ValpoScholar Valparaiso University Law Review

Volume 38
Number 2 *Symposium on Tomorrow's Issues in State Constitutional Law*

*pp.*317-326

Symposium on Tomorrow's Issues in State Constitutional Law

Foreward: Continued Commitment to State Constitutional Law

Robert F. Williams

VALPARAISO UNIVERSITY LAW REVIEW

VOLUME 38 SPRING 2004 NUMBER 2

SYMPOSIUM ON TOMORROW'S ISSUES IN STATE CONSTITUTIONAL LAW

FOREWORD: CONTINUED COMMITMENT TO STATE CONSTITUTIONAL LAW

Robert F. Williams*

This Symposium marks almost thirty-five years of commitment by the *Valparaiso University Law Review* to the area of state constitutional law. Beginning in 1969, with the publication of Robert Force's *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*,[1] the *Law Review* has made important contributions to our understanding of state constitutional law. Professor Force called for a Renaissance in the use of state constitutions, and the *Law Review* has contributed to that Renaissance.

In 1996, in a Symposium recognizing the importance of Professor Force's article, I observed that his "too-little recognized article foresaw virtually all of the major themes and developments in state constitutional law between 1969 and the present."[2] The 1996 Symposium, in the pages of this Review, also substantially advanced the field of state constitutional law.[3] Now, the *Law Review* continues its contributions to

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1 3 VAL. U. L. REV. 125 (1969).

2 Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii, xiv (1996).

3 Symposium, *The New Judicial Federalism: A New Generation Symposium Issue*, 30 VAL. U. L. REV. xiii (1996).

that field with the present Symposium. All of this work contributes to fulfilling the "research agenda" in state constitutional law.[4]

As reflected in this Symposium, much of the scholarly literature on state constitutional law has been produced by sitting state judges.[5] Chief Justice Randall Shepard of the Supreme Court of Indiana, who has already made a number of important contributions to the literature of state constitutional law,[6] considers the advisability of using the certified questions mechanism[7] to provide interpretations of the state constitution.[8] Federal courts, of course, do have diversity and supplemental jurisdiction over state constitutional claims.[9] For questions under the state constitution that are novel, however, Chief Justice Shepard points out that often federal judges will propound certified questions to state high courts.

Chief Justice Christine Durham of the Utah Supreme Court, also an established figure in the area of state constitutional law,[10] analyzes the very important area of religious liberty under state constitutions.[11] This topic rose to even greater visibility during this Term of the Supreme Court of the United States as it considered a challenge under the *federal*

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4 Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMP. L. REV. 1145 (1993).

5 For a partial list of these contributions, see Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 n.4 (2003).

6 Randall T. Shepard, *Foreword: Indiana Law, The Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 504-07 (1991); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); Randall T. Shepard, *State High Courts as Central Figures in the Future of the American Legal System*, 72 NOTRE DAME L. REV. 1009 (1997). *But see* Jon Laramore, *Indiana Constitutional Developments: The Wind Shifts*, 36 IND. L. REV. 961 (2003).

7 *See, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386 (1974); Scott v. Bank One Trust Co., 577 N.E.2d 1077 (Ohio 1991); Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003); Larry Roth, *Certified Questions from the Federal Courts: Review and Re-Proposal*, 34 U. MIAMI L. REV. 1 (1979).

8 Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327 (2004).

9 City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982); Robert A. Shapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

10 *See, e.g.*, Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics and Power*, 76 N.Y.U. L. REV. 1601 (2001); Christine M. Durham, *Obligation or Power? The New Judicial Federalism and the Policy Making Role of State Supreme Courts*, 2 EMERGING ISSUES IN ST. CON. L. 219 (1989).

