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Why a State Bill of Rights?

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tively, the need for a State Bill of Rights and the content which those rights must embrace.

John M. Steel†

I. WHY A STATE BILL OF RIGHTS?*

VERN COUNTRYMAN**

There is a school of thought among policemen, prosecutors, legislators, lawyers, law professors and other scholars that the Supreme Court of the United States has given us more of a Bill of Rights under the federal Constitution than we need. This view is by no means unanimous, but it is widespread.¹ Periodically this view manifests itself in thus far unsuccessful efforts in Congress to restrict the jurisdiction of the Supreme Court. One such effort was defeated in the Senate less than a month ago.² A few years ago the Council of State Governments was sponsoring an amendment to the Constitution to create a "Court of the Union," made up of the chief justices of the fifty states, to review decisions of the Supreme Court involving "rights reserved to the states or to the people."³

Some of the criticism of the Court does not rise above the level of

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1. For collections of, and rebuttals to, expressions of this view, see Choper, *On the Warren Court and Judicial Review*, 17 CATHOLIC U.L. REV. 20 (1967); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CONN. L.Q. 436 (1964); BLACK, *THE PEOPLE AND THE COURT* (1960).

2. The Senate acted to delete from S. 917, 90th Congress, 2d Session the so-called Omnibus Crime Control and Safe Streets Bill, provisions which would deprive the federal courts of habeas corpus jurisdiction over state criminal convictions and of jurisdiction to review in any manner state court rulings on the admission of confessions and of evidence of police line-up identifications. 114 CONG. REC. S6037-S6045 (daily ed. May 21, 1968).

3. See Monroe, *To Preserve the United States*, 8 ST. LOUIS L.J. 533 (1964).

State Bill of Rights

this proposal. Senator Sam Ervin, Jr. has announced that he will launch an investigation to determine whether the Supreme Court is exceeding its powers, because he finds the Court “faced with a crisis of confidence of a magnitude rarely equaled in its history”⁴—which seems to me a rather heroic statement for a member of Congress to make. Richard Nixon, campaigning in Dallas, has castigated the Court for giving the “green light” to “the criminal elements” in our society—but that is about par for Mr. Nixon.⁵

I do not intend here to pursue this debate, although candor requires me to acknowledge that in general my sympathies are with the Court rather than its detractors. Rather, I am concerned today with a somewhat different question: with the Supreme Court so active in implementing the federal Bill of Rights as against state as well as federal action, is there any real need for a Bill of Rights in a state constitution?

One affirmative answer to that question, given by a Texas lawyer, is that a state Bill of Rights should be perpetuated as part of the battle to “halt, or at least slow down, the expansion of federal power and . . . [to] revitalize state governments” because, “If the states cannot protect their citizens’ fundamental liberties, or are careless about such protection, . . . the basic, fundamental vitality of state government is immeasurably weakened.”⁶ There is something to this answer, although it does not seem to me completely dispositive. Another way of putting it would be to say that the Supreme Court got into this business by default—there would have been few occasions for it to decide what the due process clause of the fourteenth amendment requires of the states by incorporation of the guarantees of some of the first eight amendments⁷ or otherwise, if the state courts had not found that their own constitutions required so little. But this result cannot be attributed to the absence of Bills of Rights in state constitutions. Every state constitution contains one, and most of them

4. *New York Times*, May 17, 1968, at 32, col. 2.

5. *New York Times*, May 31, 1968, at 29, col. 1.

6. Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 *TEX. L. REV.* 919, 924 (1957).

7. Perhaps the ninth amendment is also on its way to incorporation. See *Griswold v. Connecticut*, 381 U.S. 479 (1965):

largely duplicate the provisions of the federal Bill of Rights.⁸ The default came when the state courts, generally speaking, gave an ungenerous interpretation to their own Bills of Rights.

It is doubtful, at least, that very much can be done to change this result by a redrafting of a state Bill of Rights. The change must come in the judges who interpret it. But since—for reasons which I will develop later—it seems to me realistic to expect some change in the judges, I can see some merit to the view that state Bills of Rights should be preserved with the expectation that we may yet see the day when state constitutional adjudication will drastically limit the occasions for the Supreme Court to test state action by the Fourteenth Amendment.

But, beyond that point, I believe that there are other reasons why any state constitutional convention of today should concern itself with devising a Bill of Rights which both reflects time-tested concepts and responds to modern needs. No state, even if it were otherwise willing to abdicate the function of protecting individual liberty entirely to the federal government, should today be willing to do so for at least three reasons: (1) Many of the Supreme Court's interpretations of federal constitutional guarantees applicable to the states are not clearly acceptable today, much less for the indefinite future. (2) Not all of the federal constitutional guarantees have been held applicable to the states. (3) Modern society is entitled to expect additional guarantees not to be found in the Constitution of the United States.

I. FEDERAL GUARANTEES APPLICABLE TO THE STATES

For those who believe that the Supreme Court has gone too far in making federal guarantees applicable to the states, or in giving content to the guarantees applied, there is little that a state constitutional convention can be expected to do. Of course, even as I look hopefully to the day when state courts will give a more generous reading to state guarantees, some may anticipate the day when the Supreme Court becomes less generous, thereby leaving the states more freedom to be

8. Rankin, *The Bill of Rights*, in W. GRAVES, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 162 (1960) [hereinafter cited as Rankin].

