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Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals

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DIALECTICAL FEDERALISM: A TRIBUTE TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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Over the course of the past decade, the West Virginia Supreme Court of Appeals has become something of a controversial institution. Allegedly seeking to "mold state government in its own image,"[1] the court has issued decisions restructuring the state property tax assessment and appraisal scheme,[2] overseeing the funding of public education,[3] invalidating a gubernatorial veto,[4] expanding tort claims beyond the umbrella of workers compensation,[5] and ordering emergency care for the homeless.[6] As a result, the high court has, perhaps deservedly, "attained a reputation for dramatic intervention in public policy disputes."[7]

As individual exercises of judicial authority, the court's determinations have received ample attention. Institutional and political conservatives have claimed that the justices have stepped beyond their allotted powers, trumped the prerogatives of other organs of governments, thwarted commercial development, and fostered bad policies in the process. Liberals and activists, perhaps less frequently, have complained that the court's efforts have been tempered by the political winds and thus fall short of the egalitarian goals occasionally suggested in its opinions.[8]

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[1] Charleston Gazette, Jan. 1, 1984, at 1B, col. 5.

[2] Killen v. Logan County Comm'n, 295 S.E.2d 689 (W. Va. 1982).

[3] Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

[4] State ex rel. Bd. of Educ. v. Rockefeller, 167 W. Va. 72, 281 S.E.2d 131 (1981).

[5] Mandolidis v. Elkins Indus., Inc., 161 W. Va. 695, 246 S.E.2d 907 (1978).

[6] Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983).

[7] Hagan, *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, 89 W. VA. L. REV. 149, 149 (1986).

[8] Consider, for example, the tone and flourish of the Court's opinions in UMWA v. Parsons, 305 S.E.2d 343 (W. Va. 1983); Major v. DeFrench, 169 W. Va. 241, 286 S.E.2d 688 (1982); Webb v. Fury, 167 W. Va. 434, 282 S.E.2d 28 (1981); Pushinsky v. West Virginia Bd. of Law Examiners, 164 W. Va. 736, 266 S.E.2d 444 (1980).

It is not my purpose here to enter that debate. Instead, this brief comment will consider the work of the court from another direction. My focus will be the contribution to the development of American constitutional decisionmaking resulting from the West Virginia Supreme Court of Appeals' efforts to interpret its own constitution. It is, as Justice Brandeis claimed, "one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory"[9] for the formulation of governmental policy. As the result of an increasing reticence by the United States Supreme Court and a heightened sensitivity to civil liberties issues by state jurists, the cast of players molding our constitutional structure has been substantially expanded. The resulting dialogue, spurred by both state and federal interpretive ventures, has bolstered the legitimacy and the precision of constitutional decisionmaking.

The rulings of the West Virginia Supreme Court of Appeals which construe the provisions of the *state* constitution, therefore, have special significance not only in the lives of West Virginians but in the development of a national constitutional jurisprudence. My task is to examine a handful of cases in which the West Virginia court has read its own constitution as more demanding than the federal counterpart. Along the way, I think something can be learned about the constitutional issues which should be particularly appealing to state tribunals, and about the role that state judiciaries, if inclined, can play in our constitutional process. Before turning to the West Virginia decisions, however, some perspective is helpful.

I. The Impact of United States Supreme Court Decisionmaking

Our constitutional memories are often short. In an era of alleged overconstitutionalization, it is easy to forget that a mere three decades ago little of our present framework for the protection of constitutional liberties was in place. On the heels of *Brown v. Board of Education*,[10] the Warren Court launched a virtual constitutional

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[9] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[10] Brown v. Board of Educ., 347 U.S. 483 (1954)(separate but equal impermissible in public education).

revolution. In fairly rapid succession, decisions were handed down not only combatting racial discrimination on a number of fronts[11] but also requiring the reapportionment of legislatures,[12] the incorporation of the bulk of the provisions of the Bill of Rights against the states,[13] giving more meaningful content to the First Amendment's speech and press guarantees,[14] protecting voting rights, prohibiting orchestrated public school prayer,[15] assuring some measure of judicial access to the poor,[16] and bolstering the demands of procedural due process.[17] Faced with an avalanche of mandated change, it is perhaps unsurprising that state supreme courts tended to react defensively. Many judges, no doubt, disagreed with the Warren Court agenda. But regardless of the predilections of local jurists, merely keeping up was a substantial hardship. It was easy, especially in criminal cases, to embrace the habit of looking no further than the announced demands of federal constitutional law.

