

Symposium on Tomorrow's Issues in State Constitutional Law

Transcript of February 16, 2004, Discussion Between Randall T. Shepard, Christine M. Durham, Randy J. Holland, Laura Denvir Stith, and Jack L. Landau – Moderated by Robert F. Williams

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**TRANSCRIPT OF FEBRUARY 16, 2004,
DISCUSSION BETWEEN RANDALL T.
SHEPARD, CHRISTINE M. DURHAM,
RANDY J. HOLLAND, LAURA DENVIR STITH,
AND JACK L. LANDAU – MODERATED BY
ROBERT F. WILLIAMS***

MR. JONES: Good afternoon, everybody. My name is Curtis Jones, and I've had the pleasure of serving as the Symposium Editor for Volume 38 of the *Valparaiso University Law Review* this year. On behalf of the Valparaiso University School of Law and the Law Review, I'd like to welcome all of you to this forum on the New Judicial Federalism. This discussion has been designed to celebrate Volume 38's Symposium Edition of which these participants and other scholars¹ have been authors. This discussion will likely become a landmark event, which will benefit the bench, the bar, the university, the journal, and the state constitutional law movement generally.

It's with great pleasure that I introduce to you the participants in this much-anticipated event. At the right of the table is Judge Jack L. Landau of the Oregon Court of Appeals. He's been on the court of appeals since

* *Valparaiso University Law Review* gives special thanks to the following persons whom have reviewed and given their permission for the publication of this transcript.

Honorable Panel:

Chief Justice Randall T. Shepard, Supreme Court of Indiana;

Chief Justice Christine M. Durham, Utah Supreme Court;

Justice Randy J. Holland, Supreme Court of Delaware;

Judge Laura Denvir Stith, Supreme Court of Missouri;

Judge Jack L. Landau, Oregon Court of Appeals.

Moderator:

Robert F. Williams, Distinguished Professor of Law, Rutgers School of Law – Camden.

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Introduction:

Curtis T. Jones, *Valparaiso University Law Review*, Volume 38, Symposium Editor.

¹ See Michael John DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 VAL. U. L. REV. 489 (2004); Roderick L. Ireland, *How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Interpreted Its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405 (2004).

578 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

1993, and in Volume 38 of this journal, Judge Landau is the author of: *A Judge's Perspective on the Use and Misuse of History on State Constitutional Interpretation*.²

Sitting next to Judge Landau is Judge Laura Denvir Stith. Judge Stith became the second woman to be appointed to the Supreme Court of Missouri in 2001. In Volume 38 of this journal, she is the author of: *A Contrast of State and Federal Court Authority to Grant Habeas Relief*.³

In the middle of our panel is Randall T. Shepard, who is the Chief Justice of the State of Indiana. He was appointed to the court in 1985 and became Chief Justice in 1987. In Volume 38 of this journal, Chief Justice Shepard is the author of: *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*.⁴

Sitting to Chief Justice Shepard's immediate left is the Chief Justice of the Utah Supreme Court, Christine M. Durham. Chief Justice Durham was appointed to the court in 1982 and became Chief Justice in 2002. In Volume 38 of this journal, she's the author of: *What Goes Around Comes Around: The New Relevancy of State Constitutional Religion Clauses*.⁵

Rounding out our prestigious panel, to the far left, is Justice Randy J. Holland. In 1986, Justice Holland became the youngest person to ever serve on the Supreme Court of Delaware. In Volume 38 of this journal, Justice Holland is the author of: *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*.⁶

This discussion will be moderated by distinguished Professor Robert F. Williams from Rutgers School of Law, Camden, New Jersey. Professor Williams is one of the best known and respected scholars of state constitutional law, and his contributions to Volume 38 of this journal are not limited to writing the Foreword.⁷

His zeal, advice, and eagerness to assist have been greatly appreciated. The journal would like to extend it's sincere thanks to these six individuals. I would also like to personally give thanks to God.

² 38 VAL. U. L. REV. 451 (2004).

³ 38 VAL. U. L. REV. 421 (2004).

⁴ 38 VAL. U. L. REV. 327 (2004).

⁵ 38 VAL. U. L. REV. 353 (2004).

⁶ 38 VAL. U. L. REV. 373 (2004).