State Bill of Rights

less generous. To that end, they might advocate a more restricted list of state guarantees to confine state courts when finally the Supreme Court comes to its senses. But they would be courting the risk that many of these state constitutional restrictions would be held unconstitutional. Perhaps this risk could be avoided by enacting the restrictions into a legal limbo by means of a preamble which recited that they should not take effect unless and until the federal Constitution permits. Somehow this doesn't seem to me to represent a very promising course for constitution-making, but that may be because my heart is really not in such a venture.

For those generally in agreement with the Supreme Court—and perhaps even in some instances for some of those who are not—there is still an office for a state Bill of Rights to perform. Even as others may look forward to a day of more restrictive interpretation of federal guarantees, we may fear such a day and therefore should value state guarantees as a second line of defense. Moreover, at this as probably at any other given moment in time, reasonable men may conclude that at least some of the federal guarantees applicable to the states are not broadly enough construed, or at least that a state should keep the way open for broader protection in the future. Without attempting an exhaustive list, I offer some examples.

First amendment rights have been incorporated into the fourteenth amendment for more than forty years⁹ and those rights have recently been broadly interpreted to protect freedom of association,¹⁰ religious liberty,¹¹ freedom to criticize public figures and public officials,¹² free-

9. In the first cases involving state sedition prosecutions, it was assumed, without deciding, that the fourteenth amendment incorporated first amendment rights, but no violation of those rights was found. *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1926). But similar prosecutions in *Fiske v. Kansas*, 274 U.S. 380 (1927) and *Stromberg v. California*, 283 U.S. 359 (1931) were invalidated as impermissible abridgements of free speech, which *Gitlow* and *Whitney* were read to incorporate into the fourteenth amendment.

10. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

11. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951).

12. *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

dom of access to information¹³ and, recently, freedom from a variety of loyalty oaths.¹⁴ But the loyalty oath decisions are recent and they leave standing in somewhat dubious status earlier decisions sustaining such oaths.¹⁵ A state might well conclude that in this and other respects it wished to give its citizens more freedom of belief, expression and association than the first amendment has yet been found to require.

The state might, for instance, extend the constitutional protection given to peaceful picketing, which has lately come into as common employment as a means of political expression as a labor organizing device.¹⁶ It might, again, after observing the struggles of the Justices in their efforts to define the kind of "obscenity" which gets no first amendment protection, conclude that Justices Black and Douglas have been right all along in their insistence that no such exception should have been carved into the area of constitutionally protected speech.¹⁷ Perhaps, in the course of its consideration of that matter, the state might conclude that publishers and producers should not be subjected to censors like Mr. Justice Stewart, who rejects a "doctrinaire knee-jerk application of the first amendment,"¹⁸ but would permit criminal

13. *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

14. *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

15. *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951).

16. See *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Cameron v. Johnson*, 390 U.S. 601 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Teamsters' Union v. Vogt, Inc.*, 354 U.S. 284 (1957); *Plumbers' Union v. Graham*, 345 U.S. 192 (1953).

17. See, e.g., *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Ginsburg v. New York*, 390 U.S. 629 (1968); *Redrup v. New York*, 386 U.S. 767 (1967); A Book named "John Cleland's Memories of A Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Mishkin v. New York*, 383 U.S. 502 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Smith v. California*, 361 U.S. 147 (1959); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Roth v. United States*, 354 U.S. 476 (1957); *Butler v. Michigan*, 352 U.S. 380 (1957).

18. *Ginsberg v. New York*, 390 U.S. 629, 648 (1968).

State Bill of Rights

sanctions for "hard-core pornography"—a term he cannot define—because he knows it when he sees it.¹⁹

If so, the state might also conclude that a speaker should not be subject to criminal sanctions whenever a jury finds that he advocated forbidden action by means of "inciting" speech²⁰ even though what he advocated was action in the indefinite future, "as speedily as circumstances would permit."²¹ Such a state might also wish to give more protection against legislative and executive harrassment and blacklisting on political grounds than has been found in the first amendment,²² at least until very recently.²³

Finally, in the area of religious liberty, a state might wish to consider whether it is willing to tolerate what the Supreme Court has held the first amendment permits by way of release time from public schools for religious instruction²⁴ and Sunday closing laws.²⁵

Other instances where a state might feel that it could improve on federal guarantees may be found in the area of searches and seizures. The fourth amendment was held applicable to the states in 1949²⁶ and really made applicable in 1961 when it was decided that evidence obtained by an illegal search was inadmissible in state trials.²⁷ But it is far from apparent to me that a state should be satisfied with the Supreme Court's rulings on what the fourth amendment permits by

19. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

20. *Yates v. United States*, 354 U.S. 298, 320 (1957); *Noto v. United States*, 367 U.S. 290 (1961).

21. *Dennis v. United States*, 341 U.S. 494, 512 (1951); *Scales v. United States*, 367 U.S. 203 (1961).

22. *Hutcheson v. United States*, 369 U.S. 599 (1962); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Braden v. United States*, 365 U.S. 431 (1961); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Beilan v. Board of Education*, 357 U.S. 399 (1958). *Cf. Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 197 (1957).

23. *Schneider v. Smith*, 390 U.S. 17 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); *United States v. Brown*, 381 U.S. 437 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963). *Cf. Cameron v. Johnson*, 390 U.S. 611 (1968).

24. *Zorach v. Clauson*, 343 U.S. 306 (1952).