While the Burger Court accomplished no true counter-revolution,[18] by the mid-1970s the tenor of United States Supreme Court decisionmaking had changed. Fewer new categories of constitutional review were recognized,[19] and existing guarantees were pared back.[20] These substantive retrenchments were accompanied by the adoption of a variety of jurisdictional principles making access to the federal courts more difficult. The standing barrier was solidified, relegating

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[11] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

[12] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[13] *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Gideon v. Wainright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure).

[14] New York Times v. Sullivan, 376 U.S. 254 (1964).

[15] Engel v. Vitale, 370 U.S. 421 (1962).

[16] Douglas v. California, 372 U.S. 353 (1963) (counsel for indigent criminal defendant).

[17] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[18] *See* V. BLASI, THE BURGER COURT: THE COUNTER-REVOLUTIO N THAT WASN'T (1983).

[19] *But see* Roe v. Wade, 410 U.S. 113 (1973); Reed v. Reed, 404 U.S. 71 (1971) (gender discrimination).

[20] *See* Washington v. Davis, 426 U.S. 229 (1976) (showing of intent required in racial discrimination cases); Milliken v. Bradley, 418 U.S. 717 (1974) (de facto segregation not unconstitutional); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (fundamental rights analysis curtailed).

agressive suitors to state tribunals.[21] The *Younger* doctrine was fashioned to assure that pending state cases would actually be tried in that forum.[22] Finally, habeas corpus review, a mainstay of the Warren Court's supervisory process, was dramatically curtailed.[23] Accordingly, state judiciaries were given a freer hand to conduct criminal trials. In broad terms, the Burger Court's message was different than that of its predecessor. While the Warren Court seemed willing to surmount any potential hurdle to assure constitutional compliance, the Burger Court often implied that the federal judiciary had strayed beyond its competence and that states should be left to run their own houses.[24]

A handful of state courts took the implied challenge seriously.[25] The California Supreme Court, for example, confirmed the "independent nature of the [guarantees of] the California Constitution."[26] The New Jersey high court similarly concluded that the provisions of the New Jersey Constitution "should be interpreted to give . . . greater protection" than their federal counterparts.[27] It was in this context, aided by a substantial change in membership,[28]

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[21] *See* Warth v. Seldin, 422 U.S. 490 (1974) (demanding distinct and palpable injury). *See generally* Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984).

[22] Younger v. Harris, 401 U.S. 37 (1971). *See* Nichol, *Federalism, State Courts and Section 1983*, 73 VA. L. REV. ____ (forthcoming).

[23] *See*, Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976).

[24] *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

I should add, however, that the Burger Court occasionally ran against this current. In Michigan v. Long, 463 U.S. 132 (1983) the Court fashioned a jurisdictional doctrine which is more interventionist than preceeding principles. *Long's* adequate and independent state ground rule demands that local courts indicate "clearly and expressly" that federal law does not compel the result in order to avoid Supreme Court review. *Id.* at 1041. Of course the adequate and independent ground doctrine comes into play primarily when state courts have chosen to provide more stringent guarantees than the federal constitution demands. *Long* apparently indicates that "federalism is not a value to be pursued when state courts have afforded their citizens too much constitutional protection." *See* Nichol, *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 321 n.39 (1984). *But see*, Althouse, *How to Build a Separate Sphere: Federal Courts and State Power, 100* HARV. L. REV. 1485 (1987).

[25] *See generally*, Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

[26] People v. Disbrow, 16 Cal. 3d 101, 114, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976).

[27] State v. Johnson, 68 N.J. 349, 353-54, 346 A.2d 66, 67-68 (1975). *See also*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[28] Hagan, *supra* note 7 at 151 & 164.

that the West Virginia Supreme Court of Appeals began to apply its constitution in earnest.

II. Interpreting the West Virginia Constitution

Across a broad spectrum of civil and criminal constitutional issues, the West Virginia Supreme Court of Appeals has concluded that the "West Virginia Constitution offers limitations on the power of the state . . . more stringent than those imposed . . . by the Constitution of the United States."[29] It is not my intention to catalogue those limitations, to discover the common themes of the court's work, or to characterize the overall quality of the judicial product. It is, instead, to emphasize categories of cases—illustrated by features of key West Virginia decisions — in which independent state constitutional decisionmaking has proven particularly useful. So considered, the work of the West Virginia Supreme Court of Appeals represents a notable contribution to the development of constitutional jurisprudence.

