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Chapter Five

Washington's Constitution: History and the Politics of State Constitutional Jurisprudence

Cornell W. Clayton and Stephen Meyer

Introduction

CONSTITUTIONS SERVE BOTH descriptive and normative functions. On the one hand, they describe the nature and structure of government—defining its institutions and their respective powers and relationships to one another. On the other hand, constitutions establish political goals or aspirations for the community to lived up to—creating general welfare, establishing justice, or protecting individual rights. Understanding a political community thus begins with understanding its constitution and how it has changed over time.

The United States has always been a system of dual constitutionalism. State constitutions preexisted the federal document and were the primary instruments for distributing and limiting government power during most of the nineteenth century. Despite this long history of constitutional dualism, Americans are today largely ignorant about state constitutions and state constitutional law. Leading constitutional commentaries and texts focus exclusively on the federal constitution, and many Americans do not even realize that their state has a constitution.[1] This undoubtedly is the result of the nationalization of American politics following the New Deal, a period capped-off by the Warren Court's expansion of federal constitutional power into seemingly every aspect of American life. It would be a mistake, however, to think that state constitutions are today unimportant or that they simply mirror their federal counterpart. State constitutions differ in important ways from the federal document. They have their own histories, their own concerns, and authorize and restrict government power in wholly different ways.

In recent years state constitutions also have taken on new importance. As the Rehnquist Court has retrenched judicial protection of federal constitutional rights, many state high courts have begun turning to their own state constitutions to expand individual rights and to limit governmental powers (Tarr 1997). Not surprisingly, this "new judicial federalism" has engendered a growing controversy about the legitimacy of using state constitutional law in this manner (see Gardner 1992; Kahn 1996). Washington's Supreme Court has been a leader in this movement, and its development of an independent constitutional jurisprudence also has become the subject of intense debate (Clayton 2002; Spitzer 1998; Utter 1992). Studying the state constitution and recent developments in state constitutional law should therefore tell us not only much about Washington's political system but also about the promise and problems of a system of dual constitutionalism in the twenty-first century.

Washington's Constitutional History and the Concerns of the Framers

Efforts to make Washington a state began immediately following the Civil War. Measures calling for a state constitutional convention began appearing on territorial ballots in 1869 and one finally passed in 1876. The first convention was held in Walla Walla in June 1878. After forty days the 15 delegates to the convention (plus one nonvoting delegate representing the panhandle region of northern Idaho) produced a lengthy draft constitutional document (Beckett 1968). Statehood, however, would be stalled for another decade.

Throughout much of the 1870s and 1880s, Congress was unwilling to admit new states into the Union out of a concern about how it might effect the delicate balance of party politics. Democrats, who controlled the House, were reluctant to admit new states that were perceived to be Republican (including Washington), while Republicans, who maintained precarious control of the Senate, refused to acquiesce to states that might elect Democrats to their chamber. The impasse finally broke in 1888, when Republicans gained control of both houses of Congress and the presidency. On February 22, 1889, Congress passed statehood-enabling legislation for Washington, Montana, and North and South Dakota.

A second constitutional convention convened in Olympia on July 4, 1889. The seventy-five delegates in Olympia were selected by a special election; two-thirds were Republican and one-third Democrat. The constitution they drafted was approved by a special election on October 1, 1889, by a vote of 40,152 to 11,879 (Beckett 1968). On November 11, 1889, President Benjamin Harrison proclaimed Washington admitted to the Union as the forty-second state.

Although a transcriber was hired to take detailed notes of the convention debates, the person was never paid and the notes were lost or destroyed.

Nevertheless contemporaneous news accounts and other historical documents shed some light on the attitudes and views of those at the convention.[2] The debates in Olympia echoed those made in other state conventions during this period. Indeed, late-nineteenth-century state constitution makers operated self-consciously in a context of constitutional pluralism and experimentation. Delegates were of course familiar with the federal constitution, and its influence on both the structure and language of the state document was ubiquitous. Not only did they copy structural features such as a separation of powers into three branches and a bicameral legislature, but several provisions of the state constitution, such as article I, section 3 ("No person shall be deprived of life, liberty, or property, without due process of law"), are copied nearly verbatim from the federal document (see U.S. Const., amendment 5).

