitutions.\textsuperscript{34} Unlike Congress, when enacting laws, state legislatures need not point to a textual grant of power to legislate on a particular topic. Instead, they may pass any law not constitutionally forbidden.

Even so, state constitutions frequently contain provisions authorizing, exhorting, or even directing state legislatures to adopt laws on particular topics.\textsuperscript{35} Education duty clauses are found in all state constitutions,\textsuperscript{36} and state constitutions may also direct state governments to provide other
public services, such as support for their poor. For example, Washington’s Constitution contains not only an education duty, but also a directive to “foster and support” institutions for the mentally ill, developmentally disabled, and deaf, blind, or otherwise disabled youth. Given the structure of state constitutions, affirmative “duty” language stands out, because directory provisions are “inherently contrary to the concept of a state constitution.” State governments exercise all governmental powers that remain after their constitutions’ restraints, so it is “theoretically unnecessary to spell out such residual powers.”

If these types of constitutional provisions are structurally superfluous, then why might state constitutional drafters have included them? Some drafters may have viewed them as policy statements not amenable to judicial enforcement. Thomas Cooley, the godfather of late nineteenth century state constitutionalism, generally cautioned against viewing constitutional text as directory rather than mandatory, but he drew a qualitative difference between self-executing provisions and “moral” requirements addressed to the legislature. He explained that no provision of a constitution is merely advisory, but some requirements are “incapable of compulsory enforcement.” Although their “purpose may be to establish rights or impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced.” For this reason, the provision may be mandatory to the legislature, but “back of it there lies no authority to

37. E.g., Usman, supra note 27, at 1465–76 (listing possible types of positive rights).
40. Id.
41. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 93 (5th ed. 1883) (discussing mandatory versus directory); id. at 98–99 (noting where legislation is necessary to implement a constitutional duty, the “requirement has only a moral force”). The treatise written by Judge Cooley, one of the most influential constitutional authorities of his day, was well known to the Territorial Supreme Court and in all likelihood known to the delegates of the Washington constitutional convention. Territorial Justices John P. Hoyt and George Turner, who cited Cooley during their tenure on the court, later served as delegates to the convention, with Hoyt elected president. See Harland v. Territory, 3 Wash. Terr. 131, 145–46, 13 P. 453, 458 (1887) (citing COOLEY, supra); Maynard v. Hill, 2 Wash. Terr. 321, 326, 5 P. 717, 718 (1884) (citing COOLEY, supra); Maynard v. Valentine, 2 Wash. Terr. 3, 9, 3 P. 195, 196 (1880) (“Especially valuable we have found the observations of . . . Judge Cooley, in his work on Constitutional Limitations.”). The author would like to thank Pam Loginsky for calling this history to her attention.
42. COOLEY, supra note 41, at 98.
43. Id. at 99 (emphasis added).
enforce the command.\textsuperscript{44}

Similarly, Theodore Stiles, a delegate to the Washington State constitutional convention and later a Washington State Supreme Court justice, opined a quarter-century after statehood that notwithstanding the mandatory character of each clause, some of the constitution’s promising provisions depend for operation upon action by the Legislature.\textsuperscript{45}

Professor John Dinan, in his study of education clause debates at state constitutional conventions, argues that these clauses include obligatory language, but they “were not drafted for the purpose of enabling judicial scrutiny of legislative judgments regarding school financing.”\textsuperscript{46}

Alternatively, constitutional drafters, including those in the nineteenth century West, might have intended to protect state legislation by affirming, particularly against \textit{Lochner}-esque challenges, that the legislature had not only the power but an obligation to enact particular policies.\textsuperscript{47}

2. \textbf{Scholars Argue That Textual Affirmative Duties Give Rise to Positive Constitutional Rights}

In a large body of scholarship, commentators argue that state constitutions include duty provisions for the express purpose of vesting judicially enforceable positive constitutional rights in individuals.\textsuperscript{48} Just

\textsuperscript{44} Id. at 99; see also Mark Tushnet, \textit{Social Welfare Rights and Forms of Judicial Review}, 82 TEX. L. REV. 1895, 1909 (2004) (noting alternate institutional mechanisms exist by which rights may be enforced).


\textsuperscript{47} Fritz, \textit{supra} note 35, at 970–71; see also TARR, \textit{supra} note 23, at 8–9, (explaining that grants of power may lead to negative implications); id. at 148–150 (Progressive-era constitutional duty language); John Dinan, \textit{Court-Constraining Amendments and the State Constitutional Tradition}, 38 RUTGERS L.J. 983, 993 (2007) (noting state constitutional amendments to address \textit{Lochner}); Talmadge, \textit{Property Absolutism}, \textit{supra} note 38, at 872–76 (listing constitutional duties of state government intended to regulate social and commercial interaction of state and citizens). But \textit{cf. John J. Dinan, THE AMERICAN STATE CONSTITUTIONAL TRADITION} 123–30 (2006) (explaining that constitutional efforts to address \textit{Lochner} took the form of efforts to limit judicial review).

\textsuperscript{48} See, e.g., Hershkoff, \textit{Positive Rights, supra} note 27, at 1138; Usman, \textit{supra} note 27, at 1464–76; \textit{see also} supra note 26 (citing authorities); \textit{cf. TARR, supra} note 23, at 147–50 (describing use of state constitutions to address positive rights and economic well-being). “While there is no apparent societal move toward recognizing positive constitutional rights, law reviews seem overwhelmingly in favor of such recognition.” Cross, \textit{supra} note 27 at 859, 860 n.12 (citing Hershkoff, \textit{Positive Rights, supra} note 27, at 1133 n.9). Needless to say, legal scholars are not in the business of
as the New Federalism movement encouraged state courts to step out from the shadow of the United States Supreme Court in interpreting civil liberties protections, positive rights advocates comprehensively argue that fundamental differences between state and federal constitutions justify judicial recognition and enforcement of positive state constitutional rights.\textsuperscript{49}

To demonstrate that constitutional affirmative duties establish corresponding positive rights, theorists have cited the writings of legal philosopher Wesley Hohfeld.\textsuperscript{50} Hohfeld is best known for developing an analytical framework to explain legal rights, a structure that characterizes “rights” based on different types of paired relationships.\textsuperscript{51} In a Hohfeldian analysis, an affirmative duty to provide necessarily correlates to an affirmative right to receive—the Hohfeldian binary framework cannot conceive of a duty without such a corresponding right.\textsuperscript{52} For that reason, positive rights scholarship argues that constitutional “duty” language must create corresponding positive rights.

What, then, is a positive constitutional right, and how does it differ from a “negative” right?

The distinction between positive and negative rights is an intuitive one: One category is a right to be free \textit{from} government, while the other is a right to command government action. A positive right is a claim to something . . . while a negative right is a right that something not be done to one.\textsuperscript{53} Stated differently, “if there was no government in existence, would the right be automatically fulfilled?”\textsuperscript{54} Admittedly, if there is no government, there are no “legal” rights, a status potentially characterized as “[s]tatelessness spells rightlessness.”\textsuperscript{55} But the absence of a state

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\textsuperscript{52} Id. at 316 (”None of the other Hohfeldian relationships map cleanly on the right to receive an entitled action, service, or set of resources.”).
\textsuperscript{53} Cross, \textit{supra} note 27, at 864. This definition is suggested by Professor Cross, a rare positive rights skeptic.
\textsuperscript{54} Id. at 866.
\textsuperscript{55} Id. (citing \textsc{Stephen Holmes \& Cass R. Sunstein, The Cost of Rights} 19 (1999)).
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means that one is by definition free from intrusive state action “done to one.”

Rights established by the federal Constitution are negative in nature. True, federal constitutional rights frequently require the state to provide publicly funded services to individuals—services that could be characterized as “a claim to something.” For example, the federal Constitution requires states to provide counsel to the accused, adequate facilities for prisoners, and “minimally adequate care and treatment” for involuntarily confined persons such as those with mental illness. However, federal constitutional rights are not truly positive rights, because the state’s constitutional duty is predicated on the initial state action “done to” the individual. If the state declines to undertake the initial state action, it may avoid the duty to provide the associated services.

In contrast, positive rights impose a qualitatively different type of duty on government: “Positive rights do not restrain government action: they require it.” If a constitutional affirmative duty creates a corresponding positive right, such as education or subsistence, only the government can fulfill the right, and it must do so. Without regard to any legislation or state-initiated action, the mere presence within the state of an individual who possesses a positive constitutional right triggers a state duty to provide publicly funded services. Simply put, in positive rights advocacy such a right imposes an unavoidable duty on the state and its taxpayers to support the program as mandated and defined by the judicial interpretation of the constitution.

B. The “Disfavored Constitution” Establishes Taxpayer Protections in the Form of Fiscal Restrictions on the State

Just as positive duties are distinctive characteristics of state constitutions, so are fiscal restraints. In another form of contrast to the federal Constitution, state constitutions consistently give extensive consideration to state and local taxing, spending, and borrowing. These public fiscal controls “seek to protect taxpayers by limiting the activities

61. Briffault, supra note 18, at 908.
and costs of government.*62

Commentators use the term “disfavored constitution”63 to describe fiscal restrictions not because these provisions are any less a part of state constitutions, but because they are a distinctly un-sexy aspect of state constitutionalism, especially when compared to the civil liberties of the New Federalism or the state-funded services of positive rights scholarship. The disfavored constitution is of little interest to academics and advocates, and of far more interest to the practitioners who facilitate the day-to-day operations of state governments.

Further, fiscal limits are also disfavored by courts, which often read them as mere technical provisions rather than as statements of important constitutional norms.64

First, courts tend to treat fiscal limits not as issues of fundamental rights—like speech, religion, or privacy—or as matters fundamental to government structure—like separation of powers, bicameralism, or federalism—but rather as ordinary legislation. . . . Second, the state courts often appear quite sympathetic to the goals of the programs that would be curbed by the fiscal limits.65

As set forth in more detail at infra Section IV.A, by reserving taxing and spending authorities to the legislative branch, the fiscal restrictions of the disfavored constitution also operate as separation of powers requirements.

II. THE BASIS FOR A POSITIVE RIGHT TO EDUCATION IN THE WASHINGTON STATE CONSTITUTION

The “paramount duty” clause of the Washington Constitution’s

62. Id. at 908; see also TARR, supra note 23, at 21 (explaining that finance and taxation provisions are common features of state constitutions); WILLIAMS, supra note 23, at 28 (state constitutions contain long articles on taxation and finance, “two of the most important functions of any government”); cf. James Gray Pope, An Approach to State Constitutional Interpretation, 24 RUTGERS L.J. 985, 985 (1993) (state constitutional text “obsesses in excruciating detail over pecuniary matters”).

63. Briffault, supra note 18, at 910.

64. Id. at 910.

65. Id. at 939–41. Regarding the latter point, Briffault’s characterization of judicial sympathy applies specifically in the context of fiscal limits that attempt to restrict financial projects of the “modern activist state”—roads, convention centers, etc., and of the risks of too much judicial deference to the political branches, rather than not enough. But his point applies either way—whether potential infringement comes from the legislature or from the courts, fiscal restrictions in state constitutions are meaningful expressions of the relationship that the voters intended to have among themselves, their elected representatives, and the public fisc.
education article has resulted in two remarkable decisions from the Washington State Supreme Court. In *Seattle School District v. McCleary*, the Court has twice ruled that article IX, section 1 imposes an affirmative duty on the State that creates its Hohfeldian “jural correlative”—a positive right on the part of the state’s children to have the State define and amply fund a program of basic education. *McCleary* took a further step by retaining jurisdiction over the case to monitor legislative implementation, culminating in an unprecedented contempt ruling against the State over the Legislature’s failure to legislate to the Court’s satisfaction.

A. *Washington’s Unique Education Clause Declares a “Paramount Duty”*

Affirmatively stated education clauses are consistent features of state constitutions, appearing in the constitutional texts of all fifty states. But article IX, section 1 of the Washington State Constitution contains singular terminology: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”

Washington’s Constitution is unique in declaring that “ample provision” for education is “the paramount duty of the state.” In textual

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67. McUsic, supra note 36, at 311 n.5.
68. Recent constitutional amendments and new constitutions contain comparatively strong education language. See Fla. Const. art. IX, § 1 (amended 2002) (“a paramount duty to make adequate provision” (emphasis added)); Ga. Const. art. VIII, § 1 (amended 1983) (“a primary obligation to make adequate provision (emphasis added)); Ill. Const. art. X, § 1 (amended 1970) (educational development a “fundamental goal”; state must provide a “high quality” education). None of these states finds a positive right to education. See infra note 76 (citing cases).
70. Compare Wash. Const. art. IX, § 3 (emphasis added), with supra note 68 (providing other high-duty text examples).
analyses that rank the verbal intensity of states’ education finance clauses, commentators classify Washington’s text as a “silver bullet,” or “high duty,” and they place the Washington State Supreme Court as among “the most liberal leaning courts” on this issue.

State constitutional education clauses have resulted in “waves” of litigation. Notably, litigation outcomes in the various states do not necessarily correlate with the verbal strength of the respective constitutional texts. Courts in states with “high duty” clauses have refused to find fundamental or otherwise judicially enforceable rights, while states with mild, generic language have experienced active judicial enforcement of education clauses.

In Washington’s education jurisprudence, however, an exceptional text receives an exceptional interpretation. Seattle School District is a “third wave” decision—one based on arguments that the constitutional language imposes a substantive standard for education quality and funding. McCleary is a “fourth wave” ruling—one in which advocates sought to re-litigate previous victories after perceived state regression.


74. For discussion of the various waves, see generally Bauries, Education Duty, supra note 27, at 726–30; Simon-Kerr & Sturm, supra note 26, at 89–95.

75. Dinan, supra note 35, at 929–30 (“[D]isembodied parsing of constitutional terminology may be of limited or no value.”); Bauries, Judicial Review, supra note 73, at 712–15 (surveying studies; no clear relation between constitutional language and outcome).

76. Thro, supra note 72, at 541; see also supra note 68 (providing constitutional texts); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (holding textual “primary obligation” did not oblige the State to equalize opportunities between districts); Blase v. State, 302 N.E.2d 46, 49 (Ill. 1973) (declaring that 1970 clause states a purpose or goal, not a legislative obligation). Arguably, it is harmful to state constitutionalism that so many state judicial rulings distill diverse education texts into a homogenized educational right. Scott R. Bauries, A Common Law Constitutionalism for the Right to Education, 48 GA. L. REV. 949, 988 (2014) [hereinafter Bauries, Right to Education]; Bauries, Conceptual Convergence, supra note 50, at 303–04.

77. See generally Simon-Kerr & Sturm, supra note 26, at 84–86 (discussing recent failed lawsuits, including first-impression and second-round adequacy cases, in 2005–2008).
Although these last-wave lawsuits have generally failed to persuade state high courts that judicial intervention is required or appropriate, Washington, as always, is a special case. In both rulings, the Washington State Supreme Court used the power of judicial interpretation to find that Washington’s unique text creates a positive right vested in the state’s schoolchildren.

B. Seattle School District: Article IX Creates a True, Absolute Right

Although McCleary’s 2012 positive rights ruling triggered an unprecedented confrontation between the state Legislature and judiciary, the holding did not spring forth fully armed from the Court’s collective brow. On the contrary, McCleary is entirely rooted in its 1978 predecessor, Seattle School District, differing primarily in its express embrace of positive rights scholarship and then in its subsequent judicial enforcement.  

The landmark Seattle School District case held that the “paramount duty” clause of article IX, section 1 establishes a mandate on the State that requires, as a first priority, fully sufficient funds for a “general and uniform system of public schools.” This right is unique in the nation. The Washington State Supreme Court was the first state high court to address educational adequacy in the absolute sense, and the Seattle School District opinion is “the most lengthy and comprehensive analysis of the question of state constitutional education rights found among all
school finance cases.”

In *Seattle School District*, the Court began by emphasizing the judicial branch’s primacy in constitutional interpretation, citing *Marbury v. Madison*’s axiom that it “is emphatically the province and duty of the judicial department to say what the law is.” Anticipating arguments that the constitution vests policy and fiscal powers in the democratically elected branches, making the matter a political question, the Court explained that once the Court determines that the dispute requires constitutional interpretation, there is no separation of powers issue, and “the matter is strictly one of judicial discretion.”

Having resolved the primacy issue, the Washington State Supreme Court then turned its interpretive focus to the precise text of article IX, section 1. *Seattle School District* used the Court’s power of interpretation to transform a single word of constitutional text into an expansive, paragraphs-long meditation about the role of public education. The constitutional term “education” embraces far more than “mere reading, writing and arithmetic.” Instead, the Court declared that the State must prepare its children to participate in both the political and economic marketplaces—otherwise, the right to an amply funded education “would be hollow indeed.”

Next, the Court considered the term “paramount.” The “framers declared only once in the entire document that a specified function was the State’s paramount duty,” and nothing shows that article IX, section 1 was a mere preamble or otherwise had secondary status. The Journal does not show any intent that the clause is a mere preamble because the Journal does not say anything about the paramount duty clause. The delegates’ reasons for borrowing the clause from the 1868 Florida

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83. 5 U.S. 137 (1803).
85. Id. at 504–05, 585 P.2d at 88 (quoting Baker v. Carr, 396 U.S. 186, 211 (1962)). In other words, in a separation of powers dispute involving the judicial branch, judicial interpretational authority means that the branch whose actions are alleged to breach separation of powers has the authority to decide whether its actions in fact have that effect.
86. Id. at 517–18, 585 P.2d at 94.
87. Notwithstanding the caption “preamble” on article IX, section 1, under article I, section 29, all provisions of the Washington Constitution are mandatory. Id. at 500, 585 P.2d at 85. The original constitution did not contain part or section headers, so nothing in its text designated article IX, section 1 as a preamble. Id. at 499, 585 P.2d at 85.
88. Id. at 510, 585 P.2d at 91.
Constitution are not stated in the Journal. Further, by definition, only one function may be “paramount,” so it is not surprising that the framers used the term only once.

To conclude that article IX, section 1 created a “social, economic and educational duty as distinguished from a mere policy or moral obligation,” the Seattle School District Court again cited the observations of Theodore Stiles: “No other state has placed the common school on so high a pedestal.” However, the Court did not analyze Stiles’ full statement, which optimistically expresses the view that federally granted state school lands would be sold to provide the Permanent Common School Fund with an irreducible endowment “of $25,000,000, an endowment greater than that of any other educational system now existing.” The delegates’ lofty goals for the Permanent Fund collapse when faced with modern K-12 funding demands: in the 2013–2015 biennium, revenue sources related to the endowment equal about one percent of total state K-12 operating appropriations.
But most significantly, the Seattle School District Court considered the constitutional term “duty,” and it used the judiciary’s interpretational authority to turn the lead of duty into the gold of a true or absolute right. By imposing a paramount duty, the constitution simultaneously established that duty’s “jurial correlative,” a corresponding paramount right on the part of the state’s children to have the State make ample provision for their education. 93

In a lengthy and abstract footnote, the Court relied on Hohfeld to explain the theoretical basis of this “jurial correlative” right. 94 The Court embraced Hohfeld’s distinction between “absolute” rights, which correspond only to an unavoidable duty, and other so-called rights, which are really liberties or immunities that may be impaired upon a judicially cognizable reason. 95 Most significantly, the Court explained that the right corresponding to the paramount duty clause is a “true ‘right’ (or absolute).” 96

The Court’s theory-dense justification demonstrates an independent state constitutionalism struggling to emerge from the strictures of constitutional interpretation based on federal Fourteenth Amendment terminology. 97 The discussion repudiates the idea that state constitutional

2015 fiscal biennium, the Permanent Common School Fund earned $16.9 million in interest; this amount is deposited into the CSCF. Estimated and Actual State Revenue Source Reports, WASH. ST. REVENUE, http://fiscal.wa.gov/Revenue.aspx [https://perma.cc/3ULM-RXDG] (last visited Jan. 19, 2016) (select dropdown menu next to “Biennium” and select “2013-15 Biennium,” select dropdown menu next to “List” and select “Common School Construction Account,” select “View Report” to retrieve the data, click the plus sign next to “Public Schools,” click the plus sign next to “Special Appropriations” to open all the data). In 2013–2015, revenues to the CSCF from timber, rentals, and other sources totaled $156.6 million. Id. Total CSCF revenues for 2013–2015 were thus $173.4 million. Id. (the data at fiscal.wa.gov treat debt service payable from the CSCF as a revenue reduction rather than an expenditure, so for purposes of this analysis the amount attributable to debt service payments is added back in as revenue. Id.) In contrast, the state’s total actual NGFS + Op expenditures for K-12 in the 2013–2015 biennium were $15.3 billion. 2015 REPORT, supra note 11, at 7, 38–39. This means that that in 2013–2015, CSCF revenues equal 1.1% of state K-12 operating expenditures. In the 2015–2017 biennium, due to the significant increase in state K-12 spending, see supra note 11, this percentage is likely to be even smaller.