A. Filtering Out Federalism

It is perhaps true that it never makes sense for a state supreme court to reflexively accept United States Supreme Court doctrine as the outer judicial boundary of the protection of individual rights. Whether or not so sweeping a statement can be sustained, it is clear that federal constitutional guidelines should *not* provide the final word for state courts when those standards are heavily influenced by federalism concerns. If the federal judiciary refrains from intervention in particular arenas out of deference to local decisionmakers, state judges should hardly follow in lockstep.

Consider, for example, the landmark ruling in *San Antonio Independent School District v. Rodriguez*.[30] There, Mexican-American

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[29] West Virginia Citizens Action Group, Inc. v. Daley, 324 S.E.2d 713, 725 (W. Va. 1984). *See also*, UMWA v. Parsons, 305 S.E.2d 343 (W. Va. 1983); Webb v. Fury, 167 W. Va. 434, 282 S.E.2d 28 (1981); Peters v. Narick, 165 W. Va. 622, 270 S.E.2d 760 (1980); Pushinsky v. West Virginia Bd. of Law Examiners, 164 W. Va. 736, 266 S.E.2d 444 (1980); Tug Valley Recovery Center, Inc. v. Mingo County Comm'n, 164 W. Va. 94, 261 S.E.2d 165 (1979); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

[30] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

parents of schoolchildren challenged the dramatically disparate per-pupil funding resulting from the Texas school finance system. The United States Supreme Court rejected the claim, ruling that the right to education is not "fundamental" for purposes of equal protection scrutiny under the fourteenth amendment.[31] Justice Powell's opinion for the Court explained that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[32] That conclusion was thought mandated, however, by the need to scrutinize state action under "judical principles sensitive to the nature of . . . the rights reserved to the states under the [federal] Constitution."[33]

Given those premises, the West Virginia Supreme Court of Appeals correctly refused to follow the federal lead in deciding *Pauley v. Kelly*.[34] Lincoln County public school students challenged unequal expenditures under the State Board of Education funding scheme in *Pauley*. While recognizing that *Rodriguez* foreclosed a traditional equal protection claim, the West Virginia high court concluded that it was "not constrained by the federal constitutional standard."[35] Emphasizing the demand in Article XII, section one of the West Virginia Constitution for a "thorough and efficient" system of public schools, *Pauley* declared education to be a fundamental right, meriting the closest judicial scrutiny.[36] Accordingly, the "woefully inadequate" Lincoln County schools were said to fall short of the constitutional mark.[37]

Rodriguez, of course, is something of a sore thumb in equal protection jurisprudence. If the primary value served by the equal protection mandate is equality of opportunity, *Rodriguez* certainly presents a strong case for judicial intervention. If one is not born rich, education is the very foundation of opportunity in the United States, and money has a substantial effect on the quality of one's

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[31] *Id.* at 35.
[32] *Id.* at 33.
[33] *Id.* at 39.
[34] Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).
[35] *Id.* at 679, 255 S.E.2d at 864.
[36] *Id.* at 708, 255 S.E.2d at 878.
[37] *Id.* at 707, 255 S.E.2d at 878.

education. A public school system, like that involved in *Rodriguez*, which results in tremendous disparities of per pupil expenditure, cannot be readily squared with a serious demand for equality. If *Rodriguez* is defensible, then, it is so only on practical grounds. Given the weighty demands of school desegration, prison reform, and criminal procedure supervision, the school funding conundrum was perhaps more than the federal judiciary could reasonably be asked to bear. But it hardly makes sense for a state court to accept the harm to equality which *Rodriguez*, one assumes reluctantly, was forced to embrace.

The United States Supreme Court's interpretations of the procedural due process mandate have given rise to similar problems. Decisions since the mid-1970's have frequently employed both cramped and convoluted definitions of the "liberty" and "property" interests needed to trigger procedural protection.[38] *Paul v. Davis*,[39] for example, butchered precedent[40] to conclude that no liberty interest was implicated by a governmental scheme which listed the plaintiff, picture included, as an "active shoplifter" on a flyer distributed to some 800 merchants.[41] *Bishop v. Wood*,[42] on the other hand, held that a "permanent employee" who, under local ordinance, could be dismissed only for "adequate grounds,"had no property interest in the continued enjoyment of his job.[43] The driving force behind both decisions was federalism. *Paul* characterized the reputational interest as one "which the State may protect against injury by virtue of its tort law."[44] *Bishop* turned on judicial reluctance to convert federal courts into ". . . the appropriate forum in which to review the multitude of personnel decisions made daily" by such state agencies.[45]

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[38] *See*, Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 401, 405 (1977).