25. *Gallagher v. Crown Kasher Supermarket*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).

26. *Wolf v. Colorado*, 338 U.S. 25 (1949).

27. *Mapp v. Ohio*, 367 U.S. 643 (1961).

means of electronic bugging,²⁸ the use of informers²⁹ and involuntary blood tests,³⁰ the warrantless search of automobiles,³¹ the extension of the search to "mere evidence" as distinguished from contraband, fruits of crime and weapons,³² searches by such functionaries as building and health inspectors,³³ or the use of illegally seized evidence for impeachment purposes.³⁴

The more recent application to the states of the sixth amendment's rights to counsel³⁵ and to a jury trial³⁶ leave problems of a different order for the states. With respect to jury trial the Court was explicit that "the fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they tried in a federal court—would come within the sixth amendment's guarantee."³⁷ Apparently the jury required by this guarantee is a jury of twelve, whose guilty verdict must be unanimous.³⁸ Although the sixth amendment by its terms applies in "all criminal prosecutions," neither it nor the overlapping guaranty of jury trial "of all crimes" in article III,³⁹ is construed to apply to "petty offenses" as distinguished from "serious crimes." For ordinary criminal cases, the distinction is based upon an appraisal of the nature of the offense and the extent of the penalty authorized. The dividing line falls somewhere between, on the one side, the offense of selling second-hand goods without a license, punishable by ninety days imprisonment or a \$300 fine for which no jury is required,⁴⁰ and, on

28. *Cf. Lopez v. United States*, 373 U.S. 427 (1963) (government agent wired for sound) and *Lanza v. New York*, 370 U.S. 139 (1962) *with Molod v. United States*, 390 U.S. 136 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

29. *McCray v. Illinois*, 386 U.S. 300 (1967); *Osborn v. United States*, 385 U.S. 323 (1966) (informer wired for sound); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *On Lee v. United States*, 343 U.S. 747 (1952) (informer wired for sound).

30. *Schmerber v. California*, 384 U.S. 757 (1966). *See also Breithaupt v. Abram*, 352 U.S. 432 (1957). *Cf. Rochin v. California*, 342 U.S. 165 (1952).

31. *Compare Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) *with Harris v. United States*, 390 U.S. 234 (1968) *and Cooper v. California*, 386 U.S. 58 (1967).

32. *Warden v. Hayden*, 387 U.S. 294 (1967).

33. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). *See also Abel v. United States*, 362 U.S. 217 (1960).

34. *Walder v. United States*, 347 U.S. 62 (1954).

35. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

36. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

37. *Id.* at 149.

38. *Thompson v. Utah*, 170 U.S. 343 (1898). *Cf. Maxwell v. Dow*, 176 U.S. 581 (1900).

39. U.S. CONST., art. III, § 2, cl. 3.

40. *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

State Bill of Rights

the other side, the offenses of conspiracy to deprive persons of their livelihood ("an offence of a grave character"), where the punishment is only \$25 or 30 days,⁴¹ and simple battery where the punishment is two years and \$300,⁴² for which there must be a jury. In criminal contempt proceedings, in which the right to jury trial now also applies,⁴³ where no maximum penalty is usually prescribed, the test must be based on the penalty actually imposed, and falls somewhere between six months⁴⁴ and two years.⁴⁵

The Supreme Court was not, at the time of incorporating the sixth amendment's right to counsel into the fourteenth, explicit about the extent of the incorporation. But we have since been told that this and other incorporations are to be enforced against the states "according to the same standards that protect those personal rights against federal encroachment."⁴⁶ Arguably, therefore, the sixth amendment right to counsel is not federally guaranteed in trials of "petty offenses."

This appears to leave open to the states the decision whether they want to guarantee counsel or jury trials for such offenses, and whether, if juries are provided, they are to have fewer than twelve members, and verdicts that are less than unanimous.⁴⁷

The similarly recent decision that the fourteenth amendment incorporates the fifth's privilege against self-incrimination,⁴⁸ again raises for the states the question whether they should be content with the reach of the federal guarantee or would prefer to provide a more generous one of their own. Should the states be satisfied with a privilege which protects only against compulsory "testimonial" disclosures, and not against the use of handwriting specimens,⁴⁹ items of clothing,⁵⁰ and blood tests?⁵¹ Should the states settle for privilege burdened with

41. *Callan v. Wilson*, 127 U.S. 540 (1888).

42. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

43. *Bloom v. Illinois*, 391 U.S. 194 (1968). But no jury trial is required for civil contempt proceedings. *Shillitani v. United States*, 384 U.S. 364 (1966).

44. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). See also *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (ten days and \$50).

45. *Bloom v. Illinois*, 391 U.S. 194 (1968).

46. *Malloy v. Hogan*, 378 U.S. 1, 10 (1964).

47. See *Maxwell v. Dow*, 176 U.S. 581 (1900). Cf. WASH. CONST., art. 1, § 21 (1889).

48. *Malloy v. Hogan*, 378 U.S. 1 (1964). See also *Griffin v. California*, 380 U.S. 609 (1965).

49. *Gilbert v. California*, 388 U.S. 263 (1967).

50. *Warden v. Hayden*, 387 U.S. 294 (1967).