93. Seattle Sch. Dist., 90 Wash.2d at 511–12, 585 P.2d at 91.
94. Id. at 513 n.13, 585 P.2d at 93 n.13 (citing WESLEY N. HOHFIELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 47 (Walter W. Cook ed., 1964); see also Hohfeld, supra note 50, at 30–31.
95. Seattle Sch. Dist., 90 Wash. 2d at 513 n.13, 585 P.2d at 93 n.13.
96. Id.
analysis should replicate the sliding federal scale, “sizing constitutional rights like eggs and governmental interests like olives, from medium to jumbo.” In so doing, the Court correctly focused on the state text rather than importing federal rationality analysis.

But, having appropriately turned to the state text, the Court then failed to appropriately scrutinize its wording. Rather than analyzing the meaning of the term “duty” in light of the constitutional text, structure, and history, the Court instead focused on “paramount,” borrowing Hohfeld’s abstractions to find a positive legal right in a text that declares only a duty. It is hard to say whether this is the result of too much judicial imagination, by assuming that Hohfeld’s analysis could be applied to state constitutional interpretation, or too little, by failing to recognize that there are more things in state constitutions than are dreamt of in Hohfeld’s binary philosophy. The Court did not consider whether constitutional drafters may have intended to create affirmative state duties without creating corresponding Hohfeldian claim-rights. Because Hohfeldian analysis assumes that “rights” are judicially enforceable, it obscures the possibility of other constitutional mechanisms (such as legislative action) to satisfy the affirmative duty. Particularly when considered in light of Cooley’s cautions about duties that may be given meaning only by the Legislature, only through the alchemy of judicial interpretation does the framers’ textual choice to establish a duty, even a paramount duty, create the “jural correlative” of a personal “absolute” right.

Having transmuted a duty into a right, the Court explained that it, not the Legislature, has the final word on interpreting the scope—and consequently the cost—of the right’s implementation. Again, the Court relied on Marbury and judicial primacy in constitutional

99. Cf. Malyon v. Pierce County, 131 Wash. 2d 779, 799 n.31, 935 P.2d 1272, 1281 n.31 (1997) (“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.”).
100. See Tushnet, supra note 44, at 1909 (noting constitutional rights may be enforced by non-judicial means). Hohfeld’s framework was developed for private law, but constitutional law does not necessarily involve the simple, dualistic relationship structure of common-law relations such as torts or contracts. Bauries, Conceptual Convergence, supra note 50, at 309.
101. Bauries, Conceptual Convergence, supra note 50, at 325 (concluding education duties may be read to create such rights, but the conclusion is not inevitable); see also Dinan, supra note 35, 939; Eastman, supra note 46 (discussing originalist approach to education clause interpretation).
102. Tushnet, supra note 44, at 1909.
103. See COOLEY, supra note 41; see also infra Section III.B.2 (discussing separation of powers risks of enforcing undefined provisions).
interpretation. It conceded that the administrative and organizational details of the public schools fall within the Legislature’s province under the “general and uniform” clause’s express vesting of that authority in the legislative branch, but ultimately the Court, as arbiter of constitutional meaning, determines whether the Legislature has acted pursuant to the article IX, and whether it has done so constitutionally.

Notwithstanding the breadth of the rights the majority had found in the constitutional text, the Seattle School District Court engaged in “remedial abstention,” stopping short of ordering the Legislature to enact any particular scheme of funding legislation. The Court had “great faith” in the Legislature’s ability to define and fund a program of basic education. Not only did it give the State additional time to come into compliance, but it expressly declined to retain jurisdiction over the case, making this one of the few points on which the high Court overruled the well-regarded trial court decision. According to Seattle School District, retained jurisdiction was “inconsistent with the assumption that the legislature will comply with the judgment and its constitutional duties.”

Notably, Justice Utter declined to sign on to the full scope of the Court’s rights analysis. Though he agreed with the majority that article IX, section 1 “guarantees a right of education to the state’s children,” he would have invalidated the system of local levy financing without going on to hold that the constitution mandates provision of a “specific ‘basic education.’” Turning the meaning of “education” into constitutional doctrine “deprives the people of this state of a continuing legislative and political dialogue on what constitutes a proper education.” Because the Legislature had acted “responsibly and exhaustively through its own uniquely constituted fact-finding and opinion-gathering processes,” he urged restraint and a limited holding.

105. Id. at 518, 585 P.2d at 95.
106. Bauries, Judicial Review, supra note 73, at 724–25 (maintaining judicial legitimacy by adjudicating merits but avoiding injunctive remedial orders).
107. Seattle Sch. Dist., 90 Wash. 2d at 537, 585 P.2d at 104.
108. Id. at 538, 585 P.2d at 105.
109. Id. at 546–47, 585 P.2d at 109 (Utter, J., concurring).
110. Id. at 547, 585 P.2d at 109.
111. Id. at 551, 585 P.2d at 112.
C. McCleary: A Generation Later, the Positive Right Is Reaffirmed and Expanded

Even before the Seattle School District Court ruled on appeal in 1978, the Legislature had responded to the January 1977 trial court ruling with comprehensive school funding legislation. This proof of constitutional good faith, together with the Washington State Supreme Court’s refusal to oversee the legislative process, allowed the Legislature and the Court to reach a détente of “ambiguous acquiescence” for the next thirty-plus years. In the intervening period, the Legislature engaged in a large number of studies and enacted various education reforms, and the Court ruled on challenges to specific aspects of school funding, but in none of these cases was the Court required to re-analyze Seattle School District’s “true” or “absolute” right to education.

Filed on January 11, 2007, almost forty years to the day after the trial court ruling in Seattle School District, the McCleary suit asked the court to revisit the positive rights it had recognized in the earlier leading case. As McCleary moved toward trial, the Legislature continued to study proposals for school funding reform through the 2007–2008 work of the Basic Education Finance Task Force. In 2009, before the
McCleary trial court’s ruling, the Legislature enacted ESHB 2261, which among other reforms included a framework for substantial revision of the state’s K-12 funding methodology. The following year, in SHB 2776, the Legislature provided details for the new formula, revising foundational state allocations under a new “prototypical school” model and specifying a phase-in schedule for particular new enhancements to the funding formula, such as all-day kindergarten and class size reductions in grades K-3, with final implementation of these reforms due in 2018. The new funding formulas took effect in 2011, during the depths of the Great Recession, and the 2011–2013 budget made only slight progress toward funding the new formula enhancements. Going into the 2012 legislative session, the state fiscal condition was so dire that Governor Christine Gregoire’s proposed supplemental budget recommended cutting four days from the 180-day state-funded school year. On January 5, 2012, a month after the close of a special legislative session to enact further budget cuts and just days before the opening of the 2012 regular legislative session, the Washington State Supreme Court published its McCleary ruling.

Written by Justice Stephens on behalf of a unanimous Court, McCleary reaffirmed and expanded upon two key aspects of Seattle School District. First, the Court underscored its earlier ruling on the primacy of the judicial branch in constitutional interpretation. In a brief concession, the Court acknowledged Justice Utter’s reminder that the Legislature’s “uniquely constituted fact-finding and opinion gathering processes provide the best forum” for determining the particulars of education funding formulas. For that reason, the Court declared it will not specify the details of staffing ratios, salaries, and similar costs, but it

120. 2010 Wash. Sess. Laws 1860 (SHB 2776); 2009 Wash. Sess. Laws 3331 (ESHB 2261); see infra note 152 (explaining due dates in legislation).
123. See id. at 29.
125. Justices Madsen and James Johnson dissented on the decision to retain jurisdiction. McCleary, 173 Wash. 2d at 547–48, 269 P.3d at 262–63 (Madsen, J., dissenting in part) (arguing that lack of ascertainable standards, as well as deference to legislative function, weigh against retaining jurisdiction).
126. McCleary, 173 Wash. 2d at 517, 269 P.3d at 247 (majority opinion) (citing Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 551, 585 P.2d at 71 (Utter, J., concurring)).
held the judiciary retains full authority to interpret the constitutional term “education” by providing broad guidelines and by testing legislative enactments against those judicially defined standards.\textsuperscript{127}

The second aspect of \textit{Seattle School District} on which \textit{McCleary} elaborated is the “relationship between the State’s \textit{obligation} to provide an education and the corresponding \textit{right} of Washington children to receive an education.”\textsuperscript{128} Expanding on \textit{Seattle School District}’s Hohfeld footnote and citing to leading positive rights scholarship, Justice Stephens concluded that positive rights demand that the Court view the constitution in a qualitatively different light. The distinction between positive and negative constitutional rights is significant, she explained, because in a negative rights analysis, the judicial inquiry is whether the legislative or executive branches have overstepped constitutional restraints.\textsuperscript{129} In contrast, “[p]ositive constitutional rights do not restrain government action: they require it.”\textsuperscript{130} For this reason, when confronted with a positive rights claim, the Court must use a judicial test more stringent than a mere rational basis review: the Court asks whether the State has “done enough”—“whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end.”\textsuperscript{131}

Applying this new higher standard, the Court invalidated the Legislature’s K-12 funding formulas. In rejecting the state’s former\textsuperscript{132} funding scheme, \textit{McCleary} explained that those formulas generated insufficient state funding, so the resulting state allocations failed to align with district costs of implementing the state’s program, thereby forcing school districts to depend on local levies to support the basic education program.\textsuperscript{133} Reliance on levies to support the cost of the state’s program was a shortfall directly in conflict with \textit{Seattle School District}’s prohibition on using levies for basic education.\textsuperscript{134} Ultimately the Court concluded that “[s]ubstantial evidence confirms that the state’s funding system neither achieved nor was reasonably likely to achieve the

\textsuperscript{127} \textit{McCleary}, 173 Wash. 2d at 516–19, 269 P.3d at 246–48.

\textsuperscript{128} \textit{Id.} at 518, 269 P.3d at 247 (emphasis in original).

\textsuperscript{129} \textit{Id.} at 519, 269 P.3d at 248 (citations and internal quotations omitted).

\textsuperscript{130} \textit{Id.}.

\textsuperscript{131} \textit{Id.}.

\textsuperscript{132} Due to the timing of their enactment in 2009 and 2010 respectively, the funding reforms of ESHB 2261 and SHB 2776 were not squarely before the court, so the court invalidated the state’s \textit{prior} funding formulas.

\textsuperscript{133} \textit{McCleary}, 173 Wash. 2d at 532–39, 269 P.3d at 254–58.

\textsuperscript{134} \textit{Id.} at 539, 269 P.3d at 258.
constitutionally prescribed ends under Article IX, section 1.”

D. Judicial Oversight in McCleary: Deference Followed by Demands

In contrast to the Seattle School District Court, the McCleary Court chose to retain jurisdiction over the case. The Court declared that it had the “benefit of seeing the wheels turn” under the funding reforms of ESHB 2261. But, given the scant progress toward implementation of these reforms in the 2011–2013 budget, the “court cannot idly stand by as the legislature makes unfulfilled promises for reform.”

Notwithstanding the Court’s sweeping statements about positive rights and judicial primacy in constitutional interpretation, and notwithstanding the rather perfunctory nods toward the legislative role, the initial McCleary ruling contains a pattern of subtle deference to the legislative scheme.

First, in defining the education right, the Court established one safeguard against an unlimited state obligation by rejecting an individual right to a particular educational outcome. It is an “inescapable truth that certain factors critical to a student’s achievement are simply outside the state’s control.” For that reason, article IX required the State to provide an opportunity to obtain the education described by the Court and in statute, but the positive right does not include a right to a guaranteed educational outcome.

Next, the Court endorsed the Legislature’s enactment of ESHB 2261, indicating that its “promising reform package” would, “if fully funded, . . . remedy deficiencies in the K-12 funding system.” In other words, the Court’s initially chosen remedy was implementation of the plan already adopted by the Legislature. Similarly, the compliance

135. Id.
136. Id. at 543, 269 P.3d at 260.
137. Id. at 545, 269 P.3d at 260, 261.
138. Id. at 525, 269 P.3d at 251.
139. Id. at 525–26, 269 P.3d at 251; see also Tunstall v. Bergeson, 141 Wash. 2d 201, 236, 5 P.3d 691, 709–10 (2000) (Talmadge, J., concurring) (“Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.”). Compare id., with Bauries, Right to Education, supra note 76, at 995–1006 (arguing for constitutional education right to develop through “common law” of individually adjudicated cases).
140. McCleary, 173 Wash. 2d at 484, 269 P.3d at 231; see also id. at 543–46, 269 P.3d at 260–61 (retaining jurisdiction to monitor implementation of ESHB 2261 reforms and article IX compliance generally).
141. See Bauries, Judicial Review, supra note 73, at 725–26 (discussing Thro’s proposal that courts should adopt education funding standards from coordinate branches where possible).
date the Court selected was 2018—the final implementation date indicated by the Legislature in ESHB 2261 and SHB 2776. However, nothing in the ruling expressly confined the article IX right to the program and services defined by the Legislature, leaving ample room for the Court to obligate the State to provide judicially defined services.

Despite these encouraging signs that the Court would monitor, rather than dictate, legislative implementation of the ESHB 2261 reforms, the Court quickly showed its impatience with the Legislature. In the summer of 2012, the Court agreed to exercise its oversight by receiving an annual progress report submitted by the State, and the Legislature established a joint select committee to communicate with the Court via these reports.\footnote{142. Order of July 18, 2012, \textit{McCleary}, 173 Wash. 2d 477, 269 P.3d 227, http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/mcclearyOrder.pdf \[https://perma.cc/222L-AV8Q\]; H. Con. Res. 4410, 62d Leg., Reg. Sess. (Wash. 2012). The order also permitted the plaintiffs to respond to the state’s report.} But, evidently expecting that a ruling handed down the week before a supplemental budget legislative session would trigger major institutional reforms in sixty days, the Court soon criticized legislative inaction.\footnote{143. \textit{See} Order of Dec. 20, 2012, \textit{McCleary}, 173 Wash. 2d 477, 269 P.3d 227.} As predicted by the original dissent, in December 2012 the Court directed that the Legislature enact or otherwise provide the Court with annual, interim benchmarks against which the Court could gauge legislative progress toward full implementation.\footnote{144. \textit{See id. Justice James Johnson dissented from the order. Dissent to Order of Dec. 20, 2012, \textit{McCleary}, 173 Wash. 2d 477, 269 P.3d 227 (Johnson, J., dissenting). Compare id., with \textit{McCleary}, 173 Wash. 2d at 547–50, 269 P.3d at 262–63 (Madsen, J., dissenting in part) (stating supervision will be unhelpful or obstructive without benchmarks).} Even so, viewed in the most deferential light, the Court’s first request for a “plan” expressed the Court’s intent to respect the legislature’s authority to establish guideposts for incremental implementation steps. In effect, the Court initially importuned the Legislature to provide the judicial branch with benchmarks so that the Court would not have to invent them or derive them from other sources.\footnote{145. \textit{Cf.} Order of Jan. 9, 2014 at 5, \textit{McCleary}, 173 Wash. 2d 477, 269 P.3d 227 (looking to executive budget requests and other proposals not enacted by the Legislature to gauge progress).}

In January 2014, notwithstanding the 2013–2015 biennial budget’s investment of nearly $1 billion in new state K-12 funding, the Court issued another order that not only called for an annual plan but also appeared to broaden the supervisory scope.\footnote{146. \textit{Id. at 5. Compare id. at 6 (objecting to suspension of school employee-cost-of-living adjustments, court declares that “nothing could be more basic than adequate pay”), with \textit{McGowan v. State}, 148 Wash. 2d 278, 293–94, 60 P.3d 67, 74–75 (2002) (noting such adjustments are not part of basic education).}
budget, the Legislature enacted an additional $58 million in K-12 formula funding, along with substantive policy implementation of basic education enhancements to graduation requirements and course credits, but it did not pass a “plan” as required by the Court. In September of 2014, after this second failure, the Court ruled that the Legislature’s apparent inaction constituted contempt of Court, though it held sanctions in abeyance until after the close of the 2015 session.

Given the contempt ruling, the legal and political stakes were high as the Legislature began its 2015 regular session. The 2015 session was the longest on record, entailing three special sessions that lasted well into July. Throughout the prolonged budget debates, the two chambers generally agreed on funding the phase-in steps of the statutory formula enhancements. However, the bodies struggled to achieve consensus on a solution to the structural compensation shortfall, in which insufficient state salary allocations cause school districts to supplement state salary funding with local levy revenue in violation of Seattle School District. Although the Legislature did not resolve this debate during the 2015 session, nor did it pass a “plan,” on the eve of the fiscal new year the chambers enacted a budget that provided $1.3 billion in new state funding for K-12, a nineteen percent increase over the previous biennium and a thirty-six percent increase since the Court’s order of December 2012 decried the lack of progress. This funding

147. See 2014 REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION 15–24, 27 (describing formula and policy changes but acknowledging that the Legislature had not enacted an implementation “plan”).


150. From a state perspective, the compensation problem identified by the court is structural (state salary allocations to districts are insufficient to hire and retain) rather than absolute (total salaries offered by districts are insufficient to do so). The state’s data indicate that the total salaries teachers actually receive (state allocations plus local supplements) provide market-rate compensation comparable to similar professions, such as certified public accountants. JOHN BOESENBERG ET AL., QUALITY EDUCATION COUNCIL, COMPENSATION TECHNICAL WORKING GROUP FINAL REPORT 111 (2012), http://www.k12.wa.us/Compensation/CompTechWorkGroupReport/CompTechWorkGroup.pdf [https://perma.cc/Y6W8-K82G] (market comparability studies of Dr. Lori Taylor). This means that the constitutional problem with salary funding is not market inadequacy of total salaries; it is that a portion of salaries for the state’s program is paid from school district taxpayers’ pockets (in the form of school district levies) rather than those of the state taxpayers. Seattle School District held, and McCleary confirmed, that the State may not cause school districts to rely on local levies to support the State’s program. McCleary 173 Wash. 2d at 537–39, 269 P.3d at 257–58.