11 Christine M. Durham, *What Goes Around Comes Around: The New Relevance of State Constitution Religion Clauses*, 38 VAL. U. L. REV. 353 (2004).

constitution to a restrictive *state* constitutional religion provision,[12] although not one of the so-called Blaine amendments.[13]

Justice Randy Holland of the Supreme Court of Delaware, also an important state constitutional law scholar,[14] addresses the important area of the right to criminal and civil jury trials under state constitutions.[15] This has particular importance in criminal cases, where state constitutions can be more protective than the Sixth Amendment, and in civil cases, because the federal Seventh Amendment has not been applied to the states.[16]

Justice Roderick Ireland of the Supreme Judicial Court of Massachusetts provides a detailed look at the varying analytical methods that his court has used in interpreting the Massachusetts Constitution.[17] His article is an important addition to the literature on state constitutional interpretative techniques.[18]

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12 Locke v. Davey, No. 02-1315, 2004 WL 344123 (U.S. Feb. 25, 2004). *See* Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry By Opponents of School Choise*, 59 N.Y.U. ANN. SURV. AM. L. 413 (2003); David G. Savage, *Odd Start for Lively Term*, 89 A.B.A. J. 26 (Oct. 2003).

13 *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution – A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 431-33, 436-42 (1985); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB POL'Y 657, 659, 670-74 (1998).

14 RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE (2002); THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS (Randy J. Holland, ed., 1997); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989 (1996).

15 Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL U. L. REV. 373 (2004).

16 *Id.* at 387-89.

17 Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405 (2004).

18 *See, e.g.*, Neil H. Cogan, *In Praise of Diverse Discourse*, 5 ST. THOMAS L. REV. 173 (1992); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Jeffrey A. Parness, *Failed or Uneven Discourse of State Constitutionalism?: Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155 (1992); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992); *see also* James A. Gardner, *Discourse and Difference – A Reply to Parness and Cogan*, 5 ST. THOMAS L. REV. 193 (1992); Roundtable, *Responses to James A. Gardner, The Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761 (1992)*, 24 RUTGERS L.J. 927 (1993).

Judge Laura Denvir Stith of the Supreme Court of Missouri provides a careful assessment of state habeas corpus litigation and the special problems of claims of "actual innocence" (more important now in the age of DNA evidence) and retroactive application of constitutional rulings.[19] Like the doctrines of harmless error[20] and prophylactic rules,[21] retroactivity in habeas corpus proceedings does form an important component of judicial application of state as well as federal constitutional rules. This is a significant addition to the literature on state constitutional law, and it furthers our understanding of *state* court authority over the retroactive application of *federal* constitutional rulings. Judge Stith demonstrates that federal habeas corpus is another area where the Supreme Court of the United States exercises considerable restraint out of deference to the states, making such national rulings inappropriate models for state emulation.[22]

Judge Jack Landau of the Oregon Court of Appeals, who has raised important cautionary criticisms of state constitutional law methodology,[23] continues that theme here in his refreshingly candid criticism of state courts' use of constitutional history in interpreting their state constitutions.[24] He points out and analyzes a number of specific fallacies state courts commit in their reliance on state constitutional history. He acknowledges, but does not analyze the problem of linking framers' intent to ratifying voters' intent as an important step in relying on state constitutional history.[25]

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19 Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421 (2004).

20 Cooper v. California, 386 U.S. 58, 62 (1967); State v. Harris, 544 N.W.2d 545, 561 (Wis. 1996) (Abrahamson, J., concurring); Angus M. MacLeod, Note, *The California Constitution and the California Supreme Court in Conflict Over the Harmless Error Rule*, 32 HASTINGS L.J. 687 (1981).

21 Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283 (2003).

22 *Id.*; *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389-97 (1984); Williams, *infra* note 50, at 1051-53.

23 Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793 (2000).

24 Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 VAL. U. L. REV. 451 (2004).

25 *Id.* at 483 n.137. *See generally* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 200-01 (2002).