[39] Paul v. Davis, 424 U.S. 693 (1976).

[40] It is impossible to square *Paul* with Wisconsin v. Constantineau, 400 U.S. 433 (1971) and Goss v. Lopez, 419 U.S. 565 (1975).

[41] *Paul*, 424 U.S. at 697-700.

[42] Bishop v. Wood, 426 U.S. 341 (1976).

[43] *Id.* at 347.

[44] *Paul*, 424 U.S. at 712.

[45] *Bishop*, 426 U.S. at 349.

Given this manipulation of fourteenth amendment doctrine in order to afford deference to local officials, the West Virginia Supreme Court of Appeals has correctly taken a broader view of constitutional "liberty" and "property." In *Major v. DeFrench*[46] the justices determined that a public employee discharge, which was factually similar to that involved in *Bishop v. Wood*, presented appropriately cognizable liberty and property interests.[47] *DeFrench* held that even a probationary employee enjoys procedural safeguards under West Virginia law, and that the "pursuit of a lawful occupation" is a constitutional liberty interest.[48] It remains to be seen whether these bold procedural pronouncements will stand the test of time.[49] But the West Virginia Supreme Court of Appeals was certainly right to search for answers beyond the perimeters of a federal standard which is designed, in no small measure, to limit federal interference with state prerogative. The tensions which shape federal principles are not always applicable to the development of state constitutional law. State supreme courts should work to purge their decisions of federalism concerns which they do not share.

B. Deficient Federal Standards

It is readily apparent that, in some particulars, federal constitutional standards lack both consistency and coherence. Of course, unclear or not, decisions of the United States Supreme Court announce the law of the land;[50] and federal determinations provide a floor of constitutional protection which state judiciaries must meet.[51] If, however, a state supreme court is willing to read its constitution as a stronger safeguard of personal liberties than its national counterpart, the adequate and independent state ground doctrine shields the state ruling from federal review.[52] The autonomous interpretation

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[46] Major v. DeFrench, 169 W. Va. 241, 286 S.E.2d 688 (1982).

[47] *Id.* at 251-57, 286 S.E.2d at 695-98.

[48] *Id.* at 254, 286 S.E.2d at 696.

[49] *See*, for example, the curtailed liberty definitions in Orteza v. Monongalia County Gen. Hosp., 318 S.E.2d 40 (W. Va. 1984) and Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985).

[50] That remains the case, fortunately, whether the Attorney General of the United States agrees with the rulings or not.

[51] *See*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[52] *See*, Henry v. Mississippi, 379 U.S. 443 (1965). *See also*, H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY & PRACTICE 851-67 (1984).

of state constitutional provisions provides an opportunity for state courts to avoid the unsteadying influence of faulty federal constitutional standards. When faced with a troubled federal rule, it makes sense for state courts to turn to their own charters. Again, the work of the West Virginia Supreme Court of Appeals is instructive.

Peters v. Narick[53] is a good example. There the West Virginia Supreme Court of Appeals invalidated West Virginia's gender-biased separate maintenance statute which required, in appropriate circumstances, a "husband . . . to provide suitable support for his wife."[54] The outcome of the case was hardly a surprise. The United States Supreme Court had struck down a similar provision under the federal constitution only the year before.[55] What was surprising was the methodology the court chose to employ. Declaring itself "unimpressed" with the "middle tier approach" commonly employed in the federal sex discrimination cases, the justices decided the case under Article III, section 17 of the West Virginia Constitution.[56] Pointing to a "long-standing and comprehensive system" of sex discrimination, the court concluded that gender classifications "are to be regarded as suspect, [and] accorded the strictest possible judicial scrutiny."[57]

Justice McGraw's opinion in *Peters* criticized the federal "important governmental objectives," dating from *Craig v. Boren*,[58] for being "result oriented."[59] I'm not sure that is the adjective I would have chosen — no constitutional standard is more "outcome determinative" than the compelling state interest test which the court chose to embrace. But if the court's concern was that the important government interest standard would prove to be too manipulable to foster predictable decision-making, *Peters* was clearly prescient.