51. *Schmerber v. California*, 384 U.S. 757 (1966). See also *Breithaupt v. Abram*, 352 U.S. 432 (1957).

a doctrine of waiver which frequently leaves the witness on an uncharted sea?⁵² Should they settle for a privilege which can be withdrawn on the tender of immunity only from criminal prosecution, state or federal, but not from the other consequences of compulsory disclosure?⁵³

The examples I have given are, as I have said, only illustrative. They are not meant to be exhaustive. I hope they have not been exhausting. They are more than sufficient, I believe, to demonstrate that before a state constitutional convention decides to omit any guarantee from its Bill of Rights on the ground that federal protection is adequate, it should at the least carefully examine the scope and apparent durability of the federal protection. That seems to me sound advice for each of the incorporated guarantees I have discussed and for other incorporated guarantees which I have not taken time to discuss—the fifth amendment's guarantee against the taking of property without just compensation,⁵⁴ the sixth amendment's rights to speedy⁵⁵ and public⁵⁶ trial, to confront and cross-examine adverse witnesses,⁵⁷ and to have compulsory process for obtaining witnesses,⁵⁸ and the eighth amendment's protection against cruel and unusual punishment.⁵⁹ It seems to me equally sound for other, nonincorporative protections found in the due process and equal protection clauses of the fourteenth amendment and for other federal guarantees applicable to the states but not found in the Bill of Rights, such as the prohibitions against bills of attainder, ex post facto laws, impairment of the obligation of contracts,⁶⁰ and the thirteenth amendment's abolition of

52. *Rogers v. United States*, 340 U.S. 367 (1951); *Brown v. United States*, 356 U.S. 148 (1958).

53. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Ullmann v. United States*, 350 U.S. 422 (1956).

54. *Chicago, B. & O. R.R. v. Chicago*, 166 U.S. 226 (1897).

55. *Klopper v. North Carolina*, 386 U.S. 213 (1967).

56. *In re Oliver*, 333 U.S. 257 (1948).

57. *Pointer v. Texas*, 380 U.S. 400 (1965). See also *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Smith v. Illinois*, 390 U.S. 129 (1968); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Douglas v. Alabama*, 380 U.S. 415 (1965).

58. *Washington v. Texas*, 388 U.S. 14 (1967).

59. Like the incorporation of first amendment rights (see note 9, *supra*), incorporation of this guarantee was a two step process. First it was assumed, without deciding, that it was incorporated in a case where its requirements were found not to be violated. *Francis v. Resweber*, 329 U.S. 459 (1947). That case then became authority for the incorporation. *Robinson v. California*, 370 U.S. 660 (1962).

60. U.S. Constr., art. I, § 10, cl. 1.

State Bill of Rights

slavery and involuntary servitude, which probably does not reach all that is forbidden by your state constitution's prohibition against imprisonment for debt.⁶¹

I have also suggested that, if it is desired to extend state constitutional protection beyond that of the federal constitution, the objective is not likely to be achieved merely by draftsmanship. This is not to say that draftsmanship has no role to play. Assuming that the result is desired, it would be possible, for instance, to redraft present provisions of the Washington constitution to make clear that the prohibition against state support of religion is not confined to monetary support,⁶² or that the guarantee of privacy extends against electronic or telephonic eavesdropping and the taking of blood tests without informed consent,⁶³ or that the privilege against self-incrimination extends to such involuntary "nontestimonial" disclosures as the use of handwriting specimens, blood tests and police lineups.⁶⁴

But it would be futile to attempt to convert a Bill of Rights into a detailed code which would anticipate all conceivable problems. And probably not much can be expected from attempts to frame new general principles to cover ground already worked. I doubt, for instance, that judges will be either aided in or forced to recognition of greater protection for individual liberties by currently fashionable proposals to add to due process clauses requirements of "fair and just treatment in the course of legislative and executive investigations and hearings,"⁶⁵ or to add to equal protection clauses specific prohibitions against discrimination by the state on the basis of religion, race, color, sex or national origin.⁶⁶

61. WASH. CONST., art. 1, § 17. *See Taylor v. Georgia*, 315 U.S. 25 (1942); *Bailey v. Alabama*, 219 U.S. 219 (1911).

62. WASH. CONST., Amend. 34. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

63. WASH. CONST., art. 1, § 7. *See State v. Jennen*, 58 Wn. 2d 171, 361 P.2d 739 (1961); *State v. Kuljis*, 70 Wn. 2d 168, 422 P.2d 480 (1967); *State v. Drew*, 70 Wn. 2d 193, 425 P.2d 349 (1967). *See also* the restrictions or prohibitions on electronic eavesdropping in N.Y. CONST. art. 1, § 12; PUERTO RICO CONST., art. II, § 10 (1952); NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION, § 1.03(b) (6th ed., 1962).

64. WASH. CONST., art. 1, § 9. *See State v. Craig*, 67 Wn. 2d 77, 406 P.2d 599 (1965); *State v. Cook*, 70 Wn. 2d 715, 424 P.2d 1006 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Biggers v. Tennessee*, 390 U.S. 404 (1968).

65. ALASKA CONST., art. I, § 7; MICH. CONST., art. I, § 17.

66. ALASKA CONST., art. I, § 3; CONN. CONST., art. I, § 20; HAWAII CONST., art. I, § 4; MICH. CONST., art. I, § 2; PROPOSED N.Y. CONST., art. I, § 3(b) (defeated at

In the last analysis, constitutional conventions desirous of greater protection for individual rights at the state level will probably be best advised to do the best they can with a few formulations of general principles which do not confine the courts, which leave room for growth and application to new problems, and then to hope for a new era in state constitutional interpretation.