As legal historian Stephen Gottlieb has observed, reference to state constitutional history "is valuable whether or not one subscribes to a jurisprudence of original intent."[26] He continued:

> For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen. State constitutional history has become more important as the United States Supreme Court has become less protective of individual rights.[27]

Reliance on constitutional convention or commission records, or newspaper coverage of state constitutional conventions and commissions would be used, as Professor William Fisher says, in the "contextualist method."[28] This method asserts that, by attending carefully to the discourse out of which a text grows (the vocabularies available to its author, the concepts and assumptions he took for granted, and the issues he considered contested), one can (and should) ascertain the author's intent.[29] Although Professor Fisher concludes that this approach is flawed,[30] a number of lawyers and judges make use of state constitutional history in this way. Cass Sunstein has described the constitutional lawyer's (by contrast to the historian's) task of presenting a "usable past":

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[26] Stephen E. Gottlieb, *Foreword* to *Symposium on State Constitutional History: In Search of a Usable Past*, 53 ALB. L. REV. 255, 258 (1989); *see also* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991); Pierre Schlag, *Framers' Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985). For a review of the debate over original intent at the federal level, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

[27] Gottlieb, *supra* note 26, at 258.

[28] William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1104 (1997).

[29] *Id.*; *see also* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

> American constitutional theorists are correct to turn to the history of the Founding for a number of reasons. Most generally, situating ideas in the context in which they arose enables us to comprehend and assess those ideas better than we would by viewing them as free-floating principles. This follows because the original historical setting almost invariably suggests reasons to accept or reject a given idea that would not otherwise be apparent.

Id. at 550.

[30] Fisher, *supra* note 28, at 1105, 1107.

> The search for a useable past is a defining feature of the constitutional lawyer's approach to constitutional history. It may or may not be a part of the historian's approach to constitutional history, depending on the particular historian's conception of the historian's role. The historian may not be concerned with a useable past at all, at least not in any simple sense. Perhaps the historian wants to reveal the closest thing to a full picture of the past, or to stress the worst aspects of a culture's legal tradition; certainly there is nothing wrong with these projects. But constitutional history as set out by the constitutional lawyer, as a participant in the constitutional culture, usually tries to put things in a favorable or appealing light without, however, distorting what actually can be found.[31]

In *State v. Baker*[32] Vermont Chief Justice Jeffrey Amestoy described the use of state constitutional history in interpretation as follows:

> [T]he responsibility of the Court . . . is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them .... Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the

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31 Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 603 (1995).

> What I am suggesting is that the constitutional lawyer, thinking about the future course of constitutional law, has a special project in mind, and that there is nothing wrong with that project. The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by the sources and by the interpretative conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future. On this view, the historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.

Id. at 605; *see also* Douglas A. Hedin, *The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past*, 30 WM. MITCHELL L. REV. 241 (2003); Richard H. Pildesn, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002).

32 744 A.2d 864 (Vt. 1999).

> motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.[33]

Judge Landau criticizes the use of constitutional history in this Vermont case.[34] By contrast, Justice Ireland generally supports resort to constitutional history in interpreting state constitutions.[35]

Still, one must be careful not to view constitutional history as providing a single truth. As H. Jefferson Powell cautioned:

> One of the most common sources of misunderstanding and anachronism in constitutional history stems from the desire to identify a common set of ideas and arguments shared by groups labeled "the founders," "framers," "'traditional' constitutional lawyers," or similar appellations. This desire easily leads one to find more agreement and intelligibility in the past than was in fact there.[36]

Analysis of, and reliance on, state constitutional history has been an integral part of the New Judicial Federalism.[37] This is partially because, in contrast to federal constitutional history, more details are available at the state level.[38] Additionally, as Dr. G. Alan Tarr has pointed out, a careful look at state constitutional history (in addition to textual differences) can be used to justify an interpretation of the state constitution that is more protective, or recognizes greater rights, than those available at the federal level.[39]

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33 *Id.* at 874; *see* Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 79-86 (2001).

34 Landau, *supra* note 24, at 457-60.

35 Ireland, *supra* note 17, at 409-11.

36 H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*, 53 ALB. L. REV. 283, 283-84 (1989); *see* Landau, *supra* note 24, at 454-57.

37 *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 852 (1991).