151. 2015 REPORT, supra note 11, at 5–7 (describing state education spending increases but acknowledging that the Legislature had not enacted an implementation “plan”).
implemented the formula enhancements of SHB 2776 in compliance with the respective due dates enacted in that bill.\textsuperscript{152}

Notwithstanding the Legislature’s funding increases and compliance with its own statutory schedule, in August of 2015 the Court declared that the Legislature’s actions failed to purge contempt, and as of this writing the Court has ordered sanctions against the State of $100,000 per day until the Legislature provides the Court with a plan.\textsuperscript{153} This order states that the plan must include not merely a list of reforms or a schedule for implementation, but apparently also must address the fiscal means—the State must “fully explain how it will achieve the required goals.”\textsuperscript{154}

III. JUDICIAL ENFORCEMENT OF POSITIVE RIGHTS POSES SEPARATION OF POWERS RISKS

The State’s efforts to move toward full compliance with \textit{McCleary} and article IX will involve complex fiscal analysis and legislative drafting, as well as difficult political compromise. On top of these near-term legislative challenges, the broader issue of judicially enforceable positive rights poses substantial difficulties in constitutional practice. This Part will briefly discuss the separation of powers risks of the apparently unbounded positive rights enforced in \textit{McCleary}.

\textit{McCleary} initially called for a dialogic approach, claiming that judicial oversight to monitor the legislative response would have “the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms.”\textsuperscript{155} A risk of dialogic enforcement, however, is that it fails to

\textsuperscript{152} Id. at 3–4. All elements of SHB 2776’s formula enhancements were fully implemented in the 2015–2017 biennial budget, except for one remaining increment of K-3 class size reduction, which must be implemented by the 2017–2018 school year. \textsc{Wash. Rev. Code} § 28A.150.260(4)(b) (2014 & Supp. 2015); 2015 \textsc{Report, supra} note 11, at 9. In 2014, the Legislature implemented ESHB 2261’s changes to instructional hours (school year 2015–2016) and graduation credits (beginning with the class of 2019, i.e., school year 2015–2016). \textsc{Wash. Rev. Code} § 28A.150.220 (2014 & Supp. 2015). The Legislature has not specified a due date in statute for as-yet unquantified reforms to compensation and levies. \textit{See} 2009 Wash. Sess. Laws 3331, 3332 (“The legislature intends that the redefined program of basic education and funding for the program be fully implemented by 2018.”); \textit{id.} at 3331, 3369–71 (declaring intent to enhance salary allocations with no date specified); \textit{id.} at 3331, 3356–57 (declaring intent to revise levies with no date specified); \textit{see also} \textsc{Wash. Rev. Code} § 84.52.0531 (2014 & Supp. 2015) (causing current school levy lids to expire in 2018, creating a “cliff” by which Legislature must address levy reform).


\textsuperscript{154} Id.

\textsuperscript{155} \textit{McCleary}, 173 Wash. 2d at 546, 269 P.3d at 261.
account for the “the elephant in the room”—separation of powers in state constitutions. Washington lacks an express textual separation of powers requirement, but nonetheless it has both a vigorous separation of powers doctrine and express provisions that vest fiscal controls solely in the legislative branch.

The McCleary Court acknowledged the separation of powers difficulties in a positive rights analysis, but easily resolved the dilemma in favor of the judicial branch. Positive rights “test the limits of judicial restraint and discretion by requiring the Court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty,” but judicial primacy in constitutional interpretation trumps any counterarguments.

Even so, because of the qualitatively different nature of positive constitutional rights, judicial enforcement of these rights in the form of orders to co-equal branches poses separation of powers risks not found in other forms of constitutional enforcement. First, the absence of state jurisdictional constraints on judicial actions creates the risk of the “perceived imperative to decide,” inviting the courts to intrude into policy decisions for which they are institutionally ill-suited. Second, if the court defines a constitutional term to include a particular constellation of affirmative services, the legislative branch is left without a check on that definition, impairing its ability to make policy and fiscal decisions for the state. Third, the dialogue of constitutional enforcement must not convert judicial primacy in constitutional interpretation to judicial supremacy in governing, lest it vitiate the Legislature’s status as a co-equal branch.

A. Separation of Powers Risks Arise from the “Perceived Imperative to Decide”

When reviewing a case that is rooted in both politics and the state

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156. Bauries, Judicial Review, supra note 73, at 739–40; see id. at 728–35 (questioning assumptions of positive rights scholars due to their “dismissive” belief that the separation of powers doctrine does not affect adjudication).


158. See infra Section IV.A.

159. McCleary, 173 Wash. 2d at 520, 269 P.3d at 248. Compare id., with Seattle Sch. Dist. v. State, 90 Wash. 2d 476, 512, 585 P.2d 71, 92 (1978) (explaining that article IX duty imposed on the state as a polity, not on any one of the three branches).
constitution, state court judges must confront the “perceived imperative to decide.”\textsuperscript{160} This apparent mandate invites a judicial belief that all politico-legal disputes are amenable to a courthouse resolution—that a constitutional ruling can solve complex problems of public policy and resource allocation. Stated differently, if one’s only tool is a hammer, every problem looks like a nail.\textsuperscript{161} As described by Phil Talmadge, who served both as a state senator and later as a Washington State Supreme Court justice, “[w]hat has emerged too often is a cowboy judiciary riding roughshod over separation of powers in its zeal to save every damsel in distress and right every wrong.”\textsuperscript{162}

The perceived imperative to decide arises from the absence of jurisdictional limits on the authority of state courts. Principles of judicial restraint in state courts are jurisprudential rather than jurisdictional.\textsuperscript{163} This means the political question doctrine and related theories of restraint are not a per se bar to judicial consideration of essentially political disputes such as legislative resource allocation decisions. For that reason, the court is not obligated to make a threshold jurisdictional determination of whether the constitution textually commits a matter to one of the other branches.\textsuperscript{164} Positive rights advocates specifically argue that the absence of jurisdictional limits on state courts should embolden judges to enforce positive rights.\textsuperscript{165}

Contributing to the perceived imperative to decide is the experience of state court judges in affirmatively making law as common-law jurists.\textsuperscript{166} To the extent judges have a law-making role in adjudicating

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\bibitem{161} ABRAHAM H. MASLOW, \textit{The Psychology of Science} 15 (1966).
\bibitem{162} Talmadge, \textit{Limits of Power}, supra note 160, at 695–96 (condemning judicial activism of both the left and the right).
\bibitem{164} Talmadge, \textit{Limits of Power}, supra note 160, at 710. In contrast are cases involving the Washington State Supreme Court’s narrow original jurisdiction in mandamus. \textit{See, e.g.}, Brown \textit{v.} Owen, 165 Wash. 2d 706, 718, 206 P.3d 310, 316 (2009) (no original jurisdiction in mandamus due to separation of powers concerns “similar to” the federal political question doctrine).
\bibitem{165} Hershkoff, \textit{Positive Rights}, supra note 27, at 1156–67 (contrasting state court adjudication of positive rights with Article III political question doctrine).
\bibitem{166} Usman, \textit{supra} note 27, at 1527–28. \textit{Compare id., with Talmadge, \textit{Limits of Power}, supra note 160, at 699 (describing the power of common law as individualized decision-making, given that legislatures cannot anticipate all factual circumstances).}
common-law cases, they are comfortable testing out their theories against a background of court-made precedent.\textsuperscript{167} This risk is reinforced by judges who are “doctrinally oriented toward the individualized, non-general decision-making that the common law offers.”\textsuperscript{168} But state constitutions are not common law.\textsuperscript{169} Constitutional interpretation is document-based, a fundamentally different task. It involves not only interpretation of individual words and sections, but the balancing of particular rights, duties, or terminology against the background of the entire constitutional text and structure. Moreover, constitutional interpretation of an affirmative duty applies not only to the facts of the case at bar, but throughout the entire state until reversed by a constitutional amendment or subsequent judicial decision.

Any skepticism about the court’s ability to solve persistent policy and political debates with constitutional rulings inevitably raises a question: having chosen to elevate education to a constitutional duty, are the voters not entitled to the benefit of their “constitutional bargain”?\textsuperscript{170} In this view, the judiciary is not a participant in an inter-branch power struggle, but rather is the neutral arbiter of the people’s compact with the state.\textsuperscript{171} The analogy of Odysseus and the sirens is sometimes used to characterize the nature of this compact\textsuperscript{172}: when sailing past the sirens’ isle, Odysseus wishes to hear their song without succumbing to their fatal allure, so he directs his sailors to stop their ears with wax and bind him to the ship’s mast while ignoring any pleas he might make for release.\textsuperscript{173} In other words, if a society feared that the siren song of

\textsuperscript{167} As makers of common law, judges not only adjudicate but also create and abolish common-law causes of action. Compare Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980) (abolishing the common-law tort of alienation of affections), with Ueland v. Pengo Hydra-Pull Corp., 103 Wash. 2d 131, 690 P.2d 190 (1984) (recognizing a new common cause of action for loss of parental consortium). Compare id., with WASH. REV. CODE § 4.04.010 (2014 & Supp. 2015) (establishing common law as rule of decision to the extent that it is not inconsistent with the state constitution or statutes, or with the conditions of society in the state).

\textsuperscript{168} Talmadge, \textit{Limits of Power}, supra note 160, at 695.

\textsuperscript{169} Linde, \textit{supra} note 98, at 952 (“In the course of deciding the merits, some opinions ignore the essential difference between constitutional law and common law: A constitutional issue presupposes that someone else has made a law.”).

\textsuperscript{170} Usman, \textit{supra} note 27, at 1517.

\textsuperscript{171} Whether the \textit{McCleary} Court is acting as a mere neutral arbiter of the constitution is in the eye of the beholder. Certainly by using the threat of contempt and later contempt sanctions to compel not ultimate constitutional compliance but rather submission of the court-ordered “plan,” the Court has staked the dignity and credibility of the judicial branch on its ability to coerce the Legislature.


\textsuperscript{173} HOMER, \textit{THE ODYSSEY} 273 (Robert Fagles trans., 1996) (“[I]f you plead, commanding your
transitory legislative or voter majorities could result in failure to satisfy a core value expressed in the constitution, the voters could codify their “pre-commitments” in a higher level of law not subject to reinterpretation by a mere temporary political agreement. In this scenario, of course, the judiciary ultimately determines the meaning of this pre-commitment. Or, as framed by the McCleary Court: “We cannot abdicate our judicial duty to interpret and construe” the constitution.

This perceived imperative to define the constitution’s education rights in the form of a judicial ruling disregards other aspects of the voters’ electoral bargain in the constitutional text. The constitution expressly vests in the legislative and executive branches the responsibility for defining and operating the state’s education system. As noted by Phil Talmadge, constitutionalizing K-12 funding and administration by placing it beyond the control of these democratically elected state officers leaves education under the control of a branch that is “ill-equipped to annex such a duty.” More broadly, as discussed infra Section IV.A, the “disfavored” constitution establishes substantive separation of powers protections that vest state fiscal decisions solely in the legislature. Finally, whatever the merits the “Odysseus” approach might have for interpreting restraints on state government, judicial interpretation of constitutional terms in a positive rights context poses a different issue.

B. Positive Rights Pose Qualitatively Unique Separation of Powers Dilemmas

A positive constitutional right is very different than other legal rights to state-funded services. From Marbury to Seattle School District, judicial primacy in interpreting constitutional text means that the court has the ultimate ability to define constitutional terms. This power has

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176. McCleary, 173 Wash. 2d at 516–17, 169 P.3d at 247; see also WASH. CONST. art. IX, § 2 (“The legislature shall provide for a general and uniform system of public schools.”); WASH. CONST. art. III, § 22 (“The superintendent of public instruction shall have supervision over all matters pertaining to public schools.”).
two consequences. First, when the court uses this primacy to define positive rights, it deprives the Legislature of its ability to make policy and fiscal choices about the constitutional subject. Second, it could hijack the legislative process, compelling the Legislature to legislate prospectively to the court’s standards rather than testing enacted legislation against constitutional requirements.

1. Positive Rights Interpretation Is Unlike Other Forms of Judicial Rights Adjudication

In the course of state policy-setting, legislatures frequently create positive statutory rights to public programs and services, but the legislature retains the ability to revise or repeal its creations.\(^\text{178}\) Once the legislature has enacted such a statute, the judiciary may order agencies to provide services to individuals as a matter of statutory entitlement,\(^\text{179}\) but crucially—as a matter of separation of powers—the court will not order the legislature to make an appropriation for a statutory program.\(^\text{180}\) It is a “legislative fact of life” that the legislature may create “laudable programs” but fail to fund them adequately: “the decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.”\(^\text{181}\)

Likewise, when the courts enforce negative constitutional rights against the branch that allocates public resources, the legislature still retains a choice. The choice may be largely theoretical, but it still exists. For example, though it may be politically difficult to cut services to persons with mental illness, if the state does not want to fund costs the judiciary determines are needed to comply with Fourteenth Amendment standards, the state may change involuntary commitment statutes,

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180. Pannell v. Thompson, 91 Wash. 2d 591, 599, 589 P.2d 1235, 1240 (1979) (noting a possible exception if creation of a program is constitutionally required); see also Talmadge, Limits of Power, supra note 160, at 729–30 (discussing separation of powers basis for Pannell line of decisions).

181. Pannell, 91 Wash. 2d at 599, 589 P.2d at 1240; see also Farm Bureau Fed’n, 162 Wash. 2d at 301–02, 174 P.3d at 1150. Compare id., with McCleary, 173 Wash. 2d at 526–27, 269 P.3d at 251–52 (declaring that court may interpret Article IX to limit legislature’s ability to reduce offerings in the basic education program).
reprioritize executive branch commitment efforts, or repeal its commitment statutes entirely. 182

In contrast to statutory positive rights, and in contrast to “negative” constitutional rights, positive constitutional rights leverage the judicial branch’s interpretative power to compel the legislative branch to create and fund public programs as defined by the court. Where the court defines a positive right, the state has no choice 183: the judicial branch has final say in defining the program. 184 Under this analytical regime, absent a constitutional amendment, the duty of the state—and its taxpayers—to fund that definition is absolute.

2. Only the Legislature Can Provide Meaningful Definitions of Positive Rights

From the single constitutional word “education,” the Seattle School District Court developed a multi-paragraph description of the constitutional education objective. But, this necessarily vague definition could not, on its own, translate into the multiplicity of complex formulae by which the Legislature allocates state K-12 funding to school districts based on districts’ and students’ needs. 185 As Cooley puts it, because the texts of constitutional affirmative duties in themselves do not provide a “sufficient rule” for determining the scope of right or duty, “supplemental legislation must be had.” 186

The constitutional duty and its judicially created corresponding right lack meaning and coherence unless defined and rendered operative in statutory policies enacted by the people’s representatives. For this reason, the legislature has an intended constitutional role in defining how the state implements its duty.

The Seattle School District and McCleary Courts imposed judicial definitions of constitutional terms such as “education” and “ample,” but Seattle School District wholly deferred to legislation to implement and

182. But see infra Section III.B.3 notes 197–199 and accompanying text (discussing how under the “foster and support” clause, the State may have a positive duty to operate mental health facilities).

183. Cf. Tushnet, supra note 44, at 1897 (describing democratic concern that positive rights enforcement requires courts to displace legislative judgments on a large scale).

184. McCleary, 173 Wash. 2d at 516, 269 P.3d at 246–47 (endorsing Seattle School District’s judicial definition of “education”); id. at 526–27, 269 P.3d 251–52 (holding that the legislature’s education definition is not set “in constitutional stone” but the Court may impose limits on future legislatures’ ability to amend statutory program of education).


186. COOLEY, supra note 41, at 98–99.
give life to these terms, and *McCleary* initially did so, endorsing enacted legislative reforms. In the absence of a ruling that relates the judicial definition to legislative enactments, positive constitutional rights are unmoored from the statutes that are constitutionally and practically needed to implement them. When constitutional duties are stated so broadly as to be inchoate absent implementing legislation, they cannot be uprooted from their bases in the text of a foundational document to become free-floating judicial mandates on the taxpayer.

3. Positive Rights Enforcement Risks Commandeering the Legislative Process

Continued judicial oversight poses the risk that the judicial power of constitutional interpretation will be used to compel the Legislature to enact particular policy and appropriation laws. If the *McCleary* Court had confined its enforcement activities to overseeing incremental implementation of scheduled statutory reforms, retained jurisdiction would pose less of a risk to legislative policy-making. But the Court’s orders have evolved from a request for interim benchmarks to insistence on a comprehensive plan to “fully comply with article IX” by achieving “full funding of all elements of basic education,” whatever the Court believes that to mean. 187 Each order introduces a judicial demand for the Legislature to address a new aspect of K-12 funding, from cost-of-living adjustments188 to capital construction189 funding to, in one possible interpretation, new taxes.190

In the case of positive rights, where the judicial branch is asking in the abstract whether the state has “done enough” rather than “done too much,”191 the court could use its interpretation of the constitutional text

188. See supra note 146.
189. Order of Aug. 13, 2015 at 7, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227. Although the trial court’s order briefly declared that state facilities funding was inadequate, the 2012 *McCleary* ruling did not address the state’s capital funding formulas, much less invalidate them the way it did the pre-ESHB 2261 operating formulas. *McCleary* v. State, No. 07-2-02323-2 SEA at 55 (King Cty. Super. Ct. Feb. 4, 2010). For school construction, the constitution prescribes a plan of shared responsibility between the State and school districts, which the State has implemented through the School Construction Assistance Program. See WASH. CONST. art. VII, § 1 (school district capital levies and construction bond levies); *id.* art. VIII, § 1(e) (state guarantee of school district debt); *id.* art. VIII, § 6 (school district debt limits for construction); *id.* art. IX, § 3 (Common School Construction Fund); WASH. REV. CODE § 28A.525.162–166 (2014 & Supp. 2015).
190. Order of Aug. 13, 2015 at 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227 (requiring the State to explain “not only what it expects to achieve . . . but to fully explain how it will achieve the required goals” (emphasis in original)).
to order the state and its taxpayers to create and pay for a variety of programs. Bypassing the legislative process of policy-setting and resource allocation, judicial enforcement of the education right could remove a large portion of the budget from legislative control. As Phil Talmadge cautions, the Court must avoid characterizing education rights as “absolute,” because doing so arrogates to the judiciary total responsibility for operating the state’s education system.192

In education litigation in other states, concern about the judiciary’s ability to turn constitutional text into workable funding standards has either changed liability decisions or stayed enforcement.193 In particular, second-generation cases such as McCleary pose enforcement challenges for courts that have already found strong positive rights.194 In second-round cases, the court confronts not legislative abdication, but instead an active legislative branch with its own evolving vision of adequacy, so the court must parse the adequacy of a comprehensive legislative response rather than direct the legislature to fill a statutory vacuum. As school conditions and the elusive constitutional standard converge, breach becomes more difficult to establish.195 Further, some scholars express doubt that funding alone can change schools, “contending that the solution lies not in more money, but in measures such as increased accountability, better management, and the flexibility to fire failing teachers.”196 If the court ventures further into education litigation, it could be asked to impose these types of standards by judicial fiat.

Finally, education is not the only state duty that the judicial branch could transform into a positive right, creating the risk that a still larger portion of the state budget could be subject to judicial definition and more stringent constitutional scrutiny. For example, constitutional provisions such as the “foster and support”197 clause of article XIII could

supra note 27, at 1137).


193. Simon-Kerr & Sturm, supra note 26, at 100 (citing the example of Massachusetts, where “[f]orced to choose between an aggressive remedial stance and abdication of any role in adjudicating the education right,” the court bowed out by refusing to find breach).