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[53] Peters v. Narick, 165 W. Va. 622, 270 S.E.2d 760 (1980).

[54] W. VA. CODE § 48-2-28 (1976).

[55] *See*, Orr v. Orr, 440 U.S. 268 (1979).

[56] *Peters*, 165 W. Va. at 630, 270 S.E.2d at 764. Article III, section 17 reads, in pertinent part, "every person shall have remedy by due course of law."

[57] *Id.* at 634, 270 S.E.2d at 766.

[58] Craig v. Boren, 429 U.S. 190 (1976)(gender classifications must be based on "important government interests and must be substantially related to achievement of those objectives.")

[59] *Peters*, 165 W. Va. at 630, 270 S.E.2d at 764.

The most glaring problem with the important government interest—middle tier—standard is its studied ambiguity on the means-end scrutiny it demands. Under its terms, gender-biased statutes must be "substantially related" to the achievement of important government ends. Since the court has not defined "substantial," however, the standard has been subjected to intense interpretive maneuvering. In *Michael M. v. Superior Court*, for example, the United States Supreme Court accepted a tenuous relationship to a contrived governmental interest to justify the constitutionality of California's gender-biased statutory rape law.[60] And in the male-only draft registration case, *Rostker v. Goldberg*,[61] the Court read the gender standard so deferentially that no elevated review was thought necessary. The result of all this is that no one has a clue what the federal gender standard actually is. While Justices Brennan and O'Connor apply the test stringently, in the hands of Chief Justice Rehnquist it is hard to imagine a statute that would fall short of the standard's demands.[62] Fortunately for lawyers and government officials charged with measuring the requisites of equality, West Virginia avoided this wrong turn with the opinion in *Peters*.

Tug Valley Recovery Center, Inc. v. Mingo County Commission,[63] though not a civil liberties case, provides a second example. There a group of taxpayers challenged the taxing and assessment of various third-party properties. When faced with a claim that the plaintiffs lacked standing, the West Virginia Supreme Court of Appeals, based on Article III, section 14 of the state constitution, ruled that "every taxpayer, every person affected by the tax base, has a financial interest in seeing that all property in the district [is] prop-

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[60] Michael M. v. Superior Court, 450 U.S. 464 (1981). The California statute was apparently designed to foster female chastity and to carry out a presumption that minor females—unlike their male counterparts—cannot consent to sexual intercourse. Moreover, even if one accepts California's latter day statement of legislative purpose—prevention of teenage pregnancy—the statute was not a reasonable method (compared with a gender neutral statute) to carry out that interest.

[61] Rostker v. Goldberg, 453 U.S. 57 (1981).

[62] *See*, e.g., Mississippi Univ. For Women v. Hogan, 458 U.S. 718 (1982) (O'Conner, J.); Michael M. v. Superior Court, 450 U.S. 464 (1981)(Rehnquist, J.); Craig v. Boren, 429 U.S. 190 (1976)(Brennan, J.).

[63] Tug Valley Recovery Center, Inc. v. Mingo County Comm'n, 164 W. Va. 94, 261 S.E.2d 165 (1979).

erly taxed."[64] As a result, the West Virginia Constitution has been read to provide an extremely liberal, and extremely clear, rule on taxpayer standing. Unfortunately, the same can hardly be said of the United States Supreme Court.

Federal taxpayer standing guidelines date from the 1968 decision in *Flast v. Cohen*.[65] There, in a remarkably unpersuasive opinion, the Court concluded that federal taxpayers have a sufficient "personal stake" to challenge expenditures[66] if the statute attacked is an exercise of the spending power, and if the government action allegedly violated a specific constitutional limitation.[67] Of course, for decades it has been difficult to understand why a taxpayer's "personal stake" varies so dramatically depending on the nature of the claim on the merits and on whether the government action can be classified as an expenditure.[68] To make matters worse, in *Valley Forge Christian College v. Americans United for Separation of Church & State*,[69] the Court interpreted the *Flast* test in an almost comically literalistic fashion, ruling that the donation of real property, even real property worth a half million dollars, is not an "expenditure" which will support standing.[70]

This judicial slalom is hardly one to make the United States Supreme Court proud. Federal decisions exploring the contours of the case or controversy requirement of Article III, however, are not binding on the state courts. The states are free to fashion their own concepts of justiciability. Given that, and given the federal courts' poor record of performance in the area, any state determination to blindly embrace the federal path is unwarranted. The *Tug Valley* decision offers a preferable alternative for state judiciaries seeking

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[64] *Id.* at 104, 261 S.E.2d at 171.