Even more important, however, was the influence of other state constitutions. Delegates at these late-nineteenth-century constitutional conventions engaged in systematic analysis of other state constitutions and borrowed freely from the provisions they thought had been successful elsewhere (Fritz 1994; Utter and Spitzer 2002, 9-10). This spirit of comparative constitutional construction clearly infected the delegates in Olympia. Scarcely any of the provisions in Washington's constitution can claim originality. Perhaps one of the more obvious examples is article IV, establishing the state judicial system, which is taken nearly entirely from California's constitution of 1879. But nearly all the other provisions too—from the various provisions of rights found in article I, to the restrictions placed on corporations under article XII, to the design of the executive branch and the titles given various state officers in article III—had appeared in other states' constitutions before their adoption in Olympia. In fact, prior to the convention a former territorial judge, W. Lair Hill, drafted a model constitution which was distributed to delegates at the convention (Knapp 1913). Drawing heavily on California's constitution, Hill's draft eventually provided the exact wording for fifty-one sections and similar wording for forty-one sections of Washington's constitution. In all, the constitution of California provided complete wording for at least forty-five provisions, Oregon's constitution accounted for twenty-three provisions, Wisconsin's for twenty-seven, and Indiana's for seven (Clayton 2002).

In addition, the basic structural features of Washington's constitution were all borrowed from other constitutions. They provided for a bicameral legislature: the House would consist of between 63-99 members, each serving two-year terms (art. I, sec. 2); the Senate would be from one-third to one-half this size, and senators would serve four year terms, with half the seats selected every two years (art. I, sec. 6). Regular legislative sessions would be biennial, in odd-numbered years, and limited to 60 days (art. I, sec. 12). The convention also decided to disperse the executive authority among the office of governor, elected to a four-year term, who would serve as chief executive (art. III, sec. 2), and

seven other independently elected officers—the lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and the commissioner of public lands (art. III, sec. 1).

There was lively debate about giving the governor the veto power. In the end, the convention granted the governor a broad power to veto any bill or even a single item of any bill, and required a two-thirds vote of those present in both legislative houses to override (art. II, sec. 12). The court system, again drawing on the California model, was to consist of a supreme court of five members (later expanded to nine) and lower superior courts (art. IV). Supreme Court justices were to be elected to six-year terms and superior court judges to four-year terms (art. IV, secs. 3 and 5).

The general attitudes and concerns of late-nineteenth-century America influenced the Olympia convention in many other ways as well. Two contentious issues of the period, women's suffrage and the prohibition of alcohol, were debated at the convention. In the end, the convention offered voters two separate articles dealing with these issues. Neither passed; the article for women's suffrage was defeated by a state-wide vote of 16,527 to 34,513, while prohibition was defeated 19,546 to 31,487 (Beckett 1968).

Other social and political attitudes of the period, however, did find their way into the constitution. In general, late-nineteenth-century America was an era of wrenching social and economic change. The nation was shifting from an agrarian economy to industrial capitalism and the period was marked by rapidly increasing concentrations of wealth, rising corporate power, and government corruption. In response to these problems, Progressive third parties had sprung up throughout the United States, and Washington was no exception. State chapters of the Grange, the Farmers Alliance, and the Knights of Labor were all established in territorial Washington and their ideas animated much of the debate at the Olympia convention (Crawford 1939; Schwantes 1982).

Influenced by the Progressive-era attitudes, the delegates in Olympia had very different concerns about the operation of democratic institutions and their relationship to private power than did the framers of the federal constitution one hundred years earlier (Airey 1945; Avery 1962; Dolliver 1992; Fitts 1951). In particular, while the federalists had been influenced by the ideas of civic republicanism and a fear of populist majorities, the framers of Washington's constitution were strong advocates of popular sovereignty and more direct forms of democracy. They feared concentrations of power in government, especially the legislature, but the tyranny they feared most was not *the tyranny of the majority* but the *tyranny of corporate power and special interests* who might capture or corrupt governing institutions. Liberty, they believed, would be best secured through an open, democratic government that was capable of strong regulation and controlling private concentrations of power (Dolliver 1989; Dolliver 1992; Snure 1992). Similar to other Western states adopting constitutions at this time,

delegates in Olympia thus sought to balance their desire to encourage economic development in the state with their desire to protect citizens against concentrations of private power and corporate tyranny (Bakken 1987; Fritz 1994; Johnson 1992: Tarr and Williams 1998).

Understanding this historical milieu and the progressive political culture of the era can help make sense out of several otherwise disparate provisions of Washington's constitution. To secure popular, democratic government and protect against corporate corruption, while simultaneously protecting individual rights, the framers concentrated on four priorities:

1) Rights. The framers made rights their first concern. Article I of the constitution is a broadly phrased declaration listing 27 individual liberties that range from traditional legislative prohibitions on bills of attainder and ex post facto laws (sec. 23), to specific proclamations of individual liberties, including a right to assemble (sec. 4), a right to speak freely (sec. 5), a right to religious freedom (sec. 11), a right to trial by jury and other due process restrictions (sec. 3, 21, 22, 26), a right to bear arms (sec. 24), and a right to privacy (sec. 7). Unlike the federal bill of rights, most of these provisions are phrased as broad affirmations of rights and are therefore limitations, at least in text, against both government and private intrusion.