194. Id. at 97–111.

195. Id. at 102–03.

196. Id. at 96–97 (citing authorities). Compare id., with McCleary, 173 Wash. 2d at 539–40, 269 P.3d at 258 (stating that “fundamental reforms are needed . . . . Pouring more money into an outmoded system will not succeed,” statements which in this author’s opinion are frequently misinterpreted as a statement from the McCleary Court that these types of management reforms are required for McCleary compliance).

197. WASH. CONST. art XIII, § 1; see also Adam Sherman & Hugh Spitzer, Washington’s Mandate: The Constitutional Obligation to Fund Post-Secondary Education, 89 WASH. L. REV.
be interpreted to establish state duties and corresponding Hohfeldian
duties. Although the education right may be “paramount” among these
duties, if the courts recognize other positive constitutional rights, they
will be different only in degree, not in kind.\(^{198}\) Subjecting state
expenditures for these purposes to the “has the state done enough?”
positive rights analysis would make over two-thirds of the state budget
subject to McCleary-level scrutiny.\(^{199}\)

C. Primacy in Constitutional Interpretation Does Not Alter the Co-
Equal Status of the State Branches

Judicial enforcement of positive rights against the democratic
branches impairs the constitutionally established co-equal status of the
three departments. This risk arises because judicial primacy in
constitutional interpretation is not judicial supremacy in governing.

Positive rights advocates insist that state courts must “rise to the
challenge” and adjudicate positive rights cases despite possible judicial
difficulty in developing manageable standards and policy expertise.\(^{200}\)
Admittedly, these types of exhortations have a basis in Washington’s
text: as Seattle School District explained, the article IX duty is imposed
on the State as a polity, not merely on the legislative branch.\(^{201}\) But the
real leverage sought by positive rights advocates in pursuit of their
preferred policies comes from the finality of the judicial branch’s
interpretation of a constitutional provision. In general, positive rights
scholarship strives to qualitatively distinguish state court powers from
those exercised by federal courts. But, advocates for positive rights must
necessarily rely on state courts to assert primacy in constitutional
interpretation, just as the Marbury Court asserted federal interpretational
primacy over Congress, and the Cooper Court over the states.\(^{202}\)
Similarly, in Seattle School District and McCleary, state courts declare
the finality of their authority to interpret the constitution. But an

\(^{198}\) See Hershkoff, Evolution of State Constitutions, supra note 27, at 817–18 (recognizing risks
of failing to constitutionalize all types of need).

\(^{199}\) See Budget Notes, supra note 2, at 157, 163, 276, 305, 331, 351 (summarizing state 2015–
2017 appropriations for purposes potentially subject to article XIII, plus constitutionally protected
debt service, which is three percent of the NGFS + Op budget).

\(^{200}\) Hershkoff, Positive Rights, supra note 27, at 1182.


\(^{202}\) Cooper v. Aaron, 358 U.S. 1 (1958) (stating under Marbury and the Supremacy Clause, state
governments are bound by federal courts’ interpretation of the federal Constitution).
important distinction remains: at the state court level, the alchemy of positive rights interpretation does not convert judicial primacy in interpretation into judicial supremacy in governing. 203

To compel compliance with the federal Constitution, federal courts are entitled to wield the power of the federal Supremacy Clause against recalcitrant state actors. 204 State courts have no such lever against state legislatures, which are co-equal branches. Primacy in the authority to interpret the constitution does not create a corresponding power of enforcement. Unlike the federal government enforcing the supremacy of the federal Constitution over the states, the Washington State Supreme Court is acting against a co-equal branch.

Recognition of this concern does not rely on denial of the Court’s interpretational primacy. As explained by Seattle School District, the Court’s lack of “physical power” to enforce its orders does not affect its duty to issue them; “the legality of judicial orders should not be confused with the legal consequence of their breach.” 205 But positive rights do not change the recognized judicial function of “saying what the law is” into a new ability to tell the Legislature “what the law must be.”

In the absence of express constraining principles, the Court’s new positive rights jurisprudence impairs the Legislature’s status as a co-equal branch. In the case of negative rights, it is less likely that the Court will intrude on legislative policy-setting and resource allocation, because the State always has the option of ceasing the violative conduct. But in the case of positive rights, the Court is not restraining the democratic branches with a “thou shalt not” or a “thou shalt not unless.” Rather, the Court is affirmatively specifying the delivery of publicly funded services, and short of a constitutional amendment, the Legislature has no

203. Education finance scholarship gives short shrift to concerns over the propriety of judicial review. Bauries, Judicial Review, supra note 73, at 707.

204. In the case of confrontation among the co-equal branches of federal government, the United States Supreme Court retains primacy in constitutional interpretation. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”). Certainly the Court may be asked to adjudicate constitutional questions with vast fiscal consequences. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, __U.S.__, 132 S. Ct 2566 (2012) (upholding federal Affordable Care Act). But, the Court may not tell Congress, a co-equal branch, that it must enact legislation to fund, e.g., health care or education programs. The absence of positive rights in the federal Constitution, together with federal principles of judicial abstention such as the political question doctrine, mean that only Congress resolves resource allocation questions.

205. Seattle Sch. Dist., 90 Wash. 2d at 507, 585 P.2d at 89 (citing Nixon v. Sirica, 487 F.2d 700, 711–12 (D.C. Cir. 1973)).
check on this judicial affirmative definition. Further, under the new positive rights analysis, notwithstanding the political aspects of the case, the Legislature and its enactments receive even less protection, because the Court now holds implementing legislation to a higher judicial standard. This leaves the Legislature without a corresponding check on the judicial branch’s authority to compel expenditures in furtherance of a positive right. Regardless of what the Legislature enacts to implement the constitution, the Court can always say “Article IX requires more.”

IV. THE “DISFAVORED CONSTITUTION” COUNTERBALANCES POSITIVE RIGHTS

By combining judicial primacy in constitutional interpretation with a positive right, McCleary created a court-defined state funding obligation without any expressly delineated jurisprudential boundaries. Though the original McCleary ruling recognized the delicate balance of power among the branches in positive rights implementation, the opinion and its subsequent enforcement orders do not set out any clear doctrinal limits on the Court’s ability to obligate the taxpayers to fund positive rights. Absent counterbalancing constitutional strictures, the Legislature, and the taxpayers from whom the Legislature must extract the state’s fiscal resources, have only two options: fund the education right as defined by the Court, or amend the constitution.

The Legislature’s repeated failure to enact the judicially ordered “plan,” together with the approach of the legislatively and judicially imposed 2018 deadline, will force the Court to determine whether there are any outer limits to its authority to enforce positive rights against legislative paralysis, intransigence, or outright defiance. To find these limiting principles, the Court need look no further than the text of the constitution itself.

206. Cf. Mont. Const. art. XII, § 3(3) (amended 1988). After Butte Cnty. Union v. Lewis applied higher scrutiny to classification in welfare legislation, the citizens amended the Montana Constitution in 1988 to change “[t]he legislature shall provide such economic assistance” to “may provide.” In re T.W., 126 P.3d 491, 495 & n.3 (Mont. 2005) (emphasis in original) (quoting Mt. Const. art. 12, § 3).

207. McCleary v. State, 173 Wash. 2d, 477, 519, 269 P.3d 227, 248 (2012); see also supra Section II.C, notes 131–135 and accompanying text.
A. The “Disfavored Constitution” Establishes Protections for the Public Fisc by Reserving Taxation and Expenditure Authority to the Legislature

Limitations on judicial enforcement of positive rights are already found within the constitutional text—in the so-called “disfavored constitution.” By expressly vesting the taxing and spending powers of the state solely in the legislative branch, the fiscal restrictions of the disfavored constitution protect the legislature’s institutional powers. The constitutional damage risked by potential judicial arrogation of the legislative powers of taxation and spending affects not only the legislative branch’s prerogatives, but also the substantive protections afforded to the treasury and the taxpayers by the state constitution.

Within Washington’s disfavored constitution, article VII of the Washington State Constitution establishes strictures on state taxation, and article VIII governs debt and expenditures. More particularly, article VII, section 5, and article VIII, section 4 provide respectively that taxes and expenditures of treasury funds must be enacted in law. Each of these sections further establishes specificity requirements—taxes must state an object, and appropriations must state a readily discernable amount and may not endure past the fiscal biennium.

These provisions function as more than mere restraints on the legislature. True—the specificity conditions operate as traditional restrictions on the legislative process, requiring the legislature to enact tax and spending laws in a particular way. But more importantly, the statements that taxes and appropriations may be made only pursuant to law are affirmations that the power to levy taxes and the power to spend the revenues thereby collected are vested only in the peoples’ democratically elected representatives—to the exclusion of other branches. To the extent that enforcement of positive rights could conflict with these exclusive grants of authority, it is the Court’s obligation to harmonize, rather than override, these protective portions of the

208. See supra Section I.B (discussing the disfavored constitution).
209. WASH. CONST. art. VII, § 5 (“No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”); id. art. VIII, § 4 (“No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.”).
The Legislature Has Sole Authority over Taxation

Under article VII, section 5, “no tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”211 Though buried in the disfavored constitution, this section has a long pedigree as a shield for taxpayers through protection of the prerogatives of their elected representatives. As a condition of the ascension of William and Mary, Parliament insisted that the English Bill of Rights prohibit taxation by royal prerogative: “levying Money for or to the Use of the Crowne, by pretence of Prerogative, without Grant of Parlyament, for longer time, or in other manner then the same is or shall be granted, is Illegal.”212

Similar restrictions appear before nationhood in the earliest state constitutions. John Adams’ eloquent Massachusetts State Constitution of 1780 led the way toward the tripartite, balanced government that the Union would eventually adopt.213 As originally ratified, and to this day, the Massachusetts Constitution declares that no tax may be levied “without the consent of the people, or their representatives in the legislature.”214 Likewise, taxpayer protections are reflected in the United States Constitution, which declares that “All bills for raising revenue shall originate in the House of Representatives,” which at nationhood was the federal chamber directly elected by the voters.215

Keeping this legacy in mind, article VII, section 5 is not a mere technicality but an assurance that “Taxes can be voted only by the people’s representatives.”216 “It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.”217 As Cooley explained in 1883, the taxing power is inherent in the legislature of each state, and security against the abuse of this power is found in the structure of government itself: “In imposing a tax, the legislature acts

211. WASH. CONST. art. VII, § 5.
212. English Bill of Rights, 1689 (1 W&M., 2d Sess., c.2).
213. See WILLIAMS, supra note 23, at 50–53 (describing Adams’ view of balanced government).
214. MASS. CONST. of 1780 art. XXIII; see also PA. CONST. of 1776, § 41 (requiring that any tax be authorized in law).
216. COOLEY, supra note 41, at 641 (“It is, moreover, essential to valid taxation that the taxing officers be able to show legislative authority for the burden they assume to impose in every instance.”).
upon its constituents.”

Suggestions that the Court has authority to enforce positive rights by nullifying tax exemptions, levying new taxes, or specifying the uses of tax revenues directly conflict with this constitutional principle. In its Order of August 2015, the McCleary Court briefly but expressly recognized this distribution of powers, acknowledging that the Court lacks the authority to enact legislation, appropriate state funding, or levy taxes. As in the case of judicial “impoundment” of unspecified state revenues pursuant to the August 2015 contempt sanctions, the judicial distinction between saying “what the law is” and enforcing that law may be a very fine one. But the difficulty in drawing the precise line does not negate the mandatory character of disfavored constitution as a limiting principle on the Court’s ability to enforce positive rights.

2. The Legislature Has Sole Authority over Appropriations

Under article VIII, section 4, “No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.” Per article VII, section 6, state tax revenues must be deposited in the state treasury. This means that the Legislature has the exclusive power of deciding whether, when, and for what purpose the state’s public moneys may leave the treasury, and also that the procedural law-making protections of constitutional majority, bicameralism, and presentment are necessary to spend all state tax revenues. As with the taxing provision, the requirement that appropriations be enacted in law is rooted in the English Bill of Rights’ prohibition on arrogating moneys for the use of the crown. The legislation requirement necessarily excludes the judicial branch from the process of enacting appropriations or otherwise authorizing expenditures.

218. Id. at 593–94.


221. See supra Section III.B.1, notes 178–181 and accompanying text (discussing potentially fine distinction between ordering an appropriation and ordering an agency to provide a service).

222. English Bill of Rights, 1689 (1 W&M., 2d Sess., c.2).

223. “Whether such a [court-appointed special master] could take money out of the treasury would be a really significant constitutional question on the separation of powers” according to former Washington State Supreme Court Justice Phil Talmadge. Andrew Garber, How Will State
The legislature’s duty to provide essential funding for the other branches of government must be acknowledged as a noteworthy but limited exception to this general rule. In *In re Salary of Juvenile Director*, the Court used a structural separation of powers analysis to find the Court has an inherent but constrained power to compel appropriations necessary to “ensure its own survival” upon “clear, cogent, and convincing proof.” Significantly, *Juvenile Director* did not analyze the text, purpose, or history of article VIII, section 4 in the broader context of constitutional protections for tax revenues. But *Juvenile Director* addresses only the judiciary’s ability to function within the constitutional structure as an independent branch, and under article VIII, section 4, it gives the Court no authority to order expenditures for other types of state programs, constitutionally required or not.

3. **The Disfavored Constitution Establishes a Principle of Contemporaneous Government**

Article VIII, section 4, establishes a principle of contemporaneous government, a concept that limits the usefulness of the Court’s repeated calls for a legislative “plan.”

Specifically, this section provides that appropriations must be made within a month of the close of the next ensuing biennium, i.e., the biennium that begins after the adjournment of the legislative session in odd numbered years. This means that appropriations lapse (expire) at the end of the fiscal biennium for which they are made, so each elected Legislature appropriates roughly for the period for which it sits. The delegates at the state constitutional convention established this limited

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*Supreme Court React If Lawmakers Hold Back on School Funding?, Seattle Times, Jan. 24, 2014 at B7.*

224. 87 Wash. 2d 232, 552 P.2d 163 (1976).

225. *Id.* at 245, 552 P.2d at 171.

226. *Id.* at 251, 552 P.2d at 174. In *Seattle School District*, the State argued based on *Juvenile Director* that a higher burden of proof should apply to the education duty. The Court dismissed this distinction: “Here, unlike *Juvenile Director*, the financial needs of the judiciary vis-à-vis the Legislature are not at issue. Rather, we are concerned with legislative compliance with a specific constitutional mandate.” *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 528, 585 P.2d 71, 100 (1978).

227. See *Juvenile Dir.*, 87 Wash. 2d at 242–43, 552 P.2d at 169 (citing WASH. CONST. art. VIII, § 4 only in passing).

228. *Seattle Sch. Dist.*, 90 Wash. 2d at 528, 585 P.2d at 100.

229. At statehood, regular sessions of the Legislature were held biennially beginning in January of odd-numbered years, with a two-year budget adopted for the period following adjournment. WASH. CONST. of 1889, art. II, § 12.
duration for appropriations because California had exceeded its debt limit by authorizing appropriations for future biennia.\textsuperscript{230}

When combined with the broader constitutional principles that legislative power is plenary and any Legislature may amend the work of a prior Legislature,\textsuperscript{231} article VIII, section 4 affirms that the people are governed by the legislators they elected, not by dead hands of prior legislators. Although the Court has declared that the Legislature may not revise its basic education statutes for mere pecuniary reasons,\textsuperscript{232} no Legislature may definitively declare that any “plan” commits a future Legislature to follow any particular set of standards, formulas, or revenue policies, and no Legislature may “pre-enact” the appropriations needed to give future life to the “plan.” Stated differently, talk is cheap—whiskey costs money. The real question is whether the sitting Legislature has enacted the appropriations to implement its enacted statutes.

\textbf{B. The Disfavored Constitution’s Taxpayer Protections Are a Part of the “Electoral Bargain”}

If state courts wish to accept the expansive aspects of state constitutionalism, such as the New Federalism and positive rights, they must acknowledge the constraints of the disfavored constitution as requirements of equal stature.\textsuperscript{233} Even “as they impose affirmative duties on their government, state constitutions are also marked by limited-government, taxpayer-protective principles that are entirely absent from the Federal Constitution.”\textsuperscript{234}

Positive rights advocates correctly argue that analysis of positive rights should not import federal concepts that are extraneous to state constitutions, such as rationality-level review or the political question

\begin{itemize}
\item \textsuperscript{230} JOURNAL, supra note 69, at 673–75; see also S.F. Gas Co. v. Brickwedel, 62 Cal. 641, 642 (1882) (holding article XI, section 18 of the California Constitution prohibited municipalities from paying liabilities incurred in one year with revenues of a later year absent the 2/3 voter approval constitutionally necessary to incur debt). In comparison, the modern Washington constitutional debt limit in article VIII, section 1 requires a supermajority legislative vote to bind future Legislatures by creating debt. WASH. CONST. art VIII, § 1(i) (amended 1972).
\item \textsuperscript{232} McCleary v. State, 173 Wash. 2d 477, 526–27, 269 P.3d 227 (2012) (holding that elements of the basic education program are not “etched in constitutional stone,” but the Legislature may not eliminate or reduce program offering without an educational reason).
\item \textsuperscript{233} Briffault, supra note 18, at 956.
\item \textsuperscript{234} Id.
\end{itemize}
Using state tax and spending restrictions as a restraint on judicial positive rights enforcement flows naturally from the bargain that the state constitution strikes with the people in its own text. The disfavored constitution provides the judiciary with the ability to give meaning to affirmative duties in state constitutions while acknowledging that the very text of state constitutions contains outer boundaries on the court’s ability to define and enforce positive rights.

1. The Disfavored Constitution Is Substantive and Mandatory

The paramount duty may be paramount among constitutional provisions that establish rights or duties, but the judiciary is obligated to harmonize its interpretation of this duty, and enforcement thereunder of its jural correlative right, with the structural provisions of the constitution that place the state fisc under the authority of the voters’ representatives.

Positive rights commentators argue courts must enforce positive rights so “the electorate should be given the benefit of their constitutional bargain.” Further, as the Seattle School District and McCleary Courts point out, only one provision of the constitution declares itself to be “paramount.” At the same time, positive rights are only one part of the “electoral bargain.” Just as article IX constitutionalizes a state education duty, the disfavored constitution constitutionalizes a norm of taxpayer protection.

To begin, all provisions of the constitution are equally mandatory. The constitutional text declares the education duty to be “paramount” among state activities, but this text does not make other provisions structurally subordinate, and it does not overwrite the equally mandatory provisions that vest taxing and spending authority solely in the Legislature.

Moreover, “structural” provisions of state constitutions may nonetheless declare protective principles that that receive judicial enforcement. For example, Washington’s Constitution does not contain an express textual separation of powers clause, but the division of state government into three branches is nonetheless a crucial protection for

235. E.g., Herskhoff, Positive Rights, supra note 27, at 1156–67 (contrasting state court adjudication of positive rights with article III political question doctrine).

236. Usman, supra note 27, at 1517. Compare id., with Tushnet, supra note 44, at 1915 (coupling strong right with weak remedies may create cynicism about the constitution).

237. Briffault, supra note 18, at 909.

238. WASH. CONST. art. I, § 29.
individual liberties.\textsuperscript{239} Similarly, though not expressly framed as a “rights” provision, the disfavored constitution provides important protection for the public fisc and for the people’s relationship with their elected representatives. Further, \textit{McCleary} itself demonstrates that not all constitutional rights are found in constitutional articles denominated “Declaration of Rights.” The tax and spending restrictions in the disfavored constitution place in the constitutional text the people’s right to have state fiscal policy determined by their elected representatives.