Obviously, the new era will not arrive overnight. I have said that the Supreme Court got into the business of developing the federal Bill of Rights through the default of the state courts. In too many instances, that default has continued. In 1879 the Supreme Court reversed a state conviction and held that a state statute which limited grand and petit jury service to white persons violated the equal protection clause of the fourteenth amendment.⁶⁷ Since that time it has dealt with numerous instances of systematic exclusion from jury service on the basis of race which were not expressly authorized by statute. But in 1967 it reversed a state conviction in a case in which the state of Georgia offered no explanation for the process by which it was able to draw jurors from tax lists which contained 24% Negroes, yet ended with a list of jurors only 5% of which were black,⁶⁸ and in another from a county in Alabama where it appeared that no Negro had ever served on a grand jury.⁶⁹

Again, the Supreme Court first invalidated under the due process clause of the fourteenth amendment a state conviction based on a coerced confession in 1936. It appeared in that case⁷⁰ that the confession of one defendant was obtained after he had been twice hanged by his neck from a tree, tied to the tree and whipped, and again whipped a day or two later. Thereafter, the Court dealt with a great variety of more subtle forms of coercion, but in 1967 it again reversed a state conviction where the petitioner, lying in a field with a bullet wound in his leg, two policemen's guns aimed at his head, and

referendum November 7, 1967); PROPOSED MD. CONST., art. I, § 1.03 (defeated at referendum May 14, 1968); PUERTO RICO CONST., art. II, § 1; NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION, art. I, § 1.02 (6th ed., 1962).

67. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

68. *Jones v. Georgia*, 389 U.S. 24 (1967). See also *Sims v. Georgia*, 389 U.S. 404 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967).

69. *Coleman v. Alabama*, 389 U.S. 22 (1967). See also *Swain v. Alabama*, 380 U.S. 202 (1965), where it was shown that in another Alabama county no Negro had served on a petit jury since about 1950.

70. *Brown v. Mississippi*, 297 U.S. 278 (1936).

State Bill of Rights

threatened by one of them that he would be killed if he did not tell the truth, confessed "immediately" after the other one "fired his rifle next to the petitioner's ear."⁷¹

The Court in 1942 declined to read the sixth amendment's right to counsel into the fourteenth amendment for noncapital cases;⁷² when it overruled that determination more than twenty years later,⁷³ nearly one-third of the states still recognized no right to counsel in noncapital felony cases.⁷⁴

In 1949 the Court held the fourth amendment applicable to the states, but declined to interpret that amendment to mean that the states were barred from using illegally seized evidence at trial.⁷⁵ When it concluded, twelve years later, that the amendment should be read to bar the use of such evidence,⁷⁶ twenty four states were still using it.⁷⁷

When the Court eight years ago reached the eminently sound conclusion that a criminal conviction based on no evidence whatsoever could not stand under the due process clause, it acted on direct review of a city police court judgment which was not reviewable in the state courts.⁷⁸ But in three subsequent cases in the next five years it reversed on the same ground convictions which state supreme courts let stand.⁷⁹

The attitude of many state court judges, I am afraid, approaches that of the state Chief Justices who, in 1958, with only eight dissenting votes, adopted a remarkable resolution admonishing the Supreme Court that the division of powers between state and national governments "should be tested solely by the provisions of the Constitution of the United States" and calling upon the Court to exercise⁸⁰

71. *Beecher v. Alabama*, 389 U.S. 35 (1967).

72. *Betts v. Brady*, 316 U.S. 455 (1942).

73. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

74. See Appendix to concurring opinion of Justice Douglas in *McNeal v. Culver*, 365 U.S. 109, 120-22 (1961).

75. *Wolf v. Colorado*, 338 U.S. 25 (1949).

76. *Mapp v. Ohio*, 367 U.S. 643 (1961).

77. See Appendix to opinion of the Court in *Elkins v. United States*, 364 U.S. 206, 224-25 (1960).

78. *Thompson v. Louisville*, 362 U.S. 199 (1960).

79. *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961).

80. The Chief Justices of California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia and Hawaii dissented, and the Chief Justices of New Jersey,

[t]he power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable.

The resolution did not mention the Bill of Rights.

So I do not anticipate an overnight change in the attitude of most state judges toward constitutional guarantees. But constitutional conventions must take a long view. And in that view there is cause for hope. We may anticipate a new generation of state judges who will place a higher value on the Bill of Rights. That generation, some of whom are already members of the bar, will have grown up in an era of increasing concern for individual rights under an increasingly complex and bureaucratized society. They will have studied the decisions of the Supreme Court of the United States and the problems with which those decisions deal. Some of them will even have studied under law professors sympathetic to the Court's efforts. Just as it has come to pass that all but the most unreconstructed citizens—even the conservative lawyers—now accept a federally managed economy, social welfare legislation,⁸¹ and legal equality for Negroes, so it will come to pass that we will have state court judges predominately sympathetic to a broad reading of the Bill of Rights. So I bid the state constitutional conventions to be of good cheer and to draft a Bill with hope for the future.

II. FEDERAL GUARANTEES NOT APPLICABLE TO THE STATES

Some of the specific guarantees of the federal Bill of Rights have not yet been held to be incorporated into the fourteenth amendment.