2) Restricting the Legislature. The framers attempted to restrict the legislative branch so that it would not become the tool of corporate or special interests. For example, the legislature was constitutionally prohibited from lending public money or credit to private companies (art. XII, sec. 9 and art. VIII, sec. 5), from contracting out convict labor (art. II, sec. 29), from authorizing lotteries or granting divorces (art. II, sec. 24), or from passing "private or special" legislation involving taxes, highways, mortgages, corporate privileges, deeds and wills, interest rates, fines and penalties, adoptions, or civil and criminal actions (art. II, sec. 28). Moreover, the constitution imposed structural restrictions on the legislative process, such as an openness provision requiring open meetings (art. II, sec. 11), an anti-log-rolling provision that prohibits bills from embracing more than one subject (art. II, sec. 19), and specific prescriptions against bribery and corruption of government officials (art. II, sec. 30, and sec. 39).

3) Enhancing Democracy. The framers of Washington's constitution provided for direct democratic control of all three branches of government. This included the direct election of both houses of the legislature (art. II, sec. 4 and 6), the popular election of judges (art. 4, sec. 3 and 5), and the separate election of all major offices in the executive branch (art. III, sec. 1). Democratic control of government was further enhanced by amendments 7 and 8 in 1912, which allowed the people to directly legislate through the initiative and referendum processes (art. II, sec. 1), and made all state-wide elected officials, except judges, subject to popular recall after their election (art. I, sec. 23).

4) Restricting Private and Corporate Power. Finally, the framers adopted an entire article (art. XII) and several separate provisions directly restricting private corporations. These included: barring the formation of monopolies and trusts (sec. 22), prohibiting companies from discriminating in the rates that they charge customers (sec. 15), prohibiting railroads from consolidating lines (sec. 16), requiring stockholders to assume liability for corporate debts (sec. 4 and 11), prohibiting companies from receiving public subsidies or credit (sec. 9), and prohibiting the use of the government's eminent domain powers on behalf of private corporations (art. I, sec. 16). And in one of the more unique provisions in a state constitution, the framers also prohibited corporations from "organizing, maintaining or employing an armed body of men" (art. I, sec. 24). This last restriction was the result of an event in 1888 when mining companies in Cle Elum and Roslyn employed armed strikebreakers to resolve a labor dispute (Dolliver 1992).

Differences Between the State and Federal Constitutions

In addition to reflecting a distinct history and attitude of its framers, Washington's constitution, because it is a state constitution, differs from the federal document in several structural respects as well. Understanding these differences is crucial to understanding constitutional politics at the state level.

1) Restricting or Empowering Government. Constitutions can either be *sources* of political power or *limitations* on political power. It is well-known that the federal constitution was thought to establish a government of enumerated powers, so that when Congress wants to regulate an area it must find a specific grant of constitutional authority to do so.[3] The opposite is true of state constitutions. State governments possess plenary legislative authority—that is, all power not specifically removed by the federal constitution (Grad 1968). This is where the idea of "state police powers" comes from (powers not possessed by the federal government). The framers of Washington's constitution understood this difference quite well, which is one reason why the state constitution is more detailed in its restrictions on legislative authority (Utter 1985). Members of Washington's Supreme Court realize this, too, as former Justice Andersen observed:

> As this court has often observed, the United States Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes limitations on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law (*State v. Gunwall* [1986], 815).

Because of this structural difference, when the constitutionality of legislative enactments in Washington are challenged, the object of judicial inquiry is

not whether the statute is authorized by the constitution, but whether it is specifically prohibited. Thus, in contrast to federal jurisprudence, at the state level the burden falls squarely on those challenging a statute to find specific restrictions on state governmental authority (Grad 1968). Secondly, unlike the federal level where judges interpret grants of government authority expansively (such as the Supreme Court's modern commerce clause jurisprudence), constitutional specifications of authority at the state level often act as limitations on what the government may do. In a constitution of plenary authority, an authorization to pursue one course of action may by negative implication preclude others that were otherwise available in the absence of the "grant" or specification (Tarr 1998, 6-9; Utter 1985). This structural difference also forces interpreters to think differently about individual rights provisions of the federal and state constitutions. In the federal constitutional tradition, the absence of a specific grant of government authority usually acts as an implicit protection of individual liberty. At the state level, however, protection from legislative power is found solely in positive constitutional affirmations of individual liberties.