More broadly, when considering the electoral bargain, a constitutional analysis of positive rights enforcement must consider the source of the government’s powers and duties—the political power that is inherent in the people and is bestowed on government only by their consent.\textsuperscript{240} Under the covenant by which the voters delegated their political power to state government, the people were assured that their elected representatives would control state taxation and expenditures. Though some positive rights advocates contend that elected state court judges enjoy a democratic imprimatur that justifies a greater role for them in public resource allocation decisions,\textsuperscript{241} Washington courts have rejected the notion that state court judges play a “representative” role in state government.\textsuperscript{242} For these reasons, judicial branch enforcement of positive rights must respect the constitutional vesting of fiscal authority in officials who are elected to represent their constituents.

Evidence that the electoral bargain of the disfavored constitution creates taxpayer protections is found in flexible doctrines of taxpayer standing in state courts. In contrast to stringent standing requirements in federal court, Washington and other state courts generally grant broad taxpayer standing to enforce constitutional protections for the public fisc.\textsuperscript{243} These decisions reveal “an appreciation of the role that taxpayer

\textsuperscript{239} E.g., State v. Rice, 174 Wash. 2d 885, 900–01, 279 P.3d 849, 857 (2013) (discussing how the tripartite division and system of checks protects individual rights in the criminal justice system).

\textsuperscript{240} WASH. CONST. art. I, § 1.

\textsuperscript{241} Hershkoff, \textit{Positive Rights}, supra note 27, at 1157–58; see also Hershkoff, \textit{Passive Virtues}, supra note 27, at 1887 (claiming elected judges “carry a democratic portfolio”); Paul W. Kahn, \textit{Interpretation and Authority in State Constitutionalism}, 106 HARV. L. REV. 1147, 1156 (1993) (“[State court judges’] institutional position can be thought of as intermediate between that of federal judges and that of elected representatives.”). However, Hershkoff acknowledged that election does not turn “black-robed judges into representative decisionmakers.” Hershkoff, \textit{Positive Rights}, supra note 27, at 1158.

\textsuperscript{242} Eugster v. State, 171 Wash. 2d 839, 259 P.3d 146 (2011) (holding judiciary’s role is distinct from legislative branch due to obligations of impartiality and independence; election of judges does not make them like legislative or administrative elected officials whose core duties are to speak for and carry out their constituents’ interests).

\textsuperscript{243} Joshua G. Urquhart, \textit{Disfavored Constitution, Passive Virtues? Linking State Constitutional
suits play in correcting government transgressions.” Notably, flexible taxpayer standing is an important link between positive rights advocacy and the disfavored constitution, where this standing is used to enforce state constitutions’ “positive rights and regulatory norms,” including constitutional restrictions on taxes, debt, and expenditures.

2. Nevada’s Interpretational Misstep Demonstrates the Duty to Harmonize Education Rights and the Disfavored Constitution

Because of its disfavored status of state fiscal protections, courts may be tempted to use interpretational techniques that allow “rights” provisions to eclipse mere “structural” provisions. Nevada’s failed interpretational experiment underscores the need for Washington to employ the interpretational technique mandated by article I, section 29’s statement that all provisions are mandatory.

After a brief flirtation with allowing “substantive” constitutional duties to trump “procedural” fiscal provisions, Nevada quickly reversed its position and conceded judicial interpretation requires the State to read its constitution as a whole, with each provision harmonized. In Guinn v. Legislature, the Nevada Supreme Court faced “legislative paralysis” over the votes needed to pass a school appropriations bill and supporting revenue legislation, given a fairly new voter-initiated constitutional amendment that required a two-thirds legislative vote to increase taxes. The Guinn Court concluded that when “a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield,” and the supermajority provision could not be used to avoid other constitutional duties. But

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just a few years later, Nevada retreated from this interpretational position, rejecting *Guinn*’s artificial substantive/procedural distinction and declaring that the constitution “should be read as a whole, so as to give effect to and harmonize each provision.”

3. *Positive Rights Must Be Balanced with the Disfavored Constitution’s Democratic Protections for Taxpayers*

Considered in light of the disfavored constitution, the Washington State Supreme Court’s new jurisprudence must address how positive rights create an unavoidable burden for the taxpayer. If a court fails to enforce a positive right in a foundational document, then arguably that document loses its primacy, undermining respect for the rule of law. At the same time, if the Court takes an enforcement approach that conflicts with other constitutional provisions, it likewise undermines the value of the constitution.

This tension hearkens back to the Odysseus analogy: to what higher values did the voters bind themselves, and subsequent generations, when they ratified the constitution?

The paramount duty declares an important constitutional norm of educational opportunities for children, but the taxing and spending provisions of state constitutions also declare important norms of separation of powers, popular representation, and taxpayer protection. Even if the ratifying voters intended the paramount duty clause to create judicially enforceable positive rights, these same voters did not delegate budgeting and taxing authority to the judicial branch. Using positive rights enforcement to compel expenditures defined by the judiciary rather than the Legislature conflicts with the disfavored constitution.

Ultimately, the people define the resources that are available to state government. It is the most fundamental aspect of popular constitutionalism. They may do so directly through voter-initiated measures that cut state taxes or increase state budget obligations.

places both expenditures and revenue policies beyond the control of a legislative majority, state cannot function as a republican government).


251. Odysseus’ directive to his sailors did not affect his son Telemachus, for example, or any future generations home in Ithaca. See *Pettys*, supra note 172, at 325 (“Those who ratified the Constitution elected to try to bind not only themselves, but future generations who were not even parties to the deliberations, as well.”).

252. See 2011 Wash. Sess. Laws 141 (repealing tax increases enacted the previous legislative session).
They may do so indirectly through the legislatures they choose and the guidance they provide to those representatives. In turn, these manifestations of the people’s political power shape the programs funded by the state in the budget that the legislature must balance among a host of competing priorities. Collectively, the people get what they pay for.

Under the Odysseus analogy, the Court in fulfilling its interpretational task must adhere to the people’s highest values as expressed in the constitution, rather than to the will of a transitory legislative or popular majority as expressed in any particular budget, bill, or ballot measure. But when the Court, through positive rights interpretation, constitutionalizes a portion of the state budget, it is also imposing an unavoidable tax burden on the people, constitutionally dedicating an unspecified revenue stream to support the right as defined by the Court. If the right is defined judicially rather than through “supplemental legislation,” the voters are deprived of a say in how the State establishes and allocates their tax contributions. Notwithstanding the voters’ policy and fiscal preferences as expressed in their votes for legislators or ballot measures, the Court is telling the people that their judicially defined highest values require billions of dollars in new taxes or in cuts to other state programs. To illustrate the scope of the legislature’s dilemma, the budget could eliminate state funding for the entire state higher education system and still lack sufficient resources to correct the structural salary shortfall identified in McCleary. Notwithstanding the priorities of the voters and their representatives, the paramount duty clause could consume all the resources available to government for its other constitutionally required tasks, from operation of the constitutional state offices to other possible positive duties, as well as essential but not constitutionally specified programs for public peace, health, and safety. Given that all constitutional provisions are equally mandatory, and that all provisions are part of the electoral bargain ratified by the people, orders in furtherance of the paramount duty do not trump the reservation of taxing and spending authority to the legislative branch.

253. See 2015 Wash. Sess. Laws 11 (requiring the State to fund additional school staff as part of the basic education program).
254. See Pettys, supra note 172,(discussing Odysseus analogy).
255. Total state NGFS + Op appropriations in the 2015–2017 budget for state higher education institutions and financial aid are $3.525 billion, or 9.2 percent of total NGFS + Op appropriations—about the same amount as one of the lower estimates of the salary shortfall. BUDGET NOTES, supra note 2, at 305; see supra note 2 (describing shortfall estimates).
256. See Talmadge, Property Absolutism, supra note 38, at 872–76 (listing other possible positive duties).
CONCLUSION

In Seattle School District, the Court pledged the State to a unique positive rights interpretation of the paramount duty clause, but it avoided the dilemmas of enforcement against the political branches. Now, in McCleary, the Court has reaffirmed its commitment to a positive education right, but it has ventured into the “Stygian swamp” of positive rights enforcement against a co-equal branch of state government, the only branch to which the people delegated the political authority to levy taxes and to spend the revenue raised thereby. From the perspective of the state fisc, judicially enforceable positive rights pose unique risks to separation of powers due to the lack of constitutional checks to counterbalance the scope of the judicial branch’s interpretation.

The judicially and statutorily imposed 2018 deadline is approaching. The Court declared that the Legislature’s failure to provide the judicially requested “plan” constitutes sanctionable contempt of court. Under SHB 2776, the Legislature has funded its statutorily defined education enhancements in compliance with their respective statutory due dates. Admittedly, the Legislature has not yet corrected the structural shortfall in state salary allocations, but again, the deadline for funding reform has not yet elapsed.

If the Court fails to enforce a positive right in the foundational document, then arguably that document loses its primacy, undermining respect for the rule of law and for the Court as a branch. Yet the same result occurs if the Court enforces the document selectively, failing to acknowledge that the delegation of political power in the constitution itself establishes outer bounds for judicial enforcement of other constitutional provisions. The disfavored constitution protects both the Legislature’s fiscal powers and the people’s right to have these decisions made solely by their elected representatives. The disfavored status of the fiscal constitution among academics and the judiciary “may be helpful in reminding us of the need for modesty” in assuming that state constitutions are a force for judicially defined independent constitutional

257. Neb. Coal. for Ed. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007) (rejecting school funding challenge to avoid “the thickets that can entrap a court that takes on the duties of a legislature”).
258. See supra note 152 (discussing statutory due dates and implementation steps taken in 2015–2017).
259. Usman, supra note 27, at 1530–32; see also Tushnet, supra note 44, at 1915 (describing risk that lack of alignment between strength of right and remedy may create cynicism about constitution).
norms.\textsuperscript{260} An approach that balances positive duties with restrictions in the disfavored constitution results in greater fealty to the foundational document’s textual and structural protection for the relationship between the people and their government. Or, stated differently, “I’m not saying it doesn’t mean \textit{anything}. All I am saying is why does it have to mean \textit{everything}?”\textsuperscript{261}

\textsuperscript{260} Briffault, supra note 18, at 957.

\textsuperscript{261} \textit{When Harry Met Sally} (Columbia Pictures 1989). Compare id., with Tushnet, supra note 44, at 1898 (“Nonjusticiiable rights need not be legally irrelevant.”).
EVALUATING INTERNATIONAL STATE CONSTITUTIONALISM

Johanna Kalb*

I. THE ORIGINS OF INTERNATIONAL STATE CONSTITUTIONALISM

Over the last ten years, following a series of high profile state and federal court decisions citing foreign and international law, interest has grown in state constitutions as a site of human rights advocacy and enforcement. The arguments in favor of state court engagement have taken two overlapping forms, tracking the competing theories of state constitutionalism more generally. By one account, the international human rights treaties and the rights jurisprudence of other countries offer rich interpretive materials to give meaning to state constitutional provisions, particularly those that lack federal analogues. Advocates of

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1. See Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (referencing the decision of the European Court of Human Rights holding that laws proscribing consensual adult homosexual conduct violate the protections of the European Convention on Human Rights); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 966 n.31 (Mass. 2003) (citing to a decision of a Canadian court interpreting the Canadian Charter of Rights and Freedoms when considering whether limiting the right to civil marriage to heterosexual couples violated the state constitution); State ex rel. Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003) (referencing the Convention on the Rights of the Child (CRC) and other treaties prohibiting the execution of juveniles), aff’d sub nom. Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (citing the CRC and the practice of other countries in concluding that the Eighth Amendment prohibits the execution of juvenile offenders).


3. See Jonathan L. Marshfield, Foreign Precedent in State Constitutional Interpretation, 53 DUQ.
this approach point to the shared lineage that links modern state constitutions with these international instruments and with other national documents. 4 This “communitarian” 5 view of international state constitutionalism focuses on the way that international materials can help to advance each state’s particular character, which is “derived from [its] unique history, geography, economy, and relationship to the rest of the country.” 6

The other account focuses on the role of state courts and constitutions in expanding respect for individual rights and advancing national human rights compliance. 7 By incorporating the rights understandings expressed in the international human rights treaties, state courts, through constitutional and statutory interpretation, can help to satisfy the nation’s international commitments. This is particularly true in areas of law that have historically been reserved to state and local control. 8 Moreover, by adopting rights protections that are broader or different than those found

L. REV. 413 (2015). A word on definitions is in order here. As a formal matter, treaties that have been ratified, and even those that have only been signed, represent a binding legal commitment on the United States, while “foreign law,” the constitutional or statutory law of other countries, can have only persuasive value. As a practical matter, however, both federal and state courts often rely on international treaty law, foreign law, and the practice of other states for their persuasive authority, sidestepping entirely the question of whether the treaty should have binding legal effect. This was an observation that I made in my previous study of these cases, see Johanna Kalb, Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín, 115 PENN. ST. L. REV. 1051, 1072 (2011), and it remains true with the newer set of cases. When discussing my findings in the briefs and cases, I use the terms “international” and “foreign” to distinguish these sources; however, when I refer generally to “international state constitutionalism,” I mean to reference state courts’ general use of international and foreign law as persuasive sources, tracking the prevalent (if imprecise) practice in the courts. See Melissa Waters, Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, 107 COLUM. L. REV. 628, 630 (2007) (noting that commentators tend “to conflate foreign and international legal sources and to treat both kinds of sources as part of a broad, vaguely defined category known as ‘foreign authority’”); Sarah H. Cleveland, Our International Constitution, 31 YALE J. INT’L L. 1, 10–11 (2006) (highlighting the United States Supreme Court’s ambiguous use of these sources).


5. See James Rossi, Assessing the State of State Constitutionalism, 109 MICH. L. REV. 1145, 1154 (2011) (defining communitarian theory as one that “grounds state constitutional interpretation in the character of an individual state as a political community”).


8. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 MICH. L. REV. 390, 401–09 (1998) (describing areas in which domestic federal regulatory authority is limited, and arguing that the treaty power should not permit the federal government to exceed these restraints).
in the federal Constitution, state courts can help to deepen and reshape the rights dialogue at the national level. These arguments emphasize the value of state constitutionalism in terms of its contribution to the broader federal constitutional project.9

The promise of these forms of international and transnational engagement has drawn the attention of advocates and scholars, but their impact on state constitutional interpretation has been harder to assess.10 Five years ago, I conducted a survey of state court decisions to learn whether and how these courts were responding to the growing call for state court engagement with international human rights law. The results of the study were mixed. The overall number of references to the major human rights treaties in these cases was very low. Of the state court cases, published and unpublished, available on Westlaw, only 187 included references to any of seven United Nations human rights instruments signed or ratified by the United States.11 In those rare instances where human rights treaties were invoked by courts for any reason other than to summarily reject a treaty-based claim, they were usually used to help understand the scope or shape of a constitutional or statutory right. The treaties were referenced by state courts, at different levels, to extend the basic right of marriage to same-sex couples,12 to end the use of capital punishment for juvenile offenders,13 to protect the rights of the incarcerated,14 and to require age-appropriate consultation

9. James Gardner and Paul Kahn are leading proponents of this theory of state constitutionalism. See JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 253–67 (2005); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 HARV. L. REV. 1147, 1156 (1993) (arguing that “[a]t its best, state constitutional discourse can be an interpretive effort directed at the same principles of the rule of law that underlie federal constitutionalism”).

10. Some have argued that the same is true for the broader project of state constitutionalism. See James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761 (1992).

11. The citations broke down as follows. The International Covenant on Civil and Political Rights (ICCPR) was cited 118 times; the Convention Against Torture (CAT) was cited twenty-four times; the CEDAW was cited four times; the CRC was cited sixteen times; the Genocide Convention was cited four times; the ICESCR was cited three times; the CERD was cited sixteen times; and the CRPD was cited once. See Kalb, supra note 3, at n.23.


with children in custody and placement hearings\textsuperscript{15} and periodic review of guardianship arrangements to protect the rights of persons with disabilities.\textsuperscript{16}

While this use of international human rights law seemed to be meaningful in the cases in which it was applied, my review suggested that it was still quite rare. I concluded that study by considering some of the possible obstacles to this kind of engagement with human rights law, pointing to lack of technical capacity of the judiciary and political resistance as two possible reasons that state courts might avoid considering human rights. In this Essay, I return to these barriers to explore how state court engagement with international human rights law is developing, and to consider how the realities of its practice fit within the broader conversation about the purpose and value of state constitutionalism.

II. ENABLING AND UNDERMINING INTERNATIONAL STATE CONSTITUTIONALISM

In the five intervening years, the technical capacity of the judiciary to consider international and comparative law arguments has grown tremendously. As a survey of state case briefing depicts, a larger and more diverse set of human rights advocates are filing an increasing number of briefs on a wider variety of cases in state courts across the country. Thus, the technical barriers to state court consideration of human rights arguments appear to be rapidly diminishing.

Over the last five years, there has been a dramatic increase in the number of briefs filed referencing the international human rights treaties that the United States has signed or ratified. As of April 2015, a search performed in the Westlaw AllStates Brief database identified a total of 1108 briefs meeting these criteria. Of those, 692 of these briefs, over half, were filed in the last ten years.\textsuperscript{17} The breakdown is as follows:\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{15} See In re Pedro M., 864 N.Y.S.2d 869, 872 n.8 (Fam. Ct. 2008); Batista v. Batista, No. FA 92 0059661, 1992 WL 156171, at *6–7 (Conn. Super. Ct. June 18, 1992) (considering the CRC in determining how to weigh the preferences of the child in a custody suit and expressing “great concern and embarrassment that the United States of America is not a signator to that convention”).
  \item \textsuperscript{16} See In re Mark C.H., 906 N.Y.S.2d 419, 433–34 (Cty. Sur. Ct. 2010). The court explained that as a signatory to Convention on the Rights of Persons with Disabilities, the United States is required by the Vienna Convention “to refrain from acts which would defeat [the Disability Convention’s] object and purpose.” Id. at 433 (alteration in original).
  \item \textsuperscript{17} That is in part attributable to the increased availability of more recent state briefs. For some states, selected briefs are only included in the database beginning in the early 2000s. However, even in those states where a more complete set of briefs are included, the incidence of briefs referencing human rights treaties have grown rapidly. For example, in California, there have been 243 briefs
\end{itemize}
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<table>
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<th>Treaty</th>
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Moreover, a review of these briefs suggests a growing interest in and facility with international human rights law among an expanding set of actors. Briefs have been filed in all fifty states, addressing a growing set of issues and claims. Human rights law has been invoked in cases related to bail access, domestic violence, access to counsel, reproductive rights, prison conditions, and housing. The briefs have also grown more sophisticated, citing not just the text of the treaties themselves, but also the interpretive documents of the U.N. treaty bodies, as well as regional and foreign law. This survey also suggests an increasing referencing the ICCPR since 1988, and 180 since 2005. In Pennsylvania, there have been sixty-two briefs filed since 1994, and forty-six since 2005.

18. The numbers of citations exceeds the number of total briefs because some filings cite more than one treaty.

19. See Amicus Curiae Brief of New York Civil Liberties Union et al. at 9, People ex rel. McManus v. Horn, 967 N.E.2d 671 (N.Y. 2011) (No. 2012-0034) (noting that at the time the legislation was adopted, international law—including the ICCPR—“recognized a defendant’s right to pretrial release barring extraordinary circumstances”).