California, Pennsylvania and Rhode Island submitted statements in opposition to the resolution. The Chief Justices of Alaska, Arkansas, Connecticut and Indiana were not present. COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF TENTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES 23-34 (1958).

81. In 1955 the American Bar Association reversed a five-year stand and indorsed coverage of self-employed lawyers under the Social Security Act, but on a voluntary basis only. 80 A.B.A. REP. 154-55, 397 (1955). One year later it bowed to the inevitable and indorsed compulsory coverage if voluntary coverage was not obtainable. 81 A.B.A. REP. 403-05 (1956).

State Bill of Rights

Incorporation in the future seems more likely for some than for others. Since all so far held to be incorporated have, save for first amendment rights, been related to criminal proceedings, it seems appropriate to consider omitted rights in that area first.

The right which seems most likely next in line for incorporation at this point is the right not to be put twice in jeopardy for the same offense. Indeed, by the procedure which marked the incorporation of first amendment rights and the eighth amendment's prohibition of cruel and unusual punishments,⁸² this right is already halfway toward incorporation. In 1947 in *Francis v. Resweber*,⁸³ the Court assumed, without deciding, that this right and the prohibition against cruel and unusual punishments were incorporated, but found neither violated by a second attempt at execution after defendant had once been subjected to an electric chair which failed to function. Fifteen years later the prohibition against cruel and unusual punishments achieved full incorporation.⁸⁴ In 1966 the Court granted certiorari to determine whether the prohibition against double jeopardy had achieved the same status, but dismissed the writ as improvidently granted when it appeared that the question was not properly presented.⁸⁵ Whatever the ultimate decision on the federal guaranty, however, I would suppose that, in view of the decision in the *Francis* case, the complexities of the problems of reprosecution on the same charge,⁸⁶ the decisions permitting the splitting of a single act or transaction into a multiplicity of separate crimes,⁸⁷ the decisions permitting successive prosecutions for the same conduct by state and federal governments,⁸⁸ and the decisions permitting conviction both for a substantive offense and for conspiracy to commit it so long as the substantive offense "could be accomplished by a single individual,"⁸⁹ the states would want to preserve their own guarantees about double jeopardy.

82. See notes 9 and 59, *supra*.

83. 329 U.S. 459 (1947).

84. *Robinson v. California* 370 U.S. 660 (1962).

85. *Cichos v. Indiana*, 385 U.S. 76 (1966).

86. *United States v. Tateo*, 377 U.S. 463 (1964); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1273 (1964).

87. *Gore v. United States*, 357 U.S. 386 (1958); *Blockburger v. United States*, 284 U.S. 299 (1932).

88. *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Lanza*, 260 U.S. 377 (1922).

89. *Pereira v. United States*, 347 U.S. 1, 11 (1954); *Pinkerton v. United States*, 328 U.S. 640 (1946).

The applicability to the states of the eighth amendment's prohibitions against excessive bail and excessive fines has not yet been considered by the Supreme Court. But that Court has had little to say about excessive bail when required by the federal government⁹⁰ and nothing about excessive fines, so for that reason alone the states should preserve their own requirements.

Nothing has been decided, either, about the applicability to the states of the sixth amendment's guaranty that the accused shall be informed of the charges against him, but in any event it probably adds nothing to the requirements of due process.

This leaves us with the fifth amendment's requirement of grand jury indictment for capital or otherwise infamous crimes, held inapplicable to the states almost eighty-five years ago.⁹¹ I would be willing to hazard a guess that this among the federal guarantees applicable to criminal proceedings is least likely to be incorporated into the fourteenth amendment. And since I am unpersuaded by the theory that the grand jury stands as a bulwark "between the prosecution and the accused, . . . to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will,"⁹² I do not propose to urge that states like Washington⁹³ which authorize prosecution by information should change their ways.

Of those unincorporated provisions of the federal Bill of Rights not applicable to criminal proceedings, less need be said. The second amendment's guarantee of the right of the people to keep and bear arms was held inapplicable to the states almost a century ago,⁹⁴ and if the question is again raised I would be willing to predict that the National Rifle Association will be less effective with the Supreme Court than with the Congress. The similar provisions in the constitutions of most states⁹⁵ including Washington⁹⁶ have not been construed to prevent reasonable regulation of the possession and use of fire-

90. See *Stack v. Boyle*, 342 U.S. 1 (1951); *Carlson v. Landon*, 342 U.S. 524 (1952).

91. *Hurtado v. California*, 110 U.S. 516 (1884). See also *Gaines v. Washington*, 277 U.S. 81 (1928).

92. *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

93. WASH. CONST., art. 1, § 25.

94. *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886).

95. Rankin, note 8 *supra*, at 162.

96. WASH. CONST., art. 1, § 24.

State Bill of Rights

arms.⁹⁷ The third amendment's protection against the quartering of soldiers in private homes seems to have been invoked only once—in an unsuccessful attempt to persuade a court that a federal rent control act “was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people”⁹⁸—but it also is duplicated in the constitutions of Washington⁹⁹ and most other states.¹⁰⁰ I was tempted to suggest that the guarantees of both the second and third amendments were probably obsolete. But I am restrained by the example of another who voiced the opinion, shortly before the advent of marches on Washington and on state capitals, that the right to petition the government for redress of grievances, while “at one time considered fundamental,” is now “viewed as a right of little importance.”¹⁰¹

Finally, there is the seventh amendment's right to jury trial in civil cases, also held inapplicable to the states nearly a century ago.¹⁰² As the Supreme Court said in holding that a jury was required in state criminal prosecutions, most of the debate as to the merits of the jury system “has centered on the jury in civil cases,”¹⁰³ and it seems unlikely that the guaranty of a jury in such cases will soon be imposed upon the states. Most states, like Washington,¹⁰⁴ have the requirement in some form in their own constitutions, however.¹⁰⁵ There are powerful arguments against the civil jury.¹⁰⁶ It also has its powerful adherents, but in these days of increasingly crowded dockets¹⁰⁷ I would think that a state would want to preserve its freedom to experiment with other devices.