2) Positive Rights. At the federal level rights are often thought of as "trumps" against the exercise of governmental power. This is because the rights found in the federal Bill of Rights are generally "negative" rights, or rights that *prohibit* government from taking certain actions (Congress shall make no law...). State constitutions, by contrast, often contain positive affirmations of rights as well as provisions that *require* government to act (Hershkoff 1999).

Of the 35 sections in Washington's Declaration of Rights, only three were expressed in the negative, as limitations on the power of government (art I, sec. 8, 12, 23). The others are phrased as general affirmations that the state must act to enforce and not simply refrain from breaching. Moreover, in contrast to the federal document, the Washington constitution contains several provisions that expressly confer rights to some form of governmental resource. For example, article II, section 35, provides: "The legislature *shall* pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health..." Article XIII, section 1, provides that educational, reformatory and penal institutions, as well as state mental hospitals "shall be fostered and supported by the state." While article IX, section 1 declares: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders..."

What do such rights provisions mean for the role of courts in Washington? In a landmark case, *Seattle School District No. 1 v. State* (1978), the Washington Supreme Court held that the state had breached its constitutional duty to ensure a "basic education" to Washington students under article IX when it under-funded education. It then required the legislature to appropriate more money for public schools. In general, however, Washington courts have been reluctant to enforce the positive rights provisions of the state's charter, usually premising

their reluctance upon doctrines of judicial restraint (Talmadge 1999). Whether such doctrines, which are grounded in separation of powers concerns, are appropriate within the Washington constitutional context is debatable. Unlike at the federal level, when Washington courts enforce such positive rights provisions they can rely upon clear textual support in the constitution, as well as the fact they are themselves democratically elected to enforce the constitution, and the knowledge that the power of judicial review was a firmly entrenched constitutional doctrine in 1889 and an accepted feature of the state's constitution (see Clayton 2002).

3) Length and Fluidity. Washington's constitution is much longer, more detailed, and more diverse in the concerns it addresses than is the federal constitution. The state document contains thirty-two articles and ninety-one amendments, as compared to seven articles and twenty-seven amendments in the federal document. It runs to nearly 40,000 words, compared to approximately 6,000 in the federal constitution. Its provisions range from relatively clear and specific commands (such as article III, section 14, which set the governor's salary at $4,000), to extremely open textured clauses that require pure political judgement to interpret (such as article I, section 32, requiring a "frequent recurrence to fundamental principles" in order to secure "individual rights and the perpetuity of free government").

Even more troubling for interpreters of Washington's constitution is its fluidity and frequent amendment—91 times since its adoption. The federal constitution, by contrast, has been amended a mere 12 times during this same period of time. As with the provisions of the original constitution itself, the amendments vary in detail and subject matter. The subject area calling forth the most amendments is public expenditure and finance, with more than 23 separate amendments. Other areas in which there have been multiple amendments include: courts and judges (10); local governments (8); compensation of public officials (5); voter qualifications (5); filling vacancies in elective offices (4); and alien land ownership (3). In all, 78 of the constitution's 247 original sections—nearly one-third of the entire document—have been altered by amendment, and 26 of these amendments were themselves subsequently amended or repealed (Clayton 2002).

Moreover there is no pattern of tectonic constitutional change or periods of major constitutional reconstruction in Washington history. At the federal level one can identify periods of political coherence or what have been called "constitution moments," such as the Civil War or New Deal, when the entire architecture of the constitution was realigned by sweeping amendments or judicial decisions (Ackerman 1991). But it is impossible to identify any such periods of coherence in changes made to Washington's constitution. There have been several unsuccessful political efforts to fundamentally alter the state constitution. In 1918, the legislature recommended calling a constitutional convention, but

the proposal narrowly failed in a state-wide vote. Later, in the 1930s, Governor Clarence Martin created an Advisory Constitutional Revision Commission, which recommended nine sweeping reforms, including a move to a unicameral legislature. But none of the reforms were enacted. In 1965, the legislature created a Constitutional Advisory Council, which again made a series of proposals. Still no action was taken. Finally, Governor Daniel Evans, a strong advocate of constitutional reform, created constitutional revision committees in 1967, 1968, and 1975. But none of these efforts bore fruit either (Beckett and Peterson 1985).

The ninety-one amendments to the Washington constitution thus stand as individual, haphazard alterations. Some parts of the constitution have remained unchanged since 1889, while others have been altered on a regular basis (for example, article II has been amended 24 separate times). While some portions of the existing document may embody a principled and coherent constitutional perspective, others—as a result of continual amendment—reflect inconsistent constitutional perspectives and values. A judge or a lawyer seeking constitutional coherence in interpreting portions of the constitution may thus confront the task of *construction* rather than *discovery*. Moreover, to the extent the state constitutional provisions do not embody a single or consistent set of political perspectives, an interpreter cannot always look to the whole to illuminate the meaning of its various parts. Thus, unlike at the federal level, state constitutional interpreters are often forced to adopt a "clause-bound" interpretive approach, where each provision must be interpreted in isolation rather than applying a uniform interpretive process (Tarr 1998, 189-94).