38 *Id.*

39 *Id.* at 848 ("If a divergent interpretation may be justified by reference to the distinctive origins or purpose of a provision, then state jurists must pay particular attention to the intent of the framers and to the historical circumstances out of which the constitutional provisions arose."). *Id.*

Michael John DeBoer provides a detailed look at not only the evolution and content of state constitutional equality doctrine in Indiana, but also the egalitarian intent and effect of many of the other provisions contained in the Indiana Constitution.[40] He accurately notes that the Indiana Constitution, like many others, contains a wide variety of equality clauses.[41] Independent interpretation of such clauses has taken on new importance in Indiana since the important 1994 decision in *Collins v. Day*,[42] which gave an independent interpretation to Indiana's "Privileges and Immunities Clause."[43] By contrast, a number of other state courts continue to interpret their equality provisions in lockstep with the federal Equal Protection Clause.[44]

The "New Judicial Federalism" continues to evolve, both in the legal literature and in the courts.[45] Despite the warning in 1983 by Justice Robert Jones of Oregon that any "lawyer who fails to raise an Oregon constitution violation and relies solely on parallel provisions of the federal constitution ... should be guilty of legal malpractice,"[46] many lawyers continue to litigate without adequately raising or briefing state constitutional arguments.[47]

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40 Michael John DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 VAL. U. L. REV. 489 (2004).

41 Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L. REV. 1013 (2003).

42 644 N.E.2d 72 (Ind. 1994).

43 *Id.* at 75; *see* DeBoer, *supra* note 40, at 565-67.

44 *See, e.g.*, Master Builders of Iowa, Inc. v. Polk County, 653 N.W.2d 382, 398 (Iowa 2002); *In re* Cent. Ill. Pub. Serv. Co., 78 P.3d 419 (Kan. 2003); Harvey v. State, 664 N.W.2d 767, 770 (Mich. 2003); Lutheran Bhd. Research Corp. v. Comm'r of Revenue, 656 N.W.2d 375, 382 (Minn. 2003); Gallaher v. Elam, 104 S.W.3d 455, 460 (Tenn. 2003). *See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675 (1992); *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993). *But see* Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43, 66 (Neb. 2003) (equal protection and special laws tests are different).

45 Williams, *supra* note 5, at 211; *see also* Ka Tina R. Hodge, Comment, *Arkansas's Entry into the Not-So-New Judicial Federalism*, 25 U. ARK. LITTLE ROCK L. REV. 835 (2003).

46 State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring specially).

47 *See, e.g.*, State v. Dean, 76 P.3d 429, 432 n.1 (Ariz. 2003); State v. Lamar, 72 P.3d 831, 835 (Ariz. 2003); State v. Ceballos, 832 A.2d 14, 21 n.4 (Conn. 2003); Overstreet v. State, 783 N.E.2d 1140, 1162 n.15 (Ind. 2003); Sims v. United States Fid. & Guar. Co., 782 N.E.2d 345, 353 n.1 (Ind. 2003); State v. Holzer, 656 N.W.2d 686, 690-91 (N.D. 2003); Sherman v. Dep't of Revenue, 71 P.3d 67, 69 n.4 (Or. 2003); Murphy v. State, 112 S.W.3d 592, 596 (Tex. 2003); Bell v. State, 90 S.W.3d 301, 305 (Tex. Crim. App. 2002); State v. Smith, 59 P.3d 74, 78 (Wash. 2002).

The New Mexico Supreme Court has carefully set out explicit instructions for lawyers and lower court judges regarding how state constitutional claims are to be raised and preserved.[48] This issue has been important in a number of states confronting the New Judicial Federalism.[49]

A number of states have attempted to develop criteria to guide and limit state courts in their decision about whether to interpret their state constitutions to provide more rights than are guaranteed at the federal level. I have described the "criteria approach" elsewhere.[50] This approach continues to be attractive.[51] I have argued that the criteria approach gives improper deference to the Supreme Court of the United States, which is interpreting a different constitution under different, national, circumstances.[52] The Texas Supreme Court noted that the rights claimant:

> has not articulated any reasons based on the text, history, and purpose of Article I, section 8 to show that its protection of noncommercial speech is broader than that provided by the First Amendment under the circumstances presented. Accordingly, we decline to hold that the Texas Constitution affords ... greater rights than does the First Amendment.[53]

California continues to adhere to its view that "cogent reasons must exist" for it to interpret its state constitutional provisions differently from the analogous federal constitutional provisions.[54] The Supreme Court of Washington has continued its interesting application of its 1986 *Gunwall* decision, requiring litigants to brief state constitutional claims in a

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48 State v. Gomez, 932 P.2d 1, 5-10 (N.M. 1997).

49 *See* State v. Gordon, 66 P.3d 903, 913 (Kan. 2003); Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N. MEX. L. REV. 379, 380-81 (1998).

50 *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1021-22 (1997); Williams, *supra* note 5, at 218-19.

51 Williams, *supra* note 50, at 1022-26.

52 *Id.* at 1046-55.

53 Texas Dep't of Transp. v. Barber, 111 S.W.3d 86, 106 (Tex. 2003).

54 People v. Batts, 68 P.3d 357, 375 (Cal. 2003); *see also* State v. Davis, 79 P.3d 64 (Ariz. 2003); State v. Rizzo, 833 A.2d 363 (Conn. 2003); Correia v. Rowland, 820 A.2d 1009, 1017-18 (Conn. 2003).

certain way where there are analogous federal provisions.[55] Such special briefing is not required, however, where the Washington Supreme Court has already determined that the state constitutional provision is more protective than the analogous federal provision.[56]

Many state courts have continued the very common practice of interpreting their state constitutional provisions in "lockstep" with the Supreme Court of the United State's interpretation of analogous federal constitutional provisions.[57] We are, however, well into the "Third Stage" of the New Judicial Federalism:

> The most vitriolic reactions to the New Judicial Federalism now seem to have died down. More and more members of the public, lawyers, judges, academics and members of the media have learned that state constitutions may, in fact, be interpreted to provide more rights than the national minimum. This fact is no longer such a surprise to people as the maturation process of the New Judicial Federalism has continued.[58]

This symposium will contribute substantially to the further development of state constitutional law.

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55 State v. Gunwall, 720 P.2d 808 (Wash. 1986). *See generally* Williams, *supra* note 50, at 1026-29 (criticizing the *Gunwall* approach). Pennsylvania is slightly less rigid. *Id.* at 1031-33; Commonwealth v. Smith, 818 A.2d 494, 499 (Pa. 2003).

56 State v. McKinney, 60 P.3d 46, 48 (Wash. 2002); State v. Vickers, 59 P.3d 58, 67 n.43 (Wash. 2002).

57 *See, e.g.*, State v. Nowell, 817 A.2d 76, 84 (Conn. 2003); People v. Gonzalez, 789 N.E.2d 260, 264 (Ill. 2003); People v. Gherna, 784 N.E.2d 799, 806 (Ill. 2003); Doe v. O'Conner, 790 N.E.2d 985, 988 (Ind. 2003); *In re* Welfare of B.R.K., 658 N.W.2d 565, 577 (Minn. 2003); Damron v. State, N.W.2d 650, 654 (N.D. 2003); Commonwealth v. Bomar, 826 A.2d 831, 844 (Pa. 2003); Commonwealth v. Busanet, 817 A.2d 1060, 1066 (Pa. 2002); State v. Jorgensen, 667 N.W.2d 318, 327 (Wis. 2003); State v. Davison, 666 N.W.2d 1, 6-7 (Wis. 2003); Sarr v. State, 65 P.3d 711, 715 (Wyo. 2003). *See generally* Robert F. Williams, *State Courts Adopting Federal Constitutional Law: Case-by-Case Adoptionism or Prospective Lockstepping?* WM. & MARY L. REV. (forthcoming 2004).

58 Williams, *supra* note 5, at 219 (citing Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996)).