⁷ See Robert F. Williams, *Foreword: Continued Commitment to State Constitutional Law*, 38 VAL. U. L. REV. 317 (2004).

It is with honor that I invite one of my newest friends, Professor Bob Williams, to this lectern to begin the discussion.

PROFESSOR WILLIAMS: Thanks a lot, Curtis. I want to return the compliments. You've been a tireless and organized developer of this program, filled with good ideas and energy; and I think we all have benefited from that. And you're also a pretty good driver down from O'Hare Airport, so we all appreciate that very much. I can tell you that we're all excited about this program and appreciate the opportunity to be here.

I would like to congratulate the Valparaiso Law Review for almost 35 years of commitment to the area of state constitutional law. This law school and this Law Review have made real and substantial contributions to this area of law. So we appreciate that around the country.

Let's begin with Chief Justice Durham, who, you know from Curtis, had prepared an article for this symposium on the state constitutional religion clauses. Chief Justice Durham, will you give us a very brief outline of what you've said?

CHIEF JUSTICE DURHAM: Well, that's where the title came from, "What Goes Around Comes Around." The notion in the article, which draws very heavily upon some of the historical research of Professor Michael McConnell and others who have been looking at state religion clauses, focuses on two things, which I think are going to become a theme for our discussion this afternoon. I'll mention them first and then say a word or two more specifically about the article.

I think you're going to find this afternoon that you hear a lot of discussion, despite the wide variety of topics that each of us have chosen to write upon, focus on two things: One is interpretive methods—the ways in which you go about trying to understand what constitutional text means in the state constitutional area—although much of that discussion would also apply to federal; and then second, the impact of the federalism dynamic itself on that interpretive process.

One of the things that dominates the history of state religion clauses is that they go back to the founding of the nation and focus on the emphasis on religious freedom and religious liberty that dominated the debates and the thinking about the role that religion was to play in public life and vice versa about the time of the founding.

The thesis, that's not original to me, but that is contained in the paper, is that in fact state constitutional provisions, particularly those which were drafted at or about the time of the founding—many of the original state constitutions preceded the federal constitution—tended to have a far more expanded an explicit notion about what free exercise meant, what freedom of conscience demanded, and what religious practice was entitled to by way of deference from the state. There ensued a great many other developments in religion clauses; but it's astonishing to see how much of that original language still exists in the earliest state constitutions, how much of it has been carried through in same or similar language in the later constitutions, and how much religious debates having to do with free exercise and establishment have in fact been translated directly into constitutional language throughout the states.

The thesis of the article is that given the decision of the United States Supreme Court in *Employment Division, [Department of Human Resources] of Oregon v. Smith*,⁸ a little over thirteen years ago which removed the strict scrutiny standard when looking at free exercise analysis, the free exercise analysis has virtually, according to many commentators, been written out. This analysis had been very much a part of the federal analysis in *Sherbert v. Verner*.⁹ Now state religion clauses—which are very different from the federal religion clauses—are going to increasingly occupy a dominant place in the analysis of free exercise issues.

PROFESSOR WILLIAMS: Can you describe for us a little bit of the variety that we see in state constitutional religion provisions?

CHIEF JUSTICE DURHAM: Yes. If I were to ask any of you, at least those of you who have taken constitutional law and finished it now, to describe religion clauses, you'd say: there is the free exercise clause and the establishment clause. However, those particular clauses in that particular formulation don't appear all that often in state constitutions. Instead, you'll get multiple clauses.

The Oregon Constitution has six religious clauses; the Utah Constitution has seven separate clauses that deal with religion, some of them found in different portions of the constitution. There is language

⁸ 494 U.S. 870 (1990).

⁹ 374 U.S. 398 (1963).

about there shall be perfect toleration of religious sentiment; there shall be perfect toleration of freedom of conscience; the religious test language, which says you can't have any kind of religious tests for people who want to be witnesses or jurors or public officials; language specifically prohibiting the use of public funds for any form of religious "exercise," or worship.

In the Utah State Constitution – if you think about it a minute, you'll probably guess why historically it's there – there is a clause that I think is unique, in that it prohibits any church from dominating the affairs of the State. Usually it's the other way around, but in Utah, that's the way it went.