24. See Brief for Appellants at 16–18, Belanger v. Mulholland, 30 A.3d 836 (Me. 2011) (No. Ken.-11-132) (arguing that the state statute regarding the warranty of habitability should be interpreted, in line with human right standards, to include access to running water).


26. See, e.g., Brief of Amicus Curiae Human Rights Advocates in Support of Appellant at 18–23,
institutional capacity for making human rights claims and arguments. The briefs are filed by a wide range of advocates and institutions including domestic legal advocacy organizations, human rights clinics, and legal aid and bar associations.

While capacity as a barrier is diminishing, political resistance to consideration of the “foreign” and “international” has grown. In 2010, seventy percent of voters supported the “Save our State” amendment to the Oklahoma constitution, which directed the state’s judges not to “look to the legal precepts of other nations or cultures,” and not to consider “international law” or “Sharia law” in their decision-making. After the amendment provision was challenged and struck down on First Amendment grounds, the state legislature enacted a new statute that no longer mentioned Sharia but banned reliance on foreign law unless it provides “the same fundamental liberties, rights, and privileges granted


27. For example, the Juvenile Law Center, a forty-year-old advocacy organization based in Philadelphia, has filed nineteen briefs citing international treaty law, of which seventeen were filed in the last decade, and eleven in the last five years. The ACLU and its chapters have filed approximately fifty briefs citing the major human rights treaties of which thirty-five were submitted in the last decade.


under the United States and Oklahoma Constitutions.”

The negative reception that greeted the Oklahoma amendment in federal court did little to discourage other states from considering international and foreign law bans. By 2013, variations on the Oklahoma model had been introduced in more than one hundred other bills in thirty-one other states. Different versions prohibit consideration of Sharia law, religious laws, foreign religious codes, legal precepts of other nations or cultures, and international law. While only a handful of these restrictions have been adopted, and their language makes the restrictions easy to evade, their popularity sends a clear message to state jurists, many of whom are elected, about the potential costs of referencing these sources in their decision-making.

Perhaps as a result of the backlash against foreign and international law citation, the tremendous growth in cases in which human rights arguments are raised has not translated into a dramatic change in state

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31. See OKLA. STAT. ANN. tit. 12, § 20(B) (West, Westlaw through 2015 1st Sess.) (“Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.”).


courts’ uses of these instruments. Five years later, the total number of cases citing these treaties is 255, a sizable jump from 2010, but still a very small number in absolute terms when compared to the thousands of cases decided by state courts every year. Moreover, the vast majority of the new cases still are in the same handful of areas; the most common use of international law is to challenge the application of the death penalty or of a sentence of life without parole. These claims continue to be summarily rejected (for the most part) by state courts, even in Eighth Amendment cases, where a long line of Supreme Court precedent relies on international law and foreign practice, and where detailed briefs are filed raising these arguments.

Nonetheless, despite their infrequent appearance in the opinions, the human rights treaties do shape state court consideration of rights claims in some areas, particularly in the area of family law, where state courts exercise broad authority. Human rights treaty law, especially the CRC and the CRPD, continues to be invoked by courts to ensure that family law proceedings are inclusive and that the voices of vulnerable parties are adequately represented in these significant decisions. For example, in 2014, the Supreme Court of Ohio invoked the CRC in deciding whether a court may exclude a child from custody proceedings ancillary to a divorce.

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34. The breakdown is as follows. The ICCPR has been cited 154 times; CAT has been cited forty-four times; CRC has been cited twenty-seven times; the Genocide Convention was cited four times; the ICESCR was cited three times; the CERD was cited twenty-one times; and the CRPD was cited twice. For a more extensive study of these cases, see The Opportunity Agenda, Human Rights in State Courts 2014 (2014), http://opportunityagenda.org/files/field_file/2014.2.06.HumanRightsinStateCourts.pdf [https://perma.cc/3G2T-LVDW].

35. The exception is the CAT, which was invoked in almost one-third of the cases to avoid deportation.

36. See Appellant’s Opening Brief at 245, People v. Dworak, No. S135272 (Cal. filed Feb. 4, 2014), 2014 WL 1046638 (arguing that California’s death penalty law violates the ICCPR); Appellant’s Opening Brief, State v. Serrano, 324 P.3d 1274 (Or. 2014) (No. S058390) (arguing that Oregon’s death penalty statutes violate the ICCPR because the statutes fail to adequately limit the cases in which death may be imposed); Appellant’s Opening Brief at 77, Moore v. State, No. 55091, 2012 WL 3139870 (Ne. Aug. 1, 2012), 2010 WL 10932173 (arguing against the death penalty, noting that Nevada is prohibited under the ICCPR from “arbitrarily” depriving any citizen of his or her life); see also Brief of Amicus Curiae American Civil Liberties Union Foundation of Nebraska at 5–8, State v. Castenada, No. S-11-0023, 842 N.W.2d 740 (Neb. 2014), 2012 WL 5855987 [hereinafter Amicus Brief of ACLU of Nebraska] (arguing that sentencing juveniles to life sentences without parole violates international law, including the Convention Against Torture); Brief for Appellant at 36–43, Commonwealth v. Jacobs, No. 182 EDA 2010, 2011 WL 7121005 (Pa. Super. Ct. Oct 24, 2011), vacated, 69 A.3d 238 (Pa. 2013), 2010 WL 7698880 (arguing that sentences of life without parole for juveniles are barred by international law, including the Convention on the Elimination of Racial Discrimination).

litigation is an evolving issue,” citing to the provision of the CRC which provides that when children have an interest in a pending case, “they shall be given an opportunity to participate in the proceedings and make their views known.”38 Similarly, when considering a petition to terminate a guardianship for a person with intellectual disabilities, the Surrogate’s Court of New York County found that under both state law and the CRPD, the State was required to employ the least restrictive means available to achieve its objective of protecting the individual and the community.39 The Court in In re Guardianship of Dameris L.40 noted that “[w]hile the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision making, is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections.”41 In both cases, the treaty was invoked not as a binding legal standard, but as a point of reference that helped to shape the court’s understanding of the interests at stake. And, perhaps notably, for the first time that I have been able to identify, a state court invoked a treaty in order to articulate a legal standard that it would ultimately reject. In Ex parte E.R.G.,42 the Supreme Court of Alabama struck down the Alabama Grandparent Visitation Act as an unconstitutional interference of the State with the parents’ fundamental right to direct the upbringing of his or her children. In reaching this conclusion, the Alabama Court critiqued the “best-interest-of-the-child”43 standard of the CRC, along with the standard’s application by courts in Pennsylvania, North Carolina, and Washington.44

Even when treaty-based arguments or claims are rejected, these cases may be part of a broader inter-court and inter-branch dialogue that ultimately leads to recognition and realization of a right. State court human rights litigation has been an integral part of coordinated campaigns to abolish the juvenile death penalty and enforce the Vienna Convention on Consular Rights. In the former case, this campaign ultimately resulted in a success in state court that was affirmed by the

38. Id.
41. Id. at 855.
42. 73 So.3d 634, 639 ( Ala. 2011).
43. Id. at 658 n.14.
44. Id. at 393.
United States Supreme Court. In the latter, movement towards compliance with the treaty regime occurred despite and in the midst of a string of losing decisions in both state and federal courts.

Over the last five years this strategy was replicated in the campaign to end juvenile life without parole (JLWOP). Following the Supreme Court’s determination in *Miller v. Alabama* that sentencing juvenile offenders to mandatory life without parole violates the Eighth Amendment, state courts had to determine whether this holding applies retroactively. In many of these cases, either the parties or the amici argued that JLWOP violates the United States’ international law obligations. Most opinions did not reference these treaty-based


46. See Janet Koven Levit, *Does Medellín Matter?*, 77 FORDHAM L. REV. 617, 630 (2008) (arguing that by the time the Supreme Court rejected the availability of a judicial remedy for violation of the treaty right to consular notification, “a core goal of Vienna Convention litigation, compliance, had been met”).


48. Id. at 2464.

49. As this Essay went to press, the United States Supreme Court resolved this question, holding in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), that the Miller ruling applies retroactively, and that prisoners now serving mandatory life sentences for crimes committed while they were children are entitled to have their sentences reevaluated or to be considered for parole. Id.

arguments, however, in Diatchenko v. District Attorney for Suffolk District,\(^{51}\) the Supreme Judicial Court of Massachusetts referenced the CRC in holding that Miller applied retroactively to cases on collateral review.\(^{52}\) The Diatchenko decision was then cited by other state courts, in support of their own determination that Miller applied retroactively.\(^{53}\)

Treaty-based arguments may also shape judges’ and justices’ consideration of a particular rights claim, even if the results are not apparent in their constitutional decision-making. Here in Washington, the Washington State Supreme Court has been asked at least twice in the last decade to recognize a right to civil counsel as part of its state constitutional guarantees.\(^{54}\) Both times, a detailed amicus brief was filed, articulating the international law arguments for extending the right to counsel.\(^{55}\) The Court rejected both claims without commenting on the international law arguments that were raised by the parties and amici.\(^{56}\)

Yet, simultaneously, the Washington State Supreme Court has also taken a leadership role in expanding access to legal services in the state through its adoption of an innovative Limited License Legal Technician program, which creates a new category of professionals, who receive a shorter and less expensive course of training, to provide assistance to persons going through divorce, custody, and other common family law proceedings.\(^{57}\) So while the Court has so far rejected constitutional claims as a way of expanding access to counsel in civil cases, it has used its administrative authority both to elevate the status of the right to counsel and to push for its realization within the boundaries of the state.

\(^{51}\) 1 N.E.3d 270 (Mass. 2013).

\(^{52}\) Id. at 276.

\(^{53}\) See, e.g., State v. Mántich, 842 N.W.2d 217 (Neb. 2014); State v. Mares, 335 P.3d 487 (Wyo. 2014). Similarly in Montgomery, the United States Supreme Court did not reference foreign and international law, but it did reference Diatchenko in its decision. Montgomery, 577 U.S.__, 136 S. Ct. at 725.

\(^{54}\) See King v. King, 162 Wash. 2d 378, 174 P.3d 659 (2007) (examining whether an indigent parent has a constitutional right to counsel in a dissolution proceeding); In re Dependency of M.S.R. & T.S.R., 174 Wash. 2d 1, 271 P.3d 234 (2012) (considering whether children have a constitutional right to counsel in parental termination proceedings). In one case, the state constitutional argument was not squarely before the Court). The constitutional right to counsel argument was raised for the first time on appeal. Id. at 4, 271 P.3d at 237. While the Court chose to consider the federal constitutional claim, it rejected the case as an inappropriate vehicle for considering the full scope of article I, section 3 of the Washington State Constitution. Id. at 20 n.11, 271 P.3d at 245 n.11.

\(^{55}\) See generally, Corrected Amicus Curiae Brief of International Law Scholars in Support of Appellant, King 162 Wash. 2d 378, 174 P.3d 659 (No. 79978-4).


Meanwhile, outside the courts, a variety of other state and local actors have become increasingly engaged in helping to protect and advance human rights. As the Human Rights Institute at Columbia Law School has detailed, several cities have become active agents in human rights compliance, both by endorsing treaty principles and by creating special commissions or directing city agencies to consider human rights principles in the performance of their duties.\(^5^8\) In some cases, these resolutions have followed the rejection of a treaty-based claim in state or federal court.\(^5^9\) Thus, it seems possible and even likely that rejected treaty-based arguments can help to generate awareness of and engagement with rights claims.

III. ASSESSING THE PROSPECTS OF INTERNATIONAL STATE CONSTITUTIONALISM

In sum, the last five years have witnessed a marked increase in the energy expended towards both incorporating and resisting the international and the foreign. Despite the detailed direction provided by scholars and advocates, and even by some courts’ judges and justices,\(^6^0\) state courts have shown limited appetite for drawing on international materials in their decision-making. And although measurement of these references is more challenging, citations to the practice of other constitutional and regional courts also seems to be quite rare.\(^6^1\)


\(^{59}\) For example, several American cities have adopted resolutions recognizing the human right to be free from domestic violence and acknowledging that state and local government have a duty to adopt policies that secure this right. See Joann Kamuf Ward & Erin Foley Smith, Freedom from Violence: A Fundamental Human Right, Cities for CEDAW (Oct. 3, 2014), http://citiesforcedaw.org/freedom-from-violence-a-fundamental-human-right/ [https://perma.cc/2KJL-8AF8]. These resolutions were adopted in the wake of the 2005 decision of the United States Supreme Court in Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005), rejecting the respondent’s claim that she had a constitutional right to enforcement of her restraining order—and the subsequent holding of the Inter-American Commission on Human Rights, finding that the United States had violated the human rights of Ms. Lenahan (formerly Gonzales) and her three deceased children. In that case, the absence of judicial remedies has helped to motivate a successful legislative advocacy campaign. Id.


\(^{61}\) Tracking foreign references is more challenging than locating references to the international
In one view, these results are just more evidence of the failure of the communitarian vision of state constitutionalism. Yet, ending the story here would miss a substantial amount of important activity. As I have tried to illustrate, state court advocacy has been an integral part of successful national and local campaigns to reshape a variety of rights at the local, state, and federal levels. The impact of this work is easier to assess in accordance with the functionalist theories that measure the value of state constitutionalism in terms of the way that it influences the federal-state dialogue over rights. The last five years of briefs also suggest that the practice of international state constitutionalism is also more of a national effort than a bounded one. These state and local activities are often connected to a broader national and transnational movement that seeks out friendly fora to test new arguments and claims. And while, at first glance, the state foreign and international law bans might seem to be more expressive of a communitarian theory of state constitutions, scratching beneath the surface reveals that these efforts too are the product of a national and transnational network of human rights treaties. For a window into how frequently state courts cite to other jurisdictions, I searched the Westlaw database for the names of the high courts that have been actively engaged in the practice of foreign citation and surveyed the cases that have been decided in the last ten years. The Constitutional Court of South Africa was referenced once by the Supreme Court of the Navajo Nation. See Shorty v. Greyesyes, 12 Am. Tribal Law 16 (2014). The Canadian Supreme Court has been referenced in thirteen cases, of which two involved analysis of Canadian law for its persuasive authority (as opposed to situations in which the consideration of foreign law was required under a choice of law doctrine). See In re Sheila W., 835 N.W.2d 148, 149 (2013) (considering the Court’s analysis of the mature minor doctrine); E.S. v. SS, No. 23009/07 (N.Y. Sup. Ct. Feb. 17, 2010) (referencing, at a party’s direction, a parallel decision of the Supreme Court of Canada in a dispute over maintenance and support). The Supreme Court of the United Kingdom was cited once. See Allen v. Hamden Plains Cemetery Ass’n, No. CV095031784, 2015 WL 3652242, at *4 (Conn. Super. Ct. May 19, 2015) (reviewing the Supreme Court’s analysis of the nondelegable duty doctrine). The jurisprudence of the European Court of Human Rights was cited four times for its persuasive authority. See Lantz v. Coleman, No. HHDCV084034912, 2010 WL 1494985, at *18 (Conn. Super. Ct. Mar. 9, 2010); Comm’t of Corr. v. Coleman, 38 A.3d 84, 111 (Conn. 2012); People v. Pratcher, No. A117122, 2009 WL 2332183 (Cal. Ct. App. July 30, 2009), as modified on denial of reh’g (Aug. 26, 2009); State v. Santiago, 49 A.3d 566, 597 (Conn. 2012) (Harper, J., concurring in part and dissenting in part), opinion set aside and supplemented on reconsideration, 122 A.3d 1 (Conn. 2015). The Inter-American Court of Human Rights has not been cited in any opinions since 2005.

62. Many of the organizations and advocates who are engaged in filing these briefs are part of the Bringing Human Rights Home Network, a project of the Columbia Law School Human Rights Institute, which seeks to connect and equip lawyers around the United States who are using human rights strategies in their domestic work. Now in its fifteenth year, the Network has 800 members in thirty-seven states. See Risa E. Kaufman, The Bringing Human Rights Home Lawyers’ Network: A Profile, 41 HUM. RTS. MAG., no. 2, 2015, at 20.

63. See supra note 4 and accompanying text.
actors.64

Returning then to the competing understandings of state constitutionalism, this survey suggests that as a general matter, on the rare occasions in which state courts engage with international and foreign sources, they understand themselves primarily as participants in a larger federal rights conversation. Nonetheless, the debates over the anti-foreign law bans illustrate that state constitutions do offer sites for popular engagement with law as a source of state identity. And the variations in the way that these debates have played out (despite the shared origins of the proposed bills) point to differences in the ways that the legislators and voters in the various states view themselves in interaction with both the national and international.65 Thus the argument that state constitutions are a site where state identity is made (as opposed to where it is found) resonates in these cases.66 Foreign and international law is not invoked to express state political identity, but rather to create it.67

The project of international state constitutionalism is most coherent when understood through a lens proposed by Justin Long. Long has argued for the benefits of “intermittent state constitutionalism,” recognizing that state constitutional actors have multiple identities, and therefore that the choices that they make as to when and how to invoke state constitutional law are themselves meaningful and constitutive of state identity.68 By choosing the state law as the site for resolving a

64. See Judith Resnik, Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production, 10 Int’l J. Const. L. 531, 554 (2011) (“The ‘American Laws for American States’ movement is itself border-crossing, propelled by translocal organizations such as the American Public Policy Alliance, the Center for Security Policy, ACT! For America, Society of Americans for National Existence (SANE) and the Stop the Islamization of America, an entity that also crosses oceans as it is related to Stop the Islamization of Europe.”).

65. In South Dakota, for example, lawmakers first proposed a constitutional amendment that would ban the use of “international law, the law of any foreign nation or any foreign religious or moral code” in state courts. In response, a mix of local and national actors spoke out to criticize the ways in which adopting the amendment would isolate the state of South Dakota from valuable forms of international cooperation, with economic and practical implications for the state’s citizens. Tim Murphy, SD Rep. Who Authored Abortion Bill Nixes Sharia Ban, MOTHER JONES (Feb. 18, 2011, 2:38 PM), http://www.motherjones.com/mojo/2011/02/sd-rep-who-authored-abortion-bill-nixes-sharia-ban [https://perma.cc/BY42-DM8W]. As a result, the bill that was ultimately passed was limited to preventing the enforcement of “religious codes.” H. 1253, 87th Leg., Reg. Sess. (S.D. 2012) (signed into law March 12, 2012).

66. Long, supra note 6, at 87.

67. As Justin Long explains, “The doctrine that state communities express their character in state constitutions, which can then be read like tarot cards by the state high courts is wrong logically and empirically . . . . Rather . . . the opposite relation exists: state constitutions and constitutional decisions help to create a sense of cultural statehood, not express it.” Id.

68. Id. at 92; see also Robert A. Shapiro, Identity and Interpretation in State Constitutional Law,
particular legal question, state actors communicate a message about its significance to that political community. Long suggests that this is productive; the occasional “[e]mphasis on the state as a unique community permits citizens to deal with each other as different, without sacrificing the common aspects of national identity.”

By its very nature, international state constitutionalism problematizes the idea of a single consistent understanding of state constitutional purpose. In some instances, state courts do rely on international and foreign sources to offer broader or different constitutional protections for individual liberties. However, when they do so through reliance on a ratified international treaty or as subnational actors representing the United States in the global community, they also act to reinforce federal authority and to provide additional fora for articulating rights in ways that should resonate nationally. Thus, any decision invoking international law is always part of this larger national and global rights dialogue, regardless of its framing. Moreover, even if (and perhaps because) the incidence of foreign and international citation is rare, the choice to invoke these sources in a particular case communicates something about its stakes for the state community.