The Politics of Developing an Independent State Constitutional Jurisprudence

Recent interest in state constitutions dates back to a speech delivered by former U.S. Supreme Court Justice William Brennan in 1977, in which he urged state judges to look past the rights protections of the federal constitution and toward those lying dormant in their own state charters (Brennan 1977). Brennan's call ushered in a renaissance in state constitutional law as one state high court after another began plumbing the language and history of their constitutions to discover new rights (Tarr 1997; Williams 1996).

Washington was an early leader in this movement. In 1983, former Justice Robert Utter addressed a state judicial conference and urged state judges to begin developing an independent state constitutional jurisprudence in Washington (Utter 1984). Even before this, Washington's Supreme Court had begun interpreting provisions of the state constitution so as to confer greater individual rights on Washington citizens. In *Alderwood v. Washington Environmental Council* (1981), for example, the Court held that the free speech clause of

article 1, section 5, of Washington's constitution required owners of a private shopping center to accommodate free expression rights of political activists even though the federal First Amendment (which only guards against government suppression of speech) would not have provided such protection. Writing for the court, Justice Utter rejected the importation of the so-called "state action requirement" of the federal constitution into the state's free speech provision: "The United States Constitution...only establishes the minimum degree of protection that a state may not abridge." State courts "are obliged to [independently] determine the scope of their state constitutions due to the structure of our government" (113). In another prominent case, *State v. Chrisman* (1980), the Washington high court reversed a narcotics conviction of a university student when it excluded evidence from trial under article I, section 7 of Washington's constitution, even though the evidence was permitted under the Fourth Amendment of the federal constitution.

Not only did the court set out to establish an independent state constitutional jurisprudence in these early cases, but it also began to assert the primacy of state constitutional protections. In *State v. Coe* (1984), for example, the Court used the free speech provisions of article I, section 5, to bar a trial judge's gag order in a highly publicized murder trial. Writing for the Court, Justice Utter articulated several reasons why the case should be treated first under Washington's constitution rather than the federal First Amendment:

> First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system... 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... 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... Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law... 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 (359).

From the very beginning, the revived interest in state constitutions had distinct political overtones. Justice Brennan's call was viewed by many as part of a liberal agenda to use state law to expand liberal rights in the face of the conservative drift of federal jurisprudence under the Burger and Rehnquist courts. Many conservatives, both on and off state courts, thus began to complain bitterly that the new state constitutional jurisprudence was "unprincipled" and simply "result-oriented" (Clayton 2002, 49-51).

Washington's high court was not exempt from such criticism. In *State vs. Ringer* (1983), for example, the Court held that a warrantless search of a vehicle, based only on an aroma of marijuana, was impermissible under article I, section 7, of Washington's constitution (even though a similar search would be permissible under the federal Fourth Amendment). In dissent, Justice Dimmick chided the majority for its "sudden leap to the sanctuary of our own state constitution." Complaining of the confusion that would be created by developing two separate sets of constitutional rights, Dimmick wrote: "Once again we confound the constabulary and, by picking and choosing between state and federal constitutions, change the rules after the game has been played in good faith..." (1250-51).

Washington's Supreme Court attempted to ensure critics that its new constitutional jurisprudence was principled and not simply political. The year after *Ringer* the court used two cases, *State v. Coe* (1984) and *State v. Williams* (1984), to settle rights disputes under the state constitution, but it emphasized that its decisions were consistent with federal constitutional jurisprudence and therefore not an effort to circumvent the latter. Still, criticism of the court continued and eventually turned into legislative efforts to curb the court's power of judicial review. Although bills to strip the court's authority failed to pass, they nevertheless sent clear signals to members of the state's judiciary (Talmadge 1999). More importantly, cases such as *Alderwood, Ringer* and *Coe* generated public controversy that became fodder in future elections to the court and changes in its personnel (Sheldon 1988, 183-187; Sheldon 1990, 8-10).

By the mid-1980s the court was thus on the defensive. In a pair of 1986 cases, it began retreating from its expansion of state constitutional rights in the area of police searches and seizures (see *State v. Stroud* [1986] and *State v. Kennedy* [1986]). Three years later, in *Southcenter Joint Venture v. National Democratic Policy Committee* (1989), the court also revisited its free speech jurisprudence. Appealing to "general principles of constitutionalism" the court abandoned its *Alderwood* decision and applied a federal-style "state action" requirement to article I, section 5, removing any state protection against private efforts to suppress free expression.