State constitutions have equal rights provisions. The Utah Constitution actually has an original equal rights provision that includes religion as one of the categories upon which discrimination is forbidden. You have peace and safety restrictions that sometimes say there shall be absolute freedom of worship, freedom of conscience, freedom of exercise; but then they say except as necessary for the preservation of the peace and safety of the community. In some constitutions, it refers to the regulation of licentiousness. In some constitutions, there's a discussion of the State being able to regulate so that nobody's free exercise on the one hand interferes with the religious worship of others, that there's no disturbance of that religious worship or the public peace.

Some state constitutions have bans on public funding for sectarian schools or the treatment of any sectarian curricula in the public schools. There are even bans on required church attendance.

As is shown from that brief list, and there are other specifics, state constitutions are not talking about the standard establishment clause or the standard free exercise clause. You have entered a different universe when you're talking about the textual basis for religious exercise, religious freedom, and anti-establishment purposes in state constitutional language.

PROFESSOR WILLIAMS: Given that welter of different kinds of provisions, do you think it makes sense then for us to think about free exercise and establishment concepts when we're working with state constitutions?

CHIEF JUSTICE DURHAM: Obviously we're dependent, as is true in so many other areas of this federalism dynamic. When you start

582 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

looking at state constitutional interpretation, you see a real dominance coming over from the federal vocabulary in the traditions that we all learned during the first part of the latter half of the last century, when the Warren Court essentially began expanding our concerns with individual rights and the Bill of Rights. It's going to be difficult for us to abandon what we know about religion clauses from the federal analysis.

However, given the enormous textual differences, the historic links that have essentially not been overridden so much as just elided in the process of federal interpretation. It's going to be very important for state courts to start paying close attention to their text, to start focusing on the development of standards that don't pit free exercise and the anti-establishment notion against each other, but really work more towards an overlap and a balance in that regard. A holistic approach is going to make more sense; and more significantly, that's going to allow state courts in state constitutional interpretation more of an opportunity to deal with the degree of religious pluralism that has overtaken us in our country in this century, something which the federal analysis, and the very broad but now fairly constrained interpretation of the federal clauses does not make possible.

PROFESSOR WILLIAMS: I like asking questions of judges. I like this feeling, I have to say.

CHIEF JUSTICE DURHAM: Yes, but you're quiet during the answers. That's a big difference.

PROFESSOR WILLIAMS: That's a big difference.

Are there other ways that we should think differently about these kinds of clauses? You've mentioned a few. Are there other specific ways we should try to adjust our thinking about state constitutional religion guarantees, other than the ones you've mentioned?

CHIEF JUSTICE DURHAM: One of the things that you try to do when you're doing constitutional interpretation is to square the specifics of the language in the text and the context in which that language came into being.

I think that is a particular problem—both problem and opportunity for state religion clauses—because there is a wealth of history. And scholars like Professor McConnell and Professor Doug Wilcock at Texas have really identified for us the movements historically and the values

that underlay those movements that gave rise to this language. We then see the linkage through the years of that language to modern day problems, which were not at all a part of the landscape. This pluralism phenomenon, for example—it is unique in American history—was not around when the founders were framing that language.

Thus, there is both an opportunity to inform the interpretive process with history and sources, and yet a very clear challenge to then adapt the interpretive process to conditions and needs which the language, when it was drafted in many cases, was never intended to deal with.

PROFESSOR WILLIAMS: Thank you.

In terms of federalism problems, the religion area is one of the few, it seems to me, where an expansive interpretation of a state constitutional religion clause could actually go so far as to collide with the federal floor of the First Amendment? Is that a special problem in the religion area and one that lawyers and judges should be especially careful about?

CHIEF JUSTICE DURHAM: I'm sure that it's not unique. We see the same problem in the equal protection area. For example, where state constitutional provisions can in fact be challenged on federal equal protection grounds, such as the *Romer*¹⁰ case out of Colorado a few years ago. But the case of *Gary Locke v. Joshua Davey*,¹¹ coming out of the State of Washington, which was recently argued before the United States Supreme Court, challenges the availability of a state-subsidized scholarship for graduate students. The scholarship was awarded to a particular student who then chose to undertake theological studies at an institution of his choice. Subsequently, the scholarship was withdrawn on the basis of a state religion clause that prohibited the use of any public monies for religious instruction—that was the particular language in Washington. So, indeed, that has been challenged on free exercise grounds, and the grounds that because this individual chooses to follow the study of topics involving religion as opposed to economics or science, he or she has not been—he in this case—has had the scholarship withdrawn from him; and there's obviously a free exercise challenge there.