CONCLUSION

This project began with an attempt to quantify state courts’ use of international human rights treaty law. What this study suggests is that frequency may not be the most meaningful metric for evaluating these cases. Rather the promise of international state constitutionalism may be

69. Long, supra note 6, at 102.
70. See, e.g., In re Marriage Cases, 183 P.3d 384, 426 n.41 (Cal. 2008) (citing to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in supports of its determination that marriage is a basic civil right); Moore v. Ganim, 660 A.2d 742 (Conn. 1995) (referencing the UDHR in arguing that the Connecticut Constitution creates a governmental obligation to provide for minimal subsistence); Sterling v. Cupp, 625 P.2d 123, 132 (Or. 1981) (citing the UDHR and the ICCPR in support of its conclusion that cross-gender pat downs of prisoners’ intimate bodily areas violate the state constitutional ban on unnecessarily rigorous treatment of prisoners).
71. See Diatchenko v. Dist. Attorney for the Suffolk Dist., 466 Mass. 655, 671 (2013) (“As John Adams recognized over 215 years ago, we belong to an international community that tinkers towards a more perfect government by learning from the successes and failures of our own structures and those of other nations.” (citing J. ADAMS, PREFACE, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1797))).
better understood through closer examination of when and under what circumstances state courts invoke international and foreign law, and the institutional arrangements that facilitate or inhibit it. Just as intermittent state constitutionalism allows for and enables the co-existence of state identity and national patriotism, these occasional cases situate particular rights questions within a global context. They help to constitute state political identity while simultaneously engaging the state citizenry in a conversation that transcends state and national borders.
“DOES OREGON’S CONSTITUTION NEED A DUE
PROCESS CLAUSE?”

THOUGHTS ON DUE PROCESS AND OTHER
LIMITATIONS ON STATE ACTION

Thomas A. Balmer*

INTRODUCTION

During a legislative hearing last year, an Oregon state senator asked, “Does Oregon’s Constitution need a due process clause?” That question raises fundamental issues of constitutional law and of the relationship between the federal and state constitutions. Can and should state courts rely primarily on federal constitutional principles, made applicable to the states through the Fourteenth Amendment’s Due Process Clause, in deciding critical questions about the rights of criminal defendants, freedom of speech and religion, and equal protection? Or should state courts focus on their own constitutions—state due process, equal privileges and immunities, and similar “great ordinances” or more specific state provisions—in determining whether state laws and executive branch actions are valid? Would that focus still allow state courts to reach the “right” result in cases where no specific constitutional provision provides a clear basis for decision?

Professor (and later Oregon Supreme Court Justice) Hans Linde’s path-breaking 1970 article, Without “Due Process”: Unconstitutional Law in Oregon,1 addressed some of those questions and contributed to the state constitutional revolution of the succeeding decades.2 That

* Chief Justice, Oregon Supreme Court. I am indebted to Zoe Turill Powers and Alletta Brenner for research and editorial assistance and to Jack Landau and Hugh Spitzer for their helpful comments on an earlier draft.


revolution, with its emphasis on examining the text and meaning of state constitutional provisions, has had the positive effect of requiring courts (and litigants) to articulate the specific interests at stake in light of those provisions, rather than engaging in an open-ended inquiry into whether a state’s economic regulatory scheme was arbitrary or unreasonable and thus potentially unconstitutional under the Federal Due Process Clause or whether a state law impermissibly interfered with some fundamental right. But it has its shortcomings as well, and, at times, has been susceptible to the same kind of result-oriented decisions for which substantive due-process-driven analysis has long been criticized. In this Essay, I briefly examine several aspects of state court reliance on “due process” provisions—both state and federal—in an effort to see what is lost and what is gained by relying instead on other state constitutional provisions. In doing so, we can see some of the changes in state constitutional interpretation forty-five years after Linde’s article and begin to seek an answer to our legislator’s question.4

I. THE OREGON CONSTITUTION HAS NO DUE PROCESS CLAUSE—BUT THE OREGON SUPREME COURT DIDN’T NOTICE FOR 100 YEARS

We begin where Linde did, with several Oregon cases that purported to rely on the due process clause of the Oregon Constitution and that illustrate what he saw as the shortcomings of constitutional analysis at the time. In Leathers v. City of Burns,5 the Oregon State Supreme Court considered two city ordinances that regulated the unloading and storage of flammable liquids by, among other things, prohibiting unloading fuel from a truck with a capacity of over 2200 gallons and using a storage tank holding more than 3000 gallons (or 4000 for a single service station or facility).5 A service station operator challenged the constitutionality of the ordinances as arbitrary and unreasonable, arguing that they deprived him of property and liberty interests without due process of

3. Indeed, Linde can be seen as an early “textualist,” although not necessarily an “originalist” of the Antonin Scalia variety. Linde’s teachings have influenced academics and courts in Oregon and elsewhere. See Thomas A. Balmer & Katherine Thomas, In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation, 76 ALB. L. REV. 2027, 2028, 2047–49 (2012–2013).
4. I should note, however, that we are using the questions posed here primarily to illuminate aspects of state constitutional law and that the outlines of any answers are only suggestive and conditional.
5. 444 P.2d 1010 (Or. 1968).
6. Id. at 1011.
What was as interesting to Linde as the substantive decision in the case—the Court upheld the restriction on tanker size but struck down the storage tank size limit—was the way the Court went about deciding the case and what it said about due process. The Court first summarized the complaint as alleging that “the ordinances violate the due process and equal protection clauses of the Federal and state constitutions.” Then, after reviewing the evidence at trial, and to introduce its legal analysis under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court observed, “What we hold applies equally to plaintiff’s claim of violation of comparable provisions of the Constitution of Oregon.”

Similarly, just a few weeks before *Leathers*, the Court held a municipal vagrancy ordinance unconstitutional on the grounds that the ordinance was “too vague to provide a standard adequate for the protection of constitutional rights.” The Court stated that the law invited “arbitrary and discriminatory enforcement,” and held that it violated the “due process clause of [article I, section 10] of the Oregon Constitution, as well as the Fourth and Fourteenth Amendments of the United States Constitution.”

Professor Linde had the chutzpah to point out that despite the Oregon Supreme Court’s statements in *Leathers*, *City of Portland*, and other cases, “Oregon has no ‘due process’ clause. It also does not guarantee the equal protection of the laws.” As we will discuss below, the Oregon Constitution has other broad provisions protecting individual rights and liberties from government interference, but it has no provisions that track the text or specific focus of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. To the extent that Oregon courts have sometimes based their decisions on the “due process” or “equal protection” provisions of the Oregon Constitution,

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7. Id. at 1015.
8. Id. at 1011.
9. Id. at 1015.
11. Id. at 557.
12. Id. at 555. Article 1, section 10 of the Oregon Constitution is worded differently from the Due Process Clauses of the Fifth and Fourteenth Amendments and from similar provisions in other state constitutions. As I discuss below, it is more accurately described as an “open courts,” “remedy,” or “due course of law” provision. It provides: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” Or. Const. art. 1, § 10.
13. Linde, supra note 1, at 135 (emphasis in original).
they have erred. We have no such provisions.

Linde’s legacy had two different and important aspects, and the double entendre of his article’s title captures both: First, the absence of a due process clause in the Oregon Constitution and second, the process of constitutional decision-making without relying on the Federal Due Process Clause. As we have just seen, Without “Due Process” suggests first that, the Oregon State Supreme Court’s occasional contrary statements notwithstanding, the Oregon Constitution does not have a due process clause. Linde urged lawyers and judges to actually read, interpret, and apply constitutional (and other) texts, rather than simply balance an amorphous and malleable understanding of the state’s “police power”— another term, Linde often observed, that does not appear in the Constitution of Oregon (or any other state)—against asserted constitutional rights.14 And he often pointed out that many state constitutions have specific, often detailed, provisions regarding rights of expression, religion, and criminal procedure that are not found in the Federal Bill of Rights and that could provide a firmer basis for state court decisions.15

Before long, the Oregon State Supreme Court came around, citing Linde’s article and holding (contrary to earlier decisions) that article I, section 10, of the Oregon Constitution was not a due process provision and that the equal privileges and immunities clause (article I, section 20, of the Oregon Constitution) and the Equal Protection Clause of the Fourteenth Amendment were not necessarily “equivalents.”16 In 1985, after Professor Linde had become Justice Linde, the Court, in a routine case, rejected state and federal due process and equal protection challenges to a statute requiring payment of assessed income taxes as a precondition to judicial review of a tax dispute.17 Writing for the Court, Linde stated that, contrary to the taxpayer’s argument, “[a]rticle I,

14. Id. at 147–49.
15. See, e.g., State ex rel. Oregonian Publ’g Co. v. Deiz, 613 P.2d 23, 28–30 (Or. 1980) (Linde, J. concurring) (discussing constitutional protection of right to open administration of justice under Oregon Constitution and arguing that it is more stringent than that offered by the Federal Bill of Rights).
16. Olsen v. State, 554 P.2d 139, 143 (Or. 1976). Several years earlier, the Court had noted that “Professor Linde demonstrates that [article I, section 10] is not a due process provision, but rather has to do with the protection of legal remedies which assert interests recognized in tort law,” but had also pointed out that “[t]his court has not always agreed with him.” Sch. Dist. No. 12 of Wasco Cty. v. Wasco Cty., 529 P.2d 386, 391 (Or. 1974). Article 1, section 20 of the Oregon Constitution provides: “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” OR. CONST. art. I, § 20.
section 10, of the Oregon Constitution, which guarantees that ‘every man shall have remedy by due course of law for injury done him in his person, property, or reputation,’ is neither in text nor in historical function the equivalent of a due process clause.”¹⁸ The debate was essentially over.

But the title Without “Due Process” also suggests Linde’s larger project, namely his argument that state courts should not turn first to the substantive provisions of the Federal Constitution when deciding constitutional cases.¹⁹ Linde asserted—irrefutably, as a matter of logic—that there is no federal due process violation if state law, including the state constitution, provides the relief a party seeks:

The proper sequence is to analyze the state’s law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of parochialism or style, but because the state does not deny any right claimed under the [F]ederal Constitution when the claim before the court in fact is fully met by state law.²⁰

This latter impact of Linde’s legacy has been much discussed and is thoroughly engrained in Oregon law.²¹ Other states, Washington being an example, have reached similar conclusions.²² But, to return to our legislator’s question, has it mattered that Oregon does not have a due process clause?

II. THE OREGON COURT IN THE LOCHNER/SUBSTANTIVE DUE PROCESS ERA

Interestingly, the cases that Linde used to make his point that the Oregon Constitution lacks a due process clause did not involve

¹⁸. Id.
¹⁹. See Linde, supra note 1, at 133–35.
²⁰. Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981). Linde’s view may be supported by logic and important prudential considerations, but it is not clear that his central legal contention—that no violation of a federal constitutional right has occurred if a state court vindicates the claim under the state constitution—is correct. In Zinermon v. Burch, 494 U.S. 113 (1990), the Court stated that, at least as to nonprocedural federal constitutional guarantees, “the [federal] constitutional violation is complete when the wrongful action is taken.” Id. at 125; see also State v. Stoudamire, 108 P.3d 615, 624–26 (Or. Ct. App. 2005) (Landau, J., concurring) (explaining Zinermon in context of applying federal and state search and seizure protections).
procedural claims that the state had denied a person life, liberty, or property without adequate process, but rather claims that the state had restricted substantive economic or personal liberties protected by the federal and state constitutions. Moreover, Linde’s examples were from the 1960s, long after the United States Supreme Court had stopped using “substantive due process” to strike down economic regulation, and as the Court was beginning to use the concept of substantive due process instead to protect rights of privacy and personal autonomy. Nevertheless, it’s useful to look back to the era when both state and federal courts often used substantive due process to invalidate statutes regulating labor and other aspects of the economy, and to observe how the Oregon State Supreme Court approached those kinds of challenges. Based on now-discredited cases such as *Lochner v. New York*, the United States Supreme Court is often viewed as having been hostile to labor and economic legislation at the turn of the twentieth century. But, as Emily Zacklin reminds us, the Court, in fact, upheld a number of progressive efforts to protect working people. Rather, as Zacklin argues, state courts—interpreting both state and federal due process clauses (often without even quoting the provisions or differentiating between state and federal law)—struck down many regulatory statutes, and were, on the whole, probably more hostile to labor and other progressive legislation at the time than the United States Supreme Court. Similarly, Hugh Spitzer has surveyed the Washington decisions of the same period and finds that the Washington State Supreme Court in the late nineteenth and early twentieth centuries often struck down regulatory legislation, such as a law providing for the inspection of commodities, even though those commodities were not intended for immediate sale to the public. By the second decade of the new century, however, the Washington State Supreme Court was routinely upholding legislation regulating public utilities, maximum working hours for women, and mandatory workers’ compensation insurance.

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23. *See, e.g.*, City of Portland v. James, 444 P.2d 554 (Or. 1968); Leathers v. City of Burns, 444 P.2d 1010 (Or. 1968).
24. 198 U.S. 45 (1905).
26. Id. at 109.
28. Id. at 108.
But what about Oregon? While the Oregon Supreme Court seriously entertained substantive due process challenges to labor and economic regulation during this period, it generally deferred to the legislature and upheld laws that seemed reasonably related to a legitimate legislative goal. In 1902, for example, a barber challenged a state law that prohibited the operation of barbershops on Sunday, arguing that, by permitting (some) other businesses to remain open, the law was arbitrary and unreasonable. Accordingly, the barber asserted that the act violated the Federal Due Process Clause “in that it deprived [him] of liberty or property without due process of law,” and also violated article I, section 1 of the Oregon Constitution “in that it encroached upon his guaranty of equal rights.” The Court reviewed the history of Oregon’s Sunday closure laws and decisions from around the country upholding such laws as reasonable exercises of the state’s police power. Indeed, a similar case—involving a general Sunday closure law that exempted businesses of “necessity and charity,” but did not include barbers in that group—had gone to the United States Supreme Court, which had upheld the law. The United States Supreme Court had noted the “wide discretion confessedly necessarily exercised by the states in these matters,” which prohibited only classifications “so palpably arbitrary as to bring the law into conflict with the federal constitution.” The Oregon Court followed suit, quoting other state decisions regarding legislation that would prevent “overwork” and protect “the physical welfare of the citizen,” and upheld the Sunday closing requirement.

Perhaps the most famous Oregon case of that period was State v. Muller, where the Court considered due process and other constitutional challenges to a statute that made it unlawful to employ a woman in a laundry for more than ten hours a day. Curt Muller had been fined ten dollars for employing a Mrs. E. Gotcher for more than the maximum permissible hours at his Portland laundry on September 4,
1905.37 Seeking to overturn his conviction, Muller argued that the law interfered with his female employees’ liberty of contract and that it discriminated against women and in favor of men.38 The Oregon Court cited the then-recent decision in *Lochner* for the general proposition that the freedom to contract is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment and “cannot be arbitrarily interfered with by the legislature.”39 But the Court quickly added that “the right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare, and good order of the community.”40 The Court upheld the statute.

When Muller took his case to the United States Supreme Court, Louis Brandeis was recruited to support the state’s defense of its statute. He briefed and argued the case (along with a local Oregon lawyer), and prevailed in *Muller v. Oregon*.41 The Supreme Court opinion’s emphasis on the role of women as mothers whose health is “essential to vigorous offspring,” and to protecting “the strength and vigor of the race,” was certainly a victory for progressive labor legislation, even at the temporary expense of the broader cause of women’s equality, including the right to vote that was gaining prominence at the same time.42 That focus, at least, allowed the Court to distinguish *Lochner*, but it would be almost another thirty years before the Court altered its substantive due process analysis and began regularly upholding labor and economic regulatory legislation against due process challenges.

While the Oregon courts generally upheld progressive legislation under general federal or state constitutional provisions, they certainly took such challenges seriously, often evaluating new laws to decide whether they were “arbitrary” or “unreasonable” or beyond the state’s “police power.” More interesting perhaps, as *Without “Due Process”* reminds us, is that state courts have continued to apply substantive due process principles to economic and other regulatory statutes long after the United States Supreme Court abandoned that approach in the late 1930s.43 Robert Williams also has pointed out that states continue to use

37. Id.
38. Id. at 855–56.
39. Id. at 856.
40. Id.
42. *Muller*, 208 U.S. at 421.
substantive due process to scrutinize—and occasionally hold unconstitutional—economic regulation, despite the federal courts’ “hands-off” approach. In contrast to the *Lochner* era, however, Williams points out that state courts generally act in what they perceive to be the interest of the general public, rather than narrower business interests.44

III. THE PIVOT FROM DUE PROCESS TO OTHER, SPECIFIC CONSTITUTIONAL PROVISIONS

If a state constitution lacks a due process clause, and if we follow Linde and consider state constitutional arguments before turning to the Federal Due Process Clause, how should a state court approach broad constitutional challenges to state laws or policies? One answer, driven by Linde’s suggestion that courts actually consider the text—the whole text—of their state constitutions, is for litigants and state courts to focus on the narrower and sometimes forgotten provisions that hide in dark corners of many state constitutions.

State constitutions often have more specific protections of individual rights than we find in the Federal Constitution. As a result, at least with respect to these specific provisions, state constitutions may provide more direct guidance to courts. One notable example of such a case is Linde’s decision in *Sterling v. Cupp*.45 In that case, male prison inmates challenged a state practice allowing female prison guards to conduct body searches of male inmates and to monitor them, even in showers or toilets.46 The inmates argued that those activities violated their constitutional right to privacy.47 The Oregon Court of Appeals had agreed with the inmates, relying on the United States Supreme Court’s then-recent decision in *Griswold v. Connecticut*,48 in which the Court concluded that the Due Process Clause of the Fourteenth Amendment (when considered with other provisions in the Bill of Rights) protects a “right of privacy,” and held that the state policy at issue violated that right.49

The Oregon Supreme Court affirmed the court of appeals’ decision in *Sterling*, but on a different ground, looking instead to Oregon’s own constitution. Justice Linde, consistent with his earlier article, first

44. WILLIAMS, supra note 2, at 190–92.
45. 625 P.2d 123 (Or. 1981).
46. Id. at 125.
47. Id. at 126.
48. 381 U.S. 479 (1965).
49. See *Sterling*, 625 P.2d at 126 (citing *Griswold*, 381 U.S. 479).
rejected the court of appeals’ approach of turning to the Federal Due Process Clause before it had considered whether the Oregon Constitution precluded the state’s policy.\textsuperscript{50} Perhaps to the surprise of the plaintiffs, who had not raised the argument, Linde looked to article I, section 13, of the Oregon Constitution, which provides, “No person arrested, or confined in jail, shall be treated with unnecessary rigor.”\textsuperscript{51} Nothing in the history of that provision indicated that it had anything to do with searches, pat-downs, or the monitoring of incarcerated individuals, let alone of the gender of the prison guards performing those functions.\textsuperscript{52} To fill that gap, Linde looked to and relied upon what he conceded were “nonofficial”\textsuperscript{53} standards regarding the treatment of prisoners, including those adopted by the American Bar Association and the American Correctional Association, as well as the Universal Declaration of Human Rights and documents from various United Nations agencies.\textsuperscript{54}

\textit{Sterling} illustrates the strengths and potential weaknesses of focusing on specific state constitutional provisions rather than trying to discern the ill-defined parameters of the substantive aspect of the Due Process Clause—particularly the “right to privacy”—and apply that provision to a novel fact situation. Linde correctly pointed out the difficulties of defining the privacy right protected by the Due Process Clause,\textsuperscript{55} but a disinterested observer might question whether the interpretive exercise Linde undertook instead—deciding whether a male prisoner searched or observed while showering by a female guard had been “treated with unnecessary rigor”—was much less open-ended. A dissenting opinion made the reasonable point that there appeared to be nothing to indicate “that the ‘unnecessary rigor’ clause was intended to authorize the courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution,” and added that the correctional standards Linde cited “are worthy of respectful attention from the legislature or the executive branch, but they are no substitute for the constitution and they

\begin{itemize}
\item[50.] \textit{Id.} at 126.
\item[51.] \textit{Id.} at 128.
\item[52.] See \textit{id.} at 128–29 (discussing historical underpinnings of provision); \textit{id.} at 140 (Tanzer, J. dissenting) (arguing that there is “no evidence that the ‘unnecessary rigor’ clause was intended to authorize courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution”).
\item[53.] \textit{Id.} at 130 (majority opinion).
\item[54.] \textit{Id.} at 128–32.
\item[55.] \textit{Id.} at 129.
\end{itemize}
do not provide a mandate for judicial intervention.”