[65] Flast v. Cohen, 392 U.S. 83 (1968).

[66] The same principles seem to apply, at the federal level, for any sort of taxpayer challenge - except to one's own tax bill. *See*, United States v. Richardson, 418 U.S. 166 (1974).

[67] *Flast*, 392 U.S. at 102-05.

[68] *See*, Justice Harlan's dissent in *Flast*, 392 U.S. at 116-33. *See also* Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1987).

[69] Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982).

[70] *Id.* at 489. *See generally* Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798 (1983).

to open their doors under comprehensible guidelines of justiciability.

C. *Into the Breach*

A final category of state constitutional decisions I want to emphasize is more easily characterized. There are, perhaps surprisingly, substantial areas of constitutional conflict which have not been directly addressed by decisions of the United States Supreme Court.[71] Accordingly, state supreme courts and federal circuit courts have greater liberty to fashion what they deem to be appropriate rules of decision. Of course the easy, and perhaps traditional, response by state tribunals to either ambiguity or a clean slate at the federal level has been to deny the constitutional challenge. Unless clearly forced, the theory seemingly goes, state courts will reject the claim of constitutional right.

As the West Virginia Supreme Court of Appeals and other energetic state judiciaries have shown, however, another response is not only possible, but strongly suggested by our federal system. Like the judges of the federal circuits, state supreme court justices can contribute to the national dialogue through which constitutional jurisprudence is molded. As indicated, a state court's interpretation of its constitution can, in the proper circumstance, delimit the law of the jurisdiction free from federal oversight. With a well constructed opinion, it is also possible for a state tribunal to reach beyond its boundaries and affect the development of constitutional decisionmaking in other fora. Consider these illustrations.

In *Webb v. Fury* the West Virginia Supreme Court of Appeals became one of the first tribunals in the nation to offer greater protection for the right to petition the government than has been af-

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[71] One ready example is the panoply of issues naturally spawned by the United States Supreme Court's privacy decision. For the most part, the Court has left the development of the doctrine to state and inferior federal courts. *See* Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980)(use of laetrile); Alaska v. Erickson, 574 P.2d 1 (Alaska 1978) (use of cocaine); People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969) (motorcycle helmet laws). *But see* Hardwick v. Bowers, 106 S. Ct. 2841 (1986).

forded to communications under the free speech clause.[72] The *Webb* decision arose from a libel suit filed by DLM Coal Co. against a Braxton County environmentalist. DLM sought a huge damage award in circuit court as "compensation" for statements made by Webb to the Environmental Protection Agency and the Office of Surface Mining concerning DLM's operations. Issuing a writ of prohibition, the West Virginia Supreme Court of Appeals prevented the libel suit from proceeding to trial.[73] In an opinion by Justice McGraw, the court held that Webb's statements represented the exercise of "a clear constitutional right and [do] not give rise to a cause of action for damages."[74] Borrowing from a line of federal antitrust decisions, the justices held that statements directed to government officers are protected by Article III, section 16 of the West Virginia Constitution unless they are shown to be "'a mere sham to cover what is actually nothing more than an attempt to interfere directly'" with the plaintiff's business relations.[75] Accordingly, even an allegation of actual malice, sufficient to overcome free speech and press protections in the libel context,[76] would not sustain DLM's cause of action.[77]

The *Webb* decision has not gone unnoticed by other courts struggling with the boundaries of the right to petition. The District of Columbia Court of Appeals relied on *Webb* to fashion an aggressive protection of petition rights in *Myers v. Plan Takoma. Inc.*[78] And

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[72] Webb v. Fury, 167 W. Va. 434, 282 S.E.2d 28 (1981). In fairness, I should say that my former colleagues Bob Bastress, Chuck DiSalvo and I represented Rick Webb. My impartality on this case, therefore, may be subject to question.

[73] *Id.* at 441-43, 282 S.E.2d 39-44.

[74] *Id.* at 451, 282 S.E.2d at 39.

[75] *Id.* at 443-48, 282 S.E.2d at 35 (quoting Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)).