¹⁰ *Romer v. Evans*, 517 U.S. 620 (1996).

¹¹ *Davey v. Locke*, 299 F.3d 748 (2002); *cert. granted*, *Locke v. Davey*, 123 S. Ct. 2075 (May 19, 2003). After this discussion the Supreme Court of the United States reversed the Ninth Circuit's decision. *Locke v. Davey*, No. 02-1315, 2004 WL 344123 (U.S. Feb. 25, 2004).

PROFESSOR WILLIAMS: Thanks very much.

Other members of the panel, comments, questions on this particular topic?

JUDGE LANDAU: Well, I'll just go ahead and jump in. I thought that Chief Justice Durham made an excellent point when she talked about the tension that exists in many state constitutions between the wording of the constitution and the historical context in which that wording was adopted.

In my own state, for example, we have a very broad proclamation that every person has the natural right to worship Almighty God in any way he or she pleases.¹² I don't think it says he or she, but I think that that's the way that it's understood now. And there is history, such as it is in Oregon that suggested it was intended to apply very broadly.¹³

There are also comments—Oregon's is a mid-nineteenth century constitution, and at the time there was rampant anti-Catholicism in the country—that Protestants regard Catholicism as a "curse" and the "great whore of Babylon."¹⁴ It makes it difficult for us, as interpreters of the text, to kind of marry up some of this historical evidence of what the folks who drafted this had in mind, and at the same time, this broad and seemingly all inclusive wording.

I don't have any answers for that, but I just wanted to highlight with a concrete example of how difficult the problem is.

PROFESSOR WILLIAMS: So the history of state constitutions is not all pretty, I take it, somewhat like the history of the federal constitution. Thanks very much. Chief Justice Shepard.

CHIEF JUSTICE SHEPARD: I think what Chief Justice Durham has said about the conceptualization of religious clauses is very much to the point. The federal formulation is so familiar to us, and it treats the two clauses almost as though they were a zero sum game, such that the line between what is an establishment case and what is a free exercise case, moves one way or the other, adding to one side and subtracting from the

¹² OR. CONST. art. I, § 2.

¹³ THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 301 (Charles Henry Carey ed., 1926).

¹⁴ *Id.* at 168.

other. We're so familiar with that formulation, that I think it's a special challenge in a way that's not true in the criminal law. It seems much easier in, say, right to counsel cases or voluntary confession cases where the basic question is rather simple: Is there a right to counsel here, yes or no?

But in these cases, the particular challenge for state courts is to devise new ways of analyzing cases in an environment in which the free exercise and establishment clauses have achieved a virtual hegemony of legal thinking, so that you don't get much scholarship on these points. The judges frequently do not get nearly as good of help from lawyers as you get in other fields, and so you're out there on your own trying to formulate new ways of analyzing whether Jones wins or Smith wins; but for that very reason, it seems to me an exciting topic because you're involved in forging new understandings.

PROFESSOR WILLIAMS: Thanks very much.

We're going to save time for questions at the end, but let's move now to Justice Holland from Delaware, who, as you know from Curtis, has written an article on civil and criminal jury trial rights under state constitutions.

Justice Holland, will you give us a brief survey of what you've said?

JUSTICE HOLLAND: Yes. Thank you. In the article, you'll see the title talks about constitutionalizing the common law, and I mean both state and federal constitutions. It really starts with the Declaration of Independence in 1776, where we talk about part of our grievances with the King being his denial of the right to trial by jury. When states were called upon to write their constitutions, in 1776, they put bills of rights in the constitutions. While they were unhappy with the King, the colonies were very happy with the English law.

What you see in those early state constitutions are statements to the effect that the common law of England will become the law of that state. That continued for a long time. Over 15 years later, the federal Bill of Rights was added to the United States Constitution.