Nevertheless, *Sterling* reminds us that state constitutions contain a variety of sometimes forgotten provisions that may provide better, or at least state constitution-based, grounds for invalidating state statutes or policies; this may avoid other problems that can arise from reliance on the Due Process Clause. And, as Linde also noted in *Without “Due Process,”* grounding a decision on an independent interpretation of a state constitutional provision, rather than the Due Process Clause, insulates the decision from possible review and reversal by the United States Supreme Court.

A less dramatic, but perhaps more satisfying example of using a narrow, more specific state constitutional provision rather than a more general state or federal provision, can be found in Oregon’s handling of challenges to criminal penalties on the ground that they are not proportional to the offense. Article I, section 16, of the Oregon Constitution provides, in part, “[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.” In earlier days, if a defendant challenged a sentence as unconstitutional because it was draconian compared to the crime—say, life in prison for a first-time trespass—the defendant and the court would look to the cruel and unusual punishment provision of the Eighth Amendment or to an analogous state constitutional provision.

In a case from the early twentieth century, *State v. Ross*, the defendant was convicted of larceny and sentenced to pay a fine of $576,853.74, to serve five years in the state penitentiary, and to spend one day in the county jail for every two dollars of the fine, not to exceed 288,426 days. The Oregon Supreme Court held that the sentence was so excessive as to constitute cruel and unusual punishment, but engaged in essentially no textual or other analysis of any state or federal

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56. *Id.* at 140 (Tanzer, J., dissenting). The dissent also rejected the “privacy” theory adopted by the court of appeals, pointing out that the plaintiffs had not challenged the State’s right to search inmates, but only “the authority of the [S]tate to have the searches performed by persons of either sex.” *Id.* at 139. The dissent argued that “plaintiffs’ expectation of privacy is not lessened and their exposure to searches is not enlarged according to the sex of the person searching.” *Id.*


59. OR. CONST. art. 1, § 16.

60. 104 P. 596 (Or. 1909), modified, 106 P. 1022 (Or. 1910), appeal dismissed, 227 U.S. 150 (1913).

A decade later, when a defendant challenged his sentence of six months in jail and a $500 fine for possessing two quarts of “moonshine,” the Court expressly addressed under the Oregon Constitution his claim that the sentence was not “proportioned” to the offense, although the decision relied primarily on a United States Supreme Court case interpreting the Eighth Amendment’s prohibition of cruel and unusual punishment. More recently, the Court has analyzed the proportionality requirement in detail and developed an analytical structure to guide that determination. That approach has been particularly important because of uncertainty as to whether the Eighth Amendment’s prohibition of cruel and unusual punishment contains an implicit ban on sentences that are simply excessive or disproportionate to the crime in some respect, or instead whether the prohibition speaks only to the nature of the sanction itself. By relying on Oregon’s explicit proportionality requirement, the Oregon Court has used the appropriate state constitutional provision to examine claims that sentences were excessive, has been able to develop case law interpreting the explicit requirement of proportionality in the constitution, and has, on occasion, overturned criminal sentences on that ground.

The larger point, briefly alluded to before, is that state constitutions often have more specific protections of individual rights than are found in the United States Constitution. Reliance on those state texts—rather than on federal provisions made applicable to the states by the Due Process Clause—is not only legally sound (legally required, Linde would say), but more satisfactory generally because they provide more direct guidance to the courts and have the legitimacy of being traceable to the work of the constitutional framers. Other examples of Oregon’s constitution providing more specific provisions than the Federal Constitution include its free expression provision, which is written in broader terms than the First Amendment; the multiple provisions regarding religious liberty, including a specific provision preventing state funds from being spent in support of religion; and the specific directives that “no court shall be secret,” and that justice is to be

62. See Ross, 106 P. at 1024.
63. Sustar v. Cnty. Court of Marion Cnty., 201 P. 445, 448 (Or. 1921).
64. Id. at 446, 448.
68. See OR. CONST. art. I, § 8.
69. See, e.g., id. §§ 1–6
administered “openly.”70

IV. GREAT ORDINANCES: EQUAL PRIVILEGES AND IMMUNITIES, AND DUE COURSE OF LAW

Suppose a government action seems to intrude too far into areas of personal privacy, to be arbitrary and unreasonable, or to discriminate unfairly against a particular person or group—and in contrast to a punishment that involves “excessive rigor” or is not “proportioned to the offense,” there is no specific constitutional provision that can plausibly be invoked. Do other provisions of the Oregon Constitution protect those individual rights that are less well-defined? Although, as we have seen, the Oregon Constitution does not contain a true due process clause or an equal protection clause, it does include several of what Williams, quoting Justice Holmes, has called the “great ordinances of the Constitution”—those broadly, and somewhat vaguely, phrased provisions by which constitution writers attempted to circumscribe government actions that they could not (or did not want to) identify with specificity.71 In the Oregon Constitution, these include the equal privileges and immunities clause72 and the “due course of law” provision73 that guarantees open courts and a “remedy by due course of law” for injury to “person, property, or reputation.”74

Not surprisingly, the Oregon courts have often used those provisions to evaluate challenges to state statutes and actions, and sometimes have found the state action unconstitutional. In Hewitt v. State Accident Insurance Fund Corp.,75 for example, the statute permitted an unmarried woman to collect death benefits upon the death of an unmarried man with whom she had cohabited for over a year, but did not provide for a similarly situated man to receive death benefits.76 The Court agreed with the plaintiff—an unmarried man—that the statute treated one class of people (unmarried women who had cohabited with unmarried men for a particular time period) more favorably than unmarried men in the same position.77 The Court described that gender-based classification as

70. Id. § 10.
71. WILLIAMS, supra note 2, at 336–37 (quoting Vreeland v. Byrne, 370 A.2d 825 (N.J. 1977)).
73. Id. § 10.
74. See id.; see also Linde, supra note 1, at 135.
75. 653 P.2d 970 (Or. 1982).
76. Id. at 971.
77. Id. at 977–79.
“suspect” and thus subject to close scrutiny. Finding no basis to justify the different treatment of women and men in that context, the Court held that the statute violated the equal privileges and immunities clause of article I, section 20.79

If the Court’s analysis in Hewitt sounds suspiciously like that found in federal equal protection decisions, that is because the Court, in fact, cited and relied on those cases. The Court recognized that the Equal Protection Clause was intended to prevent discrimination against certain groups or individuals, while the privileges and immunities provision was focused on preventing privileges—usually economic privileges—from being granted unequally to favored individuals and groups.80 Nevertheless, the Court found helpful the equal protection analysis of when differential treatment of similarly situated persons might raise constitutional problems, although it was quick to point out that it did not need to follow then-controlling federal equal protection precedents, which were somewhat equivocal on the issue of gender discrimination.81

Hewitt then provided the groundwork for an important court of appeals decision holding that the equal privileges and immunities clause of the state constitution barred the state medical school from offering health insurance benefits to the spouses of employees but not to the similarly situated same sex domestic partners of employees.82 The same sex partners argued that, although it might be reasonable to limit benefits to spouses, they were unable to become spouses under state law; the effect of the benefit policy and the state statute limiting marriage to two persons of different genders, considered together, denied them a privilege conferred on similarly situated employees.83 The court of appeals agreed and held that the disparate treatment violated article I, section 20.84 The court observed that the insurance benefits constituted a privilege that was not made available to the same-sex partners of OHSU employees.85 Those employees constituted a “class” that was treated differently solely because of their sexual orientation—and that differential treatment was permissible only if it could be justified by

78. See id. at 977.
79. Id. at 979.
80. See id. at 975–76.
81. Id. at 974–75.
83. Id. at 444.
84. Id. at 448.
85. Id.
their sexual orientation. As the Court stated, “The parties have suggested no such justification, and we can envision none.”

Although article I, section 20, provides that “[n]o law shall be passed” granting privileges and immunities to some that are not equally available to all citizens, the Oregon courts have long held that provision to apply to executive and other government decisions, as well as to laws enacted by the legislature. And, despite the provision’s origin in concerns about economic privileges, the courts have viewed it as a more general prohibition on differential treatment, including for example, charging decisions by district attorneys. In one recent case, the state attorney general argued that the Court should disavow its longstanding approach to article I, section 20, and return to what it argued was the original scope of the provision as applying only to the legislature and only to economic benefits. The Court had little trouble rejecting that effort to turn the clock back more than 100 years.

The most obvious other “great ordinance” in the Oregon Constitution, article I, section 10, is the Oregon constitutional provision most frequently confused with the Due Process Clause of the Fourteenth Amendment. It provides:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

As the text of the provision makes clear, it touches on a number of vital aspects of government and justice. It is referred to as an “open courts” or “remedies” or “due course of law” provision. It is not, however, a “due

86. Id. at 447.
87. Id.
89. See, e.g., State v. Savastano, 309 P.3d 1083, 1093 (Or. 2013) (describing cases).
90. See, e.g., State v. Clark, 630 P.2d 810 (Or. 1980).
91. Savastano, 309 P.3d at 1099.
92. See id. (finding that the state’s argument “sweeps too broadly” and noting: “[t]he state is correct that many early privileges or immunities cases involved monopolies or other economic benefits, but nothing in the words of the provision or the historical definitions of those words indicates that they do not also apply to noneconomic privileges or immunities conferred by the government”). Interestingly, the ACLU of Oregon filed an amicus brief in the Savastano case that took no position on the defendant’s underlying argument—that the district attorney was required to have an established policy for charging decisions in order to comply to article I, section 20—but that vigorously opposed the Attorney General’s effort to return to a narrower interpretation of the provision. Amended Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., Savastano, 309 P.3d 1083 (No. S059973), 2012 WL 3569903.
93. OR. CONST. art. I, § 10.
process” clause, as Linde and others have demonstrated; and indeed its origins trace back to a different chapter of Magna Carta than the chapter that provides the basis for the Due Process Clause in the Federal Constitution.\(^94\) The meaning and proper interpretation of article I, section 10, are beyond the scope of this brief Essay, but its ancient roots, broad application, and contemporary importance place it firmly in the “great ordinance” category. The provision has provided fertile ground for litigants, particularly related to tort claims, and the Oregon courts have sometimes used it to avoid what most people would consider to be grossly unjust results. In *Clarke v. Oregon Health Sciences University*,\(^95\) for example, the Court held unconstitutional a statutory tort claims limit of $200,000 as applied to a claim for medical negligence against a state hospital and its employees, when the conceded economic damages to a newborn caused by the negligence exceeded twelve million dollars.\(^96\) But whether article I, section 10, could be used to protect substantive rights outside the tort context is unclear.

In addition to its importance in tort law, article I, section 10 may protect some procedural rights, although, as we have noted, it is not a due process clause. We need to recall that Linde’s critique was aimed at substantive due process and the use of state and federal due process analysis to invalidate state statutes—particularly, but not only, regulatory laws—on the grounds that they were arbitrary, unreasonable, or not within the so-called police power of the state.\(^97\) But aside from those categories of cases, article I, section 10 has long been held to provide at least some guarantee of procedural fairness, including an appropriate and fair hearing before a person can be deprived of property rights.\(^98\)

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94. Linde, *supra* note 1, at 136–38. See generally David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–1202 (1992) (describing history and origins of remedy clauses in state constitutions). Oregon’s remedy clause is derived from Chapter 40 of the Magna Carta. See Linde, *supra* note 1, at 138. Sir Edward Coke’s commentary on the Magna Carta, one of the most commonly read legal texts in early America, expounded on Chapter 40, providing the language from which the remedy clause was later developed: “[E]very Subject of this Realm, for injury done to him in [goods, land or person,] . . . may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.” Schuman, *supra*, at 1199 (alterations in original).

95. 175 P.3d 418 (Or. 2007).

96. Id. at 420–22, 434.


CONCLUSION: DOES OREGON’S CONSTITUTION NEED A DUE PROCESS CLAUSE?

Returning to our legislator’s question, one response is that we have a Federal Due Process Clause, so we don’t need another one in the state constitution. The Federal Due Process Clause protects our procedural and substantive rights, and it is regularly interpreted and applied by federal and state courts. As Alan Tarr notes, in describing Linde’s state law first approach, the Federal Due Process and Equal Protection Clauses are “state-failure” provisions, available to protect rights if state law does not.99 But the United States Supreme Court is the final arbiter of those federal constitutional provisions, of course, so in the absence of an analogous state provision, states lose the potential for a more expansive, rights-protective interpretation of due process. In contrast, the Oregon Supreme Court’s interpretation of its own constitution is not subject to federal review, even when that interpretation is different from the United States Supreme Court’s interpretation of parallel federal constitutional provisions. When one considers the importance of the state constitution’s free speech and search and seizure provisions (as interpreted by the Oregon courts) to Oregon law, and our preference not to rely on federal interpretations of the parallel federal constitutional guarantees, the inability to take the same approach to rights that could be protected under a state due process clause starts to look significant.

Looking at the Oregon Constitution as it is, without a due process clause, does it protect the rights we think important? Like many state constitutions, Oregon’s contains a number of provisions that expressly protect rights or impose limits on government actions, often in robust terms. Our free speech provision, article I, section 8, for example, protects the right to “speak, write, or print freely on any subject whatever,” although each person is “responsible for the abuse of this right.”100 The constitution bars the appropriation of money for any religious institution,101 protects the right of the “people to bear arms for the defence [sic] of themselves,”102 provides specific directions

100. OR. CONST. art. I, § 20.
101. Id. § 5.
102. Id. § 27.
regarding bail,\textsuperscript{103} and requires that punishments be proportioned to the offense,\textsuperscript{104} just to name a few. More recent provisions give crime victims the right to participate in proceedings against those who have caused them harm and the right to receive restitution.\textsuperscript{105} And just recently in November 2014, voters approved an “equal rights amendment,” providing that equal rights “shall not be denied or abridged . . . on account of sex.”\textsuperscript{106} When state courts rely on those specific state constitutional provisions, rather than the Federal Due Process Clause, they have more substantive guidance from the state constitution’s framers about the meaning and scope of the restrictions they sought to impose on state government and the rights they wanted to protect.

Even without a due process clause that tracks the Fifth and Fourteenth Amendments, the Oregon Constitution has provisions that protect some important procedural rights, ranging from specific rights related to jury trials and appellate review to the more general right to a “remedy by due course of law for injury” to person, property or reputation in article I, section 10.\textsuperscript{107} And in terms of substantive review of statutes and other state actions, the Oregon Constitution, as noted previously, does contain two broadly phrased, potentially far-reaching, provisions: The open courts/remedies provision of article I, section 10,\textsuperscript{108} and the equal privileges and immunities provision of article I, section 20.\textsuperscript{109} But the extent to which those provisions could be interpreted to protect the kind of individual rights covered by the “substantive” component of the Federal Due Process Clause is unclear.

Are there potential laws or policies so oppressive, intrusive, or unfair that most thoughtful people would consider them beyond the authority of state government—but that do not appear to violate any existing provision of the Oregon Constitution? Take, for example, the ban on the use of contraceptives by married couples that gave rise to the “right to privacy” articulated in \textit{Griswold}.\textsuperscript{110} A more far-fetched hypothetical, but perhaps useful for discussion purposes, would be a state law that ordered the removal of children from their parents at the age of two, to be returned to the parents at age ten. Such a law would presumably be

\textsuperscript{103} Id. §§ 14, 16.
\textsuperscript{104} Id. § 13.
\textsuperscript{105} Id. § 42.
\textsuperscript{106} Id. § 46.
\textsuperscript{107} Id. § 10.
\textsuperscript{108} Id.
\textsuperscript{109} Id. § 20.
\textsuperscript{110} Griswold v. Connecticut, 381 U.S. 479 (1965).
found to violate parental rights protected by “substantive due process” under the Fourteenth Amendment, despite the fact that nothing in the Constitution speaks specifically to such rights.

Does the Oregon Constitution offer anything to citizens who might challenge the hypothetical statute allowing the state to take custody of all children? Certainly, a court would look hard at the “remedy” clause and the equal privileges and immunities provision, both of which are written in capacious, general terms and which sometimes have been interpreted expansively—although neither speaks very clearly to rights of parenthood, privacy, or personal autonomy. Some decisions interpreting the “remedy” clause have stated that it provides a remedy only for rights that existed when the Oregon Constitution was adopted in 1857, and although the equal privileges and immunities provision has played the role of an equal protection clause, it has been interpreted as a bar against discrimination and unequal treatment, rather than as the source of unenumerated personal rights.

An Oregon court faced with a claim asserting a novel constitutional right could perhaps draw some support from article I, section 33, which provides, “[t]his enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.” That provision, of course, is almost identical to the Ninth Amendment, which the Supreme Court relied upon, in part, in *Griswold*. It suggests, at a minimum, that the framers of the Oregon Constitution did not view the specific “rights” and “privileges” enumerated in the Oregon Bill of Rights as encompassing all the rights that Oregonians “retain.” But it gives no indication of what those rights might be or the sources to which one might look for them, let alone the scope and limitations of any unenumerated rights.

The task, however, probably would not be any less daunting—or less firmly rooted in constitutional text, or less controversial—than the

113. OR. CONST. art. 1, § 33.
115. Few cases discuss or even cite article I, section 33. However, in *Hall v. Northwest Outward Bound School*, 572 P.2d 1007 (Or. 1977), Justice Linde suggested an extremely limited view of the provision, stating that any “rights, and or privileges” would probably need to be asserted by the legislature, rather than by the judiciary, and that the only rights that could be “retained” would be rights that were recognized as such at the time the Oregon Constitution was adopted. *Id.* at 1010–11 n.11. Whether Linde’s brief comments are correct or not is a topic for another day.
efforts of the United States Supreme Court to decide what is protected by the substantive component of the Federal Due Process Clause. Certainly, in states like Oregon and Washington, with their strong traditions of independent state constitutional analysis, the courts would approach such challenges with open minds—and likely would not find the absence of a state due process clause to make much difference one way or the other. On the other hand, as discussed above, the texts, origins and purposes of Oregon’s remedy and equal privileges and immunities provisions are distinct from those of a true “due process” clause. A due process clause in the Oregon Constitution would be another “great ordinance” in the constitutional toolkit, another source courts could look to in constitutional cases to help ensure that the fundamental rights of Oregon citizens are protected, even as state and local governments engaged in the necessary regulatory activities that our society needs to function effectively. In the end, perhaps Oregon’s constitution could use a due process clause after all.