[76] *See* New York Times v. Sullivan, 376 U.S. 254 (1964). DLM also sued Webb for statements, allegedly defamatory, contained in a newsletter distributed by Mountain Streams Monitors. *Webb*, 167 W. Va. at 456, 282 S.E.2d at 42. The newsletter references, since they were not directed solely to government officials, obviously fit less neatly under the petition umbrella. The court concluded, however, that the statements in the newsletter "come within the immunity conferred" by the right to petition. *Id.* at 456, 282 S.E.2d 42. The majority emphasized that the letter was an "exhortation to the public" designed to influence "passage and enforcement of laws". *Id.* That, combined with the apparent belief that suit libel suit was based on an "exchange of ideas which is more properly within the political arena than in the courthouse led to the dismissal of all counts." Justice Neeley dissented on the point. *Id.* at 461, 282 S.E.2d at 45.

[77] *Webb*, 167 W. Va. 456-59, 282 S.E.2d at 42-43.

[78] Myers v. Plan Takoma, Inc. 472 A.2d 44, 46-7 (D.C. 1983).

the Maryland courts have adopted a near absolute petition right,[79] again based on *Webb*. The Eighth Circuit recently discussed the *Webb* ruling extensively, and agreed with Justice Neely's dissenting opinion that it "overstates the reach" of the petition right.[80] Finally, two years ago in *McDonald v. Smith*,[81] the United States Supreme Court concluded that, under the federal constitution, "First Amendment rights are inseparable . . . and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment protections."[82] The *McDonald* Court did not discuss *Webb*. The district and circuit court decisions below, however, had weighed the pros and cons of the *Webb* ruling in the balance.[83] It is my guess that the last word has not yet been written on the scope of the petition right, and *Webb* will play a major role in the doctrine's development.[84]

An even more significant indication of the impact state constitutional decisionmaking can have on the federal adjudicative process is demonstrated by *West Virginia Citizens Action Group v. Daley*.[85] *Daley* examined the constitutionality of a Fairmont ordinance which prohibited charitable residential solicitation from sunset to 9 a.m.[86] The city argued that the provision served the dual goals of crime prevention and privacy. The *Daley* opinion measured the relation-

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[79] *See* Sherrard v. Hull, 53 Md. App. 553, 456 A.2d 59 (1983); Bass v. Rohr, 57 Md. App. 609, 471 A.2d 752 (1984).

[80] *In re* IBP Confidential Business Documents Litig., 755 F.2d 1300, 1311-12 (8th Cir. 1985).

[81] McDonald v. Smith, 472 U.S. 479 (1985).

[82] *Id.* at 485.

[83] *See* Smith v. McDonald, 562 F. Supp. 829, 842 (M.D.N.C. 1983); Smith v. McDonald 737 F.2d 427-28 n.3 (4th Cir. 1984).

[84] *McDonald* only clearly rejected the notion of an absolute petition right, which *Webb* had rejected as well. Although the Supreme Court saw "no sound basis" to distinguish between speech and petition rights, there are distinctions to be drawn between the two activities. Petitioning communications, unlike statements in the press (the typical libel claim), are not immediately distributed to the public at large. The nature of the harm inflicted, therefore, can not only be different in kind, but the government official receiving the petition can act as a buffer to eliminate the further distribution of a libelous allegation. The difference may not be enough to warrant an absolute privilege. But it may serve as the basis for a stronger protection than is offered under the speech and press clauses.

[85] West Virginia Citizens Action Group, Inc. v. Daley, 324 S.E.2d 713 (W. Va. 1984).

[86] The *Daley* court also found the "sun set" terminology employed in the statute to be impermissibly vague. *Id.* at 721. The court's discussion of the constitutionality of an ordinance which prohibits evening (weekday) solicitation, therefore, is dicta.

ship between these laudable aims, the Fairmont ordinance, and the demands of free speech and association.