97. See *Pettus v. Cranor*, 41 Wn. 2d 567, 250 P.2d 542 (1952), *cert. den.* 345 U.S. 967 (1953); *State v. Krantz* 24 Wn. 2d 350, 164 P.2d 453 (1945); *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939).

98. *United States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D. Calif., 1951).

99. WASH. CONST., art. 1, § 31.

100. Rankin, note 8 *supra*, at 162.

101. *Id.* at 164.

102. *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

103. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

104. WASH. CONST., art. 1, § 21.

105. COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 578 (2d ed., 1959).

106. See particularly Frank, *Courts on Trial* (1949).

107. See JAMES, *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* (1965); ZEISEL, *KALVIN & BUCHHOLZ, DELAY IN THE COURT* (1959).

III. GUARANTEES NOT FOUND IN THE FEDERAL BILL OF RIGHTS

The wisdom of 1789 was not the ultimate wisdom and it seems appropriate to ask, almost two centuries later, whether some additions to the federal Bill of Rights are now in order. I believe they are, in three areas of concern—one traditional and two fairly new.

A. Democratic Theory of Government

Most state Bills of Rights contain a statement of a democratic theory of government similar to that in the Washington constitution:¹⁰⁸

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

It has been pointed out that such a provision is not "judicially enforceable,"¹⁰⁹ and that is thought to be a sufficient reason for omitting it.¹¹⁰ Others have offered the rather uninspired defense of such provisions that, "since they do no great harm, perhaps the energy expended in the effort to remove them might be applied to more vital matters."¹¹¹

I believe that a better defense can be made. Although such a provision may not of itself provide an appropriate basis for a judicial decree, it may prove of considerable aid to the courts in construing other constitutional provisions, such as those providing for the initiative and referendum¹¹² and the guaranty of free speech.¹¹³ Indeed, where the processes by which the state constitution is amended and constitutional conventions are called vest the initiative in the legisla-

108. WASH. CONST., art. 1, § 1; COLUMBIA UNIVERSITY LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 489 (2d ed., 1959).

109. See *State v. Kruegel*, 67 Wn. 2d 673, 409 P.2d 458 (1965); *State v. Clark*, 30 Wash. 439, 71 P. 20 (1902).

110. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 36 (6th ed., 1962).

111. Graves, *What Should Constitutions Contain?* 4, quoted in Rankin, note 8, *supra*, at 161.

112. See *State v. Meyers*, 61 Wn. 2d 772, 380 P.2d 735 (1963); *Love v. King County*, 181 Wash. 462, 44 P.2d 175 (1935).

113. Cf. *Tacoma v. Roe*, 190 Wash. 444, 68 P.2d 1028 (1937).

State Bill of Rights

ture as they do in most states,¹¹⁴ and where popular initiative does not provide an alternative as it apparently does in Washington,¹¹⁵ such a provision might be invoked to empower the people to act when the legislature fails to do so.¹¹⁶

In this connection it is worth noting that the constitutions of the original states tend to be somewhat more robust than those of the later ones. Thus, the constitution of Maryland not only asserts the people's "inalienable right to alter, reform or abolish their form of government in such manner as they deem expedient"¹¹⁷ but also proclaims that¹¹⁸

[W]henever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old or establish a new Government: the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.

A 1968 effort to reduce these provisions to a statement that, "All political power originates in the people and all government is instituted for their liberty, security, benefit and protection"—on the stated ground that "the right of forcible revolution as a constitutional principle . . . is inappropriate in a stable and unified United States"¹¹⁹—fell with the rejection of the proposed new Maryland Constitution two months ago.¹²⁰

But, while I can find virtue in provisions which enunciate a democratic theory of government, I can find none in provisions which say nothing. In this category I would put that provision of the Washington Bill of Rights which admonishes that, "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."¹²¹

114. See Shull, *Legislatures and the Process of Constitutional Amendment*, 53 KY. L.J. 531 (1965).

115. WASH. CONST., amends. 7, 30 and 36.

116. See Heckel, *The Bill of Rights*, 2 N.J. CONSTITUTIONAL CONVENTION OF 1947 1336, 1340-1341 (1951).

117. MD. CONST., Declaration of Rights, art. 1.

118. *Id.*, Art. 6.