More importantly, to stem criticism that its constitutional jurisprudence was unprincipled, the court adopted a set of criteria to justify any future deviations from federal constitutional standards. In *State vs. Gunwall* (1986), Justice Andersen articulated "six neutral and nonexclusive criteria" that the court would look to when deciding whether to move from the federal to the state constitutions when adjudicating rights claims. The *Gunwall* factors include: 1) The textual language of the state constitution; 2) differences in the texts of parallel provisions of the two constitutions; 3) differences in state constitutional and common law history; 4) differences in preexisting state law; 5) differences in

structure between the two constitutions; and 6) differences that may emerge from matters of particular state interest or local concern (12-13).

Two years later, in *State v. Wethered* (1988), the court made clear that briefing the *Gunwall* factors was mandatory before the court would even consider a state constitutional rights claim. In refusing to consider a claim under the self-incrimination provisions of article I, section 9 of Washington's constitution, Justice Utter reminded the bar that *Gunwall* imposed a procedural obligation: "By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, (the defendant) requests us to develop without benefit of argument or citation of authority the 'adequate and independent state grounds' to support his assertions. We decline to do so..." (p. 800-01).

Post-*Gunwall*: Principled or Political Jurisprudence?

Gunwall was a calculated effort to reassure critics that the court's constitutional jurisprudence was "articulable, reasonable, and reasoned," not political (Utter 1992, 810). Nevertheless, the application and meaning of *Gunwall* has itself become controversial. Supporters of *Gunwall* argue that its requirement for structured analysis will ensure that the court acts in a principled way when moving beyond federal constitutional guarantees. Critics, on the other hand, contend that *Gunwall* has actually prevented the development of an independent state constitutional jurisprudence (Spitzer 1998).

Not surprisingly, this debate has been most evident on the court itself. At an aggregate level, the lack of consensus on the court over *Gunwall* can be gauged by how fragmented its decisions have become. Table I provides data on cases where members of the court cited *Gunwall* between 1986 and 2002. The data indicate, that for the entire 16-year period, cases in which *Gunwall* was cited produced 154 majority opinions. However, those same cases also produced 157 separate opinions (111 dissents and 46 concurrences). Moreover, conflict over *Gunwall* appears to be growing rather than diminishing, as the total number of dissenting and concurring opinions has been increasing as a percentage of the total.

Beyond *Gunwall's* failure to produce consensus on the court lies the substantive debate about whether it has advanced or hindered the development of state constitutional jurisprudence. A study examining the first decade of the court's decisions under *Gunwall* found that in 62 of the 108 cases where the court cited it as precedent, it did so only to point out that the parties had improperly briefed the criteria and thus refused to even reach the state constitutional claim at issue (Spitzer 1998). More importantly, the study concluded that in only 8 of the 108 cases (7.4%) did the court eventually analyze the state constitutional claims and reach a result different from the what the federal constitution would have required (1197-1200).[4]

Table 1

Gunwall Cases 1986-2002

Year	Total Majority Opinions	Concurring Opinions	Dissenting Opinions	Total Separate Opinions	Percentage of Separate Opinions
1986	2	1	0	1	33%
1987	2	0	2	2	50%
1988	10	5	6	11	52%
1989	12	4	7	11	48%
1990	9	1	3	4	31%
1991	11	2	6	8	42%
1992	12	5	7	12	50%
1993	14	6	3	9	39%
1994	12	3	6	9	43%
1995	6	1	7	8	57%
1996	15	6	10	16	52%
1997	12	4	15	19	61%
1998	10	1	11	12	55%
1999	8	3	9	12	60%
2000	9	2	8	10	53%
2001	7	2	7	9	56%
2002*	3	0	4	4	57%
Total	154	46	111	157	50.5%

* Through October 2002.

A more recent examination of the court's decisions under *Gunwall* yields nearly identical results.[5] Table II indicates that, between 1997-2002, the Court cited *Gunwall* in 39 cases. In only 14 of these (35.9%) did the Court agree to independently apply the state constitution. Moreover in only three of those fourteen cases (7.7%) did an independent state constitutional analysis yield a different result from what the federal constitution would have required.