When the Constitution was written in 1787, there was no Bill of Rights at all. Two years later, when Madison proposed the Bill of Rights, it was referred to a committee. There were over 200 proposals. Those 200 proposals were reduced to what we see in the federal Bill of Rights,

and they came from state constitutions. The state constitutional rights came first. Then they were put into the U.S. Constitution in the criminal amendment for right to jury trial, the Sixth Amendment; and the Seventh Amendment, the right to jury trial in civil cases.

Now, what's interesting is, obviously, those rights were different in state constitutions when the Sixth and Seventh Amendment were written, but what we frequently forget is that the federal Bill of Rights initially was never intended to apply to the states at all. In 1833, Chief Justice John Marshall wrote the case of *Baron v. Baltimore*.¹⁵ He held the federal Bill of Rights does not apply to the states. It only protects you against the federal government.

That was all obviously changed with the Fourteenth Amendment to the United States Constitution after the Civil War. What you're all familiar with from your classes in law school is what we know as the Incorporation Doctrine. One by one, some of the federal Bill of Rights were incorporated, and they were made applicable to the states. You recall the Fourteenth Amendment says no state shall deny you due process. By virtue of the due process clause, the United States Supreme Court has said states must honor your right to trial by jury in criminal cases in the Sixth Amendment.

But what happened once that was incorporated is the United States Supreme Court had to tell you what your Sixth Amendment right to trial by jury was. As that right became more and more defined, it became more and more clear that many state constitutional rights to trial by jury were different. There are differences in the text, and there are differences in specific provisions.

Another fact that many people don't focus on is that your right to trial by jury in the Seventh Amendment has never been incorporated by virtue of the Fourteenth Amendment. So, consequently, wherever you go in the country, your right to a trial by jury in a civil case is controlled exclusively by whatever is in your state constitution. My article goes on to develop some of the differences in state constitutions in the Sixth Amendment criminal setting and in the Seventh Amendment civil context.

¹⁵ 32 U.S. (7 Pet.) 243, 247 (1833).

PROFESSOR WILLIAMS: Can you give us some examples of some of the differences in the criminal context where we have both the Sixth Amendment applicable to the states and the states' own constitutional rights to jury trial?

JUSTICE HOLLAND: I think the easiest example that we're familiar with is that at common law, you had a right to trial by 12 jurors; and at common law, those jurors had to be unanimous. That is still the law under the Constitution of Delaware and a great many states.

But in *Williams v. Florida*,¹⁶ and other cases, the United States Supreme Court has said a jury verdict doesn't have to be unanimous, and you don't have a right to 12 jurors. Consequently, if you had 12 jurors deliberating in a federal court and one of them became ill during the deliberations, the federal law provides for you to be forced to accept a verdict by 11. Whereas, in the state courts, in the absence of a waiver, you have a mistrial. We also see other provisions with respect to substituting alternates during the course of deliberations, because at common law, deliberations were sacrosanct and they couldn't be interrupted. Most recently with *Ring v. Arizona*,¹⁷ the United States Supreme Court has told us what states must provide for the jury's role, but beyond that, state constitutions really vary on the involvement of the judge and the jury in ultimately sentencing someone to death.

PROFESSOR WILLIAMS: So it sounds like there's a lot more detail to the right to jury trial than we usually think. It's not just a right to jury trial or not; but in fact there are many questions about the administration of the jury trial, some of which could be different under state constitutions, even though the Sixth Amendment has been incorporated and applied to the states.

What about on the civil side? Are there differences under state constitutions that arise because the Seventh Amendment has not been incorporated and applied to the states?

JUSTICE HOLLAND: As you would expect, there are differences in the size and the unanimity requirements. But you also see other provisions in state constitutions that you wouldn't find in the United States Constitution. For example, Delaware judges into the 1800s didn't

¹⁶ 399 U.S. 78 (1970).

¹⁷ 536 U.S. 584 (2002).

think that you could waive your right to a civil jury trial. Consequently, the Delaware Constitution was amended in 1897 to specifically provide that you could waive the right to trial by jury.

Another provision that's unique to state constitutions would be a constitutional standard of appellate review. The Delaware Constitution provides that on an appeal from a jury trial, if the jury's factual findings are supported by the record, they're conclusive. Consequently, you have the state constitution requiring a great deal of deference to the jury's verdict.