The United States Supreme Court has yet to outline directly the method for determining the constitutionality of such a content-neutral, time, place, and manner solicitation regulation. Shortly before *Daley* was decided, however, the Third Circuit had upheld a similar statute in *Pennsylvania Alliance for Jobs & Energy v. Council of Borough of Munhall.*[87] While acknowledging the act's impact upon protected expression, the Third Circuit reasoned that the solicitation ban was closely tied to legitimate governmental interests and that it left open ample alternative channels of communication.[88]

In *Daley*, however, the West Virginia Supreme Court of Appeals rejected the Third Circuit approach. Justice McGraw's opinion for the court argued that by focusing only on the ordinance's goals and the availability of other channels of expression, the methodology employed in *Pennsylvania Alliance* ignored the existence of alternatives which would accomplish much of the provision's agenda without so significantly burdening speech.[89] Registration of canvassers, fraud and trespass prosecutions, and forced compliance with "no solicitation" signs were cited as available means to accomplish crime prevention and the protection of the home without inflicting the dramatic impact on protected expression which flows from a dusk to dawn proscription. Moreover, the court added that Article III, section 3 of the West Virginia Constitution "offers limitations on the power of the state to inquire into lawful associations and speech more stringent than those imposed by the Constitution of the United States."[90] Accordingly, ordinances "which do not permit some evening activity during the week impermissibly impinge upon . . . free speech rights."[91]

The following year the Seventh Circuit was faced with yet another solicitation regulation case. Exploring the divergent views ex-

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[87] Pennsylvania Alliance for Jobs & Energy v. Council of Munhall, 743 F.2d 182 (3rd Cir. 1984).

[88] *Id.* at 187-88.

[89] *Daley*, 324 S.E.2d 722-25.

[90] *Id.* at 725 (quoting Pushinsky v. Bd. of Law Examiners, 164 W. Va. 736, 745, 266 S.E.2d 444, 449 (1980)).

[91] *Id.* at 726.

pressed in *Daley* and *Pennsylvania Alliance*, the Seventh Circuit concluded that the West Virginia Supreme Court of Appeals was correct and invalidated the ordinance because it failed to employ less restrictive alternatives.[92] In *City of Watseka v. Illinois Public Action Council*,[93] decided in 1986, the Seventh Circuit reiterated its commitment to tight first amendment scrutiny, again relying on *Daley*.[94] Faced with this barrage, the Third Circuit apparently changed its stance in *New Jersey Citizens Action v. Edison Transp.*[95] There, citing *Daley* and the Seventh Circuit determinations,[96] the court invalidated a local ordinance because it provided for "no alternative channels of communication that adequately serve their important First Amendment rights."[97] Accordingly, the West Virginia Supreme Court of Appeals effort at state constitutional interpretation in *Daley* seems to have worked to alter the federal courts' vision of the First Amendment.

III. CONCLUSION

This anecdotal portrait hardly says all that there is to say about the work of the West Virginia Supreme Court of Appeals. Constitutional interpretation is but a part of the court's duty, and state constitutional interpretation makes up only a segment of even that effort. Moreover, the court's aggressive use of judicial power[98] and its "flexible"[99] attitude toward precedent should not be discounted as causes for concern. My point is simply that the justices' "frequent recurrence to fundamental principles"[100] represents a significant contribution to constitutional development both within and without the state's borders. That is, of course, as it should be. It was aggressive

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[92] Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1254-58 (7th Cir. 1985).

[93] City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986).

[94] *Id.* at 1553.

[95] New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986).

[96] *Id.* at 1255.

[97] *Id.* at 1262.

[98] *See, e.g.*, State ex rel. Bd. of Educ. v. Rockefeller, 167 W. Va. 72, 281 S.E.2d 131 (1981)(granting writ of mandamus overturning governor's reduction of expenditures for public education).

[99] Compare, for example, the court's description of liberty interests in Major v. DeFrench, 286 S.E.2d 688 (W. Va. 1982) with that in Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985).

[100] The language is George Mason's—set forth in Virginia's 1776 Declaration of Rights. *See* VA. CONST. art. I, § 15.

state court experimentation, it will be recalled, which resulted in the practice of judicial review in the first place.[101] It is true that the strains of politics and the pressures of the times have their effects on this tribunal like any other. But as Walter Lippman claimed, the boundaries of liberty are measured only by seeking them in the main business of human life — not in the "creation of abstract theorists."[102] And if the business of life is stirred by conflict and controversy, occasionally the judiciary's efforts to enliven the grand guarantees of our fundamental charters will rankle as well. Constitutional decisionmaking, in this country, is a multi-faceted enterprise. It is heartening to note that sometimes significant players live right in the neighborhood.

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[101] *See* Commonwealth v. Caton, 8 Va. (1 Call) 5, 8 (1782)("Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meert (sic) the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and hither shall you go, but no farther."—George Wythe).

[102] W. LIPPMAN, THE ESSENTIAL LIPPMAN, 230 (1963).