The barrier that *Gunwall* presents to developing a state constitutional jurisprudence is quite clear. During the five years examined, the court continued to refuse to reach state constitutional arguments on procedural grounds, expressly invoking its briefing requirements to altogether preclude an analysis of the state constitution fully in 13 of the 39 cases (33.3%) citing *Gunwall*. Critics contend that this rigid requirement for briefing only ensconces process at the expense of substance (Spitzer 1998). When in 1996 the court refused to reach a state criminal due process claim because of improper *Gunwall* briefing, Justice Madsen

Table 2

Published Cases Citing Gunwall*

Cases citing Gunwall	Interpreted State Const.	Result Similar	Result Different	Result Unclear	Refusal to Interpret	Gunwall Analysis Conducted	Inadequate Briefing	Percentage Vote Against State Const.
39 (total Cases)**	14 (35.9%)	6 (15.4%)	3 (7.7%)	5 (12.8%)	23 (59%)	10 (25.6%)	13 (33.3%)	
Individual Justices								
Alexander	8	3	3	2	14	5	9	64%
Bridge	3	1	1	1	10	4	6	77%
Doliver	6	1	2	3	11	6	5	65%
Durham	4	2	1	1	6	2	4	60%
Guy	9	5	1	3	17	6	11	65%
Ireland	5	3	1	1	11	4	7	69%
Johnson	8	3	2	3	14	6	8	64%
Madsen	9	4	1	4	16	9	7	64%
Sanders	7	1	2	4	10	5	5	59%
Smith	11	4	3	4	22	10	12	67%
Talmadge	7	3	1	3	13	6	7	65%

* Over the past five years; the votes of individual justices represent those cases in which the justice joined the majority opinion. With fewer than five total votes, justices Chambers and Owens are not represented.

** Of the 39 cases citing Gunwall, 37 contained a discussion of the Gunwall factors and/or analysis.

castigated the majority for "...elevat(ing) form over substance (so as) to unjustly deny the defendant the protections he deserves as a Washington state citizen" (*State v. Thorne* [1996], 537). Indeed, the court has even imposed this procedural hurdle to deny a state constitutional analysis in death penalty cases (see *State v. Davis* [2000]).

Critics also argue that the *Gunwall* criteria force the court into a mode of analysis in which it must compare and contrast state constitutional provisions with analogous federal provisions. The consequence is that state constitutional interpretation is made overly rigid and contingent on developments in federal constitutional law (Atkins 1987; Clayton 2002). In the words of Justice Madsen, this compare-and-contrast requirement of *Gunwall* has left "independent state constitutional analysis...lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than our own state courts" (*State v. Glocken* [1995], 1274-75).

In addition to preventing state constitutional claims even from being considered, *Gunwall* has not been effective at allaying concerns that the court's use of state constitutional provisions is unprincipled and political. Indeed, *Gunwall's* "structured analysis" is sufficiently malleable to allow inconsistent results in the hands of different justices. To take just one example, in several recent cases the court has addressed the relationship between the privileges and immunities clause of the state constitution (art. I, section 12) and the equal protection clause of the federal constitution (Fourteenth Amendment). In *Gossett v. Farmers Inc.* (1997), *DeYoung v. Providence Medical Center* (1998), and *In Re Detention of Turay* (1999), the court conducted a *Gunwall* analysis and then expressly held that the state provided no greater protection against discrimination than did the federal equal protection clause. Then, in the 2002 case of *Fire Protection District v. City of Moses Lake*, the court changed directions. After conducting a *Gunwall* analysis, the court decided to strike down a city's annexation process on the theory that it violated the state's privilege and immunity clause even though it did not run afoul of the federal constitution. Attempting to explain this discrepancy, Justice Bridge stated: "Although in recent cases we have held that the privileges and immunities clause is substantially similar to the equal protection clause [cites omitted], we have also left open the possibility that article I, section 12 could provide greater protection than the federal equal protection clause" (725). In dissent, Justice Madsen, also citing *Gunwall*, complained:

> The predictable, and unfortunate, result [of the court's decision] is that courts will have license to make what are essentially ad hoc determinations of constitutionality under article I, section 12... With this in mind, I believe it is essential that the court adhere to a principled analysis... An important starting point is that a *Gunwall* analysis is intended to identify those situations where a state constitutional provision requires a separate and independent constitutional analysis (736-37).

In addition to using *Gunwall* to reach inconsistent results, the court's threshold determination of whether to even engage in a *Gunwall* analysis has been equally unpredictable. For example, in *Gallwey v. Grimm* (2002), the court upheld a state program that provided tuition assistance to place-bound students at certain public and private universities. Concluding that the program violated neither state nor federal constitutional prohibitions on public assistance to religious organizations, Justice Madsen's majority opinion contains no reference to *Gunwall* at all. Nevertheless, Justice Johnson's concurring opinion in *Grimm* contained a detailed *Gunwall* analysis. Thus the justices themselves appear uncertain as to when a *Gunwall* analysis is both necessary and appropriate.