Another provision that was constitutionalized in Delaware was in response to the custom in England of judge's instructions to the jury. In England, judges are allowed to instruct the jury and comment on the facts. It's termed, summing up. Delaware has a constitutional prohibition against the judge ever commenting on the facts. Frequently, we have appeals where the judge is trying to instruct the jury on the law, and the argument on appeal is the judge went too far in commenting on the facts and violated the state constitution.

Probably the most interesting effect of state constitutions, for those of you that will be practicing in the years ahead, has to do with the implications for tort reform. A great many statutes that purported to reform the law of torts have been invalidated under state constitutions. The easiest example would be, if you had a right to trial by jury at common law, and that was limited or modified in any way by a statute in the guise of tort reform, such statutes have frequently been held to be unconstitutional.

PROFESSOR WILLIAMS: Very interesting. Thank you.

At the risk of driving the audience out of the room, I want to ask a civil procedure question. Where the Seventh Amendment applies to civil cases in federal court, and there's a diversity case being heard, what would then be the implication of the state civil jury trial rights provisions in the state constitution? You may recognize the Erie Railroad issue. Do we see a problem or potential problems that this new generation of lawyers may help us with in that area?

JUSTICE HOLLAND: Well, I know you all remember *Erie v. Tompkins*¹⁸ and the distinction between substance and procedure. You'll know that after you have been admitted to the bar like I have for more than 30 years, you'll never forget *Erie v. Tompkins*. But from a state constitutional point of view, a good example would be either the standard of review, or more importantly, this idea that you have to give deference to the jury's findings of fact. The argument could be made that in a federal diversity case, you have a substantive right to have some deference given to the jury's findings of fact; but I'm sure the federal courts would tell you that the way they run jury trials is procedural, and that they don't have to do that.

PROFESSOR WILLIAMS: So, this may raise some problems in the future in terms of the interaction of the Seventh Amendment as applicable federal court jury trials and the possible application of state constitutional jury trial rights that will remain to be seen with the new generation of lawyers.

Comments from the panel on the jury trial question? Judge Stith.

JUDGE STITH: In Missouri, a good example of the interplay between the state and federal systems is the enforcement of the Missouri Human Rights Act. Until very recently, the state courts of appeals had held that there was no right to jury trial for causes of action under the Missouri Act, because they're considered equitable, and therefore not historically subject to being heard by a jury.

But the federal courts had interpreted Missouri's Act as providing a right to jury trial, because it dealt with issues that under the federal equal opportunity laws would be heard by a jury; therefore, if you wanted to have a jury trial of your claims, you went to federal court and brought suit under both the federal statutes and the Missouri Act. The Missouri Supreme Court very recently addressed this issue for the first time and found by going through legislative history, comments of original intent and so forth, that because the claim is basically one in tort, it was one that you would have had a right to jury trial on when Missouri's original constitution was created and therefore, you have a right to jury trial under the Missouri Human Rights Act now.

¹⁸ 304 U.S. 64 (1938).

A related issue is currently before us, so I can't resolve it, but I'll mention it. In cases in which a person has a claim that's both equitable and legal, for instance, you ask for injunctive relief and you ask for damages, Missouri traditionally had what's called the Equitable Clean-Up Doctrine. It says that once equity takes a case it retains jurisdiction for all purposes, including granting damages. But now that we recognize this right to jury trial, how will those two lines of authority—one allowing a jury and the other recognizing the role of equity—be sorted out?

PROFESSOR WILLIAMS: Fascinating. Chief Justice Durham.

CHIEF JUSTICE DURHAM: I just had a brief observation. As I was listening to Justice Holland, it occurred to me that one of the reasons you needed to amend the Delaware Constitution to permit waiver of jury trial rights in civil actions was probably the Alternative Dispute Resolution movement and the need for arbitration; because otherwise, under the old provision, I assume that you could not agree to arbitration of jury claims.

JUSTICE HOLLAND: You're probably right, and we were very avant-garde. We did that in 1897.

CHIEF JUSTICE DURHAM: Oh, well, maybe not.

PROFESSOR WILLIAMS: We call that ahead of the curve a little bit, in a way. Chief Justice Shepard.