119. REPORT OF THE [MARYLAND] CONSTITUTIONAL CONVENTION COMMISSION 99-100 (1967).

120. See note 66, *supra*.

121. WASH. CONST., art. 1, § 32.

B. Social and Economic Rights

Some recent state constitutional provisions and some proposals take the view that the sole purpose of a Bill of Rights is not merely to protect individual rights *against* government infringement, but also to define certain rights which the people can expect *from* government.¹²² Among these are the right of labor to organize and bargain collectively,¹²³ the right of the needy to public assistance,¹²⁴ the right of employees to a reasonable minimum salary,¹²⁵ and the right of all to full educational opportunity.¹²⁶

These provisions have also been criticized as not enforceable,¹²⁷ and insofar as they require the use of public funds it is doubtless true that neither constitutional conventions nor courts are equipped to make appropriations.¹²⁸ But this is simply to say that these nontraditional rights should not be recognized because they cannot be enforced in the traditional way. It is nonetheless true that, if the promotion of such rights is viewed as proper, their inclusion in a Bill of Rights could serve some useful purposes. The very fact of their adoption should be viewed as a mandate to the legislature to act to implement them. Particularly if they included their own "necessary and proper clauses," they would make clear the authority of the legislature to act, just as the grants of power to Congress to implement the thirteenth, fourteenth and fifteenth amendments are construed to give it independent authority to legislate.¹²⁹ And in a state like Washington which reserves to the people the right of initiative¹³⁰ such provisions could serve the same authorizing function for the voters.

122. See Graves, *A New Bill of Rights?* 46 NAT. MUN. REV. 238 (1957).

123. MO. CONST., art. 1, §29; N.J. CONST., art. 1, § 19; N.Y. CONST., art. 1, § 17; PUERTO RICO CONST. art. II, § 18. Such a provision was also included in the NATIONAL MUNICIPAL LEAGUE'S MODEL STATE CONSTITUTION, art. I, § 103 (5th ed. 1948). It was dropped from a later edition with the explanation that "under present conditions" these rights "appear to need no separate constitutional reflection," although it was recognized that "in some jurisdictions there may be need for the inclusion of such provisions." *Id.*, 37 (6th ed., 1962). The proposed New York constitution, rejected in 1967 (note 66, *supra*), would have perpetuated such a provision as Art. 1, § 10.

124. N.Y. CONST., art. 17, § 1 (1938).

125. PUERTO RICO CONST., art. II, § 16.

126. *Id.*, art. II, § 5.

127. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 37 (6th Ed., 1962).

128. Insofar as such provisions would regulate private conduct, they are governed by what is said about that subject below.

129. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 387 U.S. 745 (1966); *Clyatt v. United States*, 197 U.S. 207 (1905).

130. WASH. CONST., amends. 7, 26, 30, and 36.

State Bill of Rights

Hence, I would suggest that a constitutional convention should consider the wisdom of incorporating some declarations of social and economic rights—cast, perhaps, in a larger focus than some of those I have previously cited, such as a right to an adequate standard of living, a right to full educational opportunity, and a right to a decent measure of leisure.¹³¹

C. Regulation of Private Conduct

All provisions of a Bill of Rights need not be directed to or against government. Some may also regulate private conduct, as does the thirteenth amendment to the United States Constitution.

As Walter Gellhorn and Alexander Pekelis have pointed out,¹³² the growing concentration of economic power in our society means, among other things, that more and more of our lives are subject to the control of “private governments” against whose excesses we are also in need of a Bill of Rights. The proposed New York state constitution rejected last year took a modest step in this direction by providing that¹³³

No person shall, because of race, color, creed, religion, national origin, age, sex or physical or mental handicap be subjected to any discrimination in his civil rights by the state or any subdivision, agency or instrumentality thereof *or by any person, corporation or unincorporated association, public or private* (emphasis added).

The sanction behind this provision was limited: “The legislature shall provide that no public money shall be given or loaned to or invested with any person or entity, public or private, violating this provision.” But there is no apparent reason why the provision could not

131. The declaration of personal rights prepared for President Franklin D. Roosevelt is suggestive. NATIONAL RESOURCES PLANNING BOARD, NATIONAL RESOURCES DEVELOPMENT REPORT 3 (1942). So is the United Nation's Declaration of Human Rights. So are the provisions of the French and Japanese constitutions cited in Dionisapoulos, *Indiana, 1851, Alaska 1956: A Century of Difference in State Constitutions*, 34 IND. L.J. 34, 35 (1958).

132. W. GELLHORN, AMERICAN RIGHTS, Ch. 9 (1960); A. PEKELIS, LAW AND SOCIAL ACTION, 91-127 (1950).

133. Art. I, § 3b. I have previously indicated that, insofar as this provision applies to the state, it probably adds nothing to a state equal protection clause. But I would concede that, as a rule for private conduct, it should be more narrowly drawn than an equal protection clause.

be made "judicially enforceable" by express authorization of enforcement by public or private action.

Nor is there any apparent reason why the constitutional proscription should be confined to private discrimination. Other rights which all constitutions guarantee against the state—and particularly rights of belief, speech and association—are as vulnerable to infringement by "private governments" and as deserving of protection from such infringement.

So I commend also to state constitutional conventions the task of attempting to preserve our individual freedoms not merely against those governments we elect but also against those governments we do not elect.

II. NEW HORIZONS FOR A STATE BILL OF RIGHTS*

Arval A. Morris**

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

—WASH. CONST. art. I, § 32.

A Bill of Rights is a basic part of each American constitution, in part summarizing the past experiences of a people and serving as a continuous reminder to their government of the rights which the people deem fundamental to their liberty and welfare. Currently there are additional reasons for incorporating a Bill of Rights into a state constitution. Some people¹ want a state Bill of Rights in order to slow

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1. Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 455 (1970) [hereinafter cited as Countryman], quoting Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEXAS L. REV. 919, 924 (1957).