Finally, reviewing the voting patterns of individual justices in cases that cite *Gunwall* also leads to the conclusion that it is being applied in a selective, result-oriented manner. As noted in Table II, the votes for and against an independent state constitutional analysis are fairly evenly distributed among the justices across the ideological spectrum. In other words, "conservatives" on the court appear equally willing to selectively favor or oppose an independent state constitutional analysis under *Gunwall* as do "liberals"—its structure for analysis appears to have provided no constraint. This suggests that Justice Madsen's dissent in *Fire Protection District* is right, that reliance on *Gunwall* does not guarantee a principled outcome and in fact appears to lead to the very sort of *ad hoc*, result-oriented jurisprudence it was designed to prevent.

Conclusion

The great constitutional historian Edward Corwin observed some time ago that "one of the greatest lures to the westward movement of population was the possibility which federalism held out to the advancing settlers of establishing their own undictated political institutions..." (Corwin 1950, 22). Washington's constitution has a distinct history. Its structure and purposes differ in important respects from the federal constitution. This is as it should be in a federal system.

The great promise of dual constitutionalism is that states can learn from each other and from the federal experience and act as "laboratories of democracy." Former Justice Utter recognized this promise in *Southcenter* when he noted that federal constitutional jurisprudence is "fraught with contradictions" and pitfalls that the state need not adopt. Federalism, he argued, "allows the states to operate as laboratories for more workable solutions to legal and constitutional problems. As part of our obligation to interpret our State's constitution, we have the opportunity to develop a jurisprudence more appropriate to our own constitutional language" (1303-06).

Washington's effort to develop an independent constitutional rights jurisprudence, however, also indicates the problems attendant with dual constitutionalism. At the national level, commitments to federalism principles are notoriously political and strategic. Conservatives, for example, favor federalism when it comes to abortion rights or welfare policy, but favor strong national government when it comes to the war on drugs or in preventing doctor assisted suicide. Liberals, of course, hold the opposite views. There is no reason to suppose that such result-oriented commitments to constitutional federalism do not also apply to constitutional politics at the state level, leading both liberals and conservatives to favor state constitutionalism only when it advances their respective agendas. In Washington, the court's resort to the *Gunwall* criteria does not seem to have allayed these fears.

Nevertheless, interest in state constitutions and the new judicial federalism is here to stay. As with other constitutional developments its life is linked to broader political and economic changes in America that have forced Americans to rethink the locus and forms of governmental power. As in the past, this challenge will require new generations of Washington citizens to define themselves and give voice to their political goals and aspirations. That voice, as in the past, will continue to be reflected in the state's constitution and discourse about its meaning.

Endnotes

1. Advisory Commission on Intergovernmental Relations, *Changing Public Attitudes on Government and Taxes* (1991), 14. 52 percent of Americans surveyed knew their state had a constitution, 11 percent believed that it did not, 37 percent did not know.
2. Perhaps the best general discussions of the convention and prevailing attitudes of the day are found in two unpublished sources: James Leonard Fitts, *The Washington Constitutional Convention of 1889* (1951) (unpublished Master's Thesis, University of Washington); Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* (1945) (unpublished Ph.D. dissertation, University of Washington). See also Dolliver, supra note 97. For views of three delegates to the convention see John R. Kinnear, "Notes on the Constitutional Convention," 4 *Washington Historical Quarterly* 276 (1913); T.L. Stiles, "The Constitutional Convention of the State and Its Effects upon Public Interests," 4 *Washington Historical Quarterly* 281 (1913); and Edmond S. Meany, *History of the State of Washington* (1937). For an account of the conventions day-to-day actions see Beverly Rosenow, *Journal of the Washington State Constitutional Convention*, 1869 (1962).
3. The literature on this aspect of the federal constitution is vast, but some of the more interesting discussions include: Kathryn Abrams, "On Reading and Using the Tenth Amendment," 93 *Yale Law Journal* 723 (1984); A.E. Dick Howard, "The States and the Supreme Court," 31 *Catholic University Law Review* 380 (1982); Lawrence Lessig, "Translating Federalism: United States v. Lopez," 1995 *Supreme Court Review* 125 (1958).
4. The cases include: *Seattle v. McCready*, 868 P.2 134 (1994) (Wash. Const., art. I, 7); *First Covenant Church v. Seattle*, 840 P.2d 174 (1992) (Wash. Const., art. I, 11); *State v. Boland*, 800 P.2d 1112 (1990) (Wash. Const., art. I, 7); *Bedford v. Sugarman*, 772 P.2d 486 (1989) (Wash. Const., art. I, 7); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (1989) (Wash. Const.,