CHIEF JUSTICE SHEPARD: One of the things that reflects the difference between the right to jury trial as a federal matter and as a state matter is a very interesting development in the last decade of reexamining how juries are called, how they are managed, how they are instructed. This has essentially been a state court movement. There really is no equivalent federal activity along these lines.

Arizona was probably the original groundbreaker, and now there have been about a dozen states that have had commissions or study committees examining how the state handles a jury trial. Some rather remarkable, innovative things are being done. And the differentiation between federal authority and state authority, it seems to me, has supported those reforms in a way that wouldn't have been as easy if the provisions were deemed to be the same.

JUSTICE HOLLAND: You bring up a good point. We had an interesting case in Delaware where we didn't have to decide the precise issue, but it had to do with jury selection. In our court of general jurisdiction, the custom evolved where all schoolteachers were excused from jury duty in the winter, and someone was tried in the summer for a criminal drug offense with a jury of all teachers. And while he was using the language from the United States Constitution, he was suggesting to us that wasn't a jury of his peers.

CHIEF JUSTICE SHEPARD: So they convicted him, no doubt.

JUSTICE HOLLAND: That's why he was appealing.

PROFESSOR WILLIAMS: Well, I think you can see throughout this, the impact of the federal system where we have these dual courts operating, and the feedback that goes back and forth.

May I ask one question? In New Jersey, where I teach now, for example, under the state civil rights statute, the legislature could decide to provide for a jury trial, and that's always available. So, the way the litigation tends to happen is that you have to retain a legal historian, basically, to help decide if—at least on the east coast where we had our first state constitution in 1776—at common law at that time, whether this is the kind of a claim that would have been subject to jury trial right.

It's very difficult when you get these brand-new statutory causes of action like whistle-blower statutes and things like this, which didn't exist in common law at all. So what the courts do is go back and they do look in the, what seems to us as the mists of history at what would have been the closest kind of cause of action to a civil rights claim or a whistle-blower claim at common law. This is really partly the domain of legal historians. If there are any of you in the audience, maybe your stock will go up a little bit with this.

But the bottom line actually is, at least in our state, if the court rules that in fact there wasn't a constitutional right to a jury trial in these newly created sorts of claims, the legislature can step in, as it did in our state when the supreme court said there was no right to jury trial for the civil rights statute. Within six months the legislature had said, yes, there is. So there is an interaction in a lot of these areas, certainly between what the state constitution requires and what the state legislature may do on top of that.

Is that probably right in Missouri?

JUDGE STITH: Absolutely, and a lot of the briefing in that case dealt with the fact that the statute that deals with the Missouri Human Rights Act is silent as to whether you get a jury trial. The comparable federal Act is not silent, and so people argued based on that distinction that there was not a right to one. A more minor argument in the briefs was, and the constitution provides such a right, because it says that the right to jury trial shall be inviolate. But really, much of the debate was over the language and statutory interpretation; but the court thought it was a much more basic issue of what the constitution requires.

JUSTICE HOLLAND: We had that come up in Delaware when the legislature amended the landlord and tenant code not that long ago to eliminate any right to trial by jury. Some creative lawyer concluded that when you were being evicted, it was the common law equivalent of an action in ejectment. We held that the statute violated the state constitutional right to jury trial that existed at common law.

PROFESSOR WILLIAMS: Another good example, is the modern statutes on civil forfeiture. If somebody uses an automobile in a drug transaction or a prostitution transaction, the automobile or the house or whatever can be seized. It's a civil proceeding. Do you get a jury trial right for that?

Well, this kind of a claim was more or less unheard of at common law, so you have exactly the same kind of process Justice Holland just mentioned, an attempt to try to equate this new claim with something at common law that did have a jury trial right or not. It's a very interesting exercise that goes on.

JUSTICE HOLLAND: A lot of this comes about because the United States Supreme Court has said that the United States Constitution did not preserve all of the common law rights in the Sixth Amendment but only the essential rights; and they're still defining what they are, whereas the state constitution might have preserved them all. But an important distinction that you frequently see on the criminal side is that many state constitutions provided for you a right to trial by jury in any criminal proceeding. And the word "any" is in the state constitution. Therefore, the federal limitation that you, don't have a right to trial by jury unless you're incarcerated for a certain amount of time, doesn't apply. Alaska is one state that's construed their state constitution that way.

PROFESSOR WILLIAMS: Interesting. Okay. I know you have questions. Hold them if you don't mind.

Let's proceed to Judge Landau from Oregon. As you know from Curtis Jones, he's written on the uses and misuses of constitutional history. Judge Landau, would you give us briefly what you've written about and then we'll discuss it?

JUDGE LANDAU: Sure. What I tried to do is focus on method, how judges arrive at the conclusions that we do about what our state constitutions mean. One of the things that you see frequently cited as a basis for state constitutional interpretation is history, the historical context in which the language was adopted. The problem that I have seen, as a state court of appeals judge for over a decade, is that we judges often do the history rather badly. What I have done—and I have to say at the outset, that almost all of these lessons are lessons that I have learned from my own mistakes; although I only cited a couple of those in the article—I cataloged a six-pack of problems that I see most frequently employed when we state court judges resort to history to justify our interpretations of state constitutional issues.

The first is that we frequently equate the historical question of what framers intended with what is arguably a very different question; and that is: What does the constitutional provision mean? That is to say: What is the legal significance of that historical fact?

Frequently you'll see state courts treat those as if though they were the same thing without explaining why that is so. There are loads of arguments about why those should or should not be the same; but I have very rarely seen any state court actually take those arguments on and justify what they're doing.

Second, the courts tend to apply what we know as "law office history." In my article, I referenced the problem as "law and the cocktail party." A famous Second Circuit Judge, Harold Leventhal, talked about looking at the legislative history of a statute was much like going to a cocktail party and only noticing the faces of your friends. Frequently, when we judges look at historical source materials, we tend only to notice the things we're looking for; and we tend not to see the sources that are problematic in terms of the interpretation of the text at issue.

Third, there is an ever-present problem of generalization. Once you identify the history, there's a problem of identifying the level of

abstraction at which you describe it. To take an example from the conversation we just had about the right to jury trials, what if the state constitution refers to the right of the jury trial as existing to the extent of the state common law? At what level of specificity do you describe the common law?

At common law, it's frequently understood that we had a right to a unanimous jury of 12 men in criminal cases. Well, does that mean that there's something special about the number 12? Does it mean there's something special about unanimity? And does it mean there's something special about male jurors? Or do we attempt to describe those features of the common law somewhat more generally or abstractly?

Fourth, there is a problem that I have called "History and the Sound of Silence," being an old Paul Simon fan. The historical record frequently, at times exasperatingly so, is silent on an issue; and we judges have a tough time with that. What we often will do is try to arrive at historical conclusions by negative inference. And so what we will say is, we'll kind of assume a default position.

A great example of this is a group of cases in the '80s and early '90s about whether—whether people have the right to collect initiative petition signatures on certain private properties, such as shopping centers. A fundamental legal issue is whether state constitutional guarantees of free speech apply only in cases of government interference or whether they also apply to private actions. The problem is that hardly anybody—nobody I know of—actually talked about those things, at least not in the mid-nineteenth century.

What courts have tended to do is say, we don't see anything in the historical record that suggests that these free expression guarantees were intended to apply to private actions or private interference; therefore, they don't apply. Well, it's not quite so simple. You can establish—it's very difficult, historically—but you can arguably establish the correctness of a default position, and *then* say, if we know they would have said this if they had thought about it, but they didn't say it, then perhaps we can attempt to draw some inferences from the silence. But we judges tend not to be quite that subtle, and we tend to reason from the silence alone.

Finally we have what I have called "History and the Whopper," and that has to do with some wholesale fictions that we tend to employ. One

of my favorites is a case from my own court about the *ex post facto* clause.¹⁹ Our constitution was adopted in 1859. It was based on the—I want to get this right, because this is Indiana—it was based on the 1851 Indiana Constitution, which in turn was very similar to the 1816 Indiana Constitution, which was construed in an 1822 Indiana Supreme Court case. And what the Oregon Supreme Court said is, well then, it's safe for us to infer that the Oregon framers in 1859 intended to adopt the Indiana court's construction of the 1816 Indiana constitution in the 1822 case. Do you all believe that?

That's only five. I promised six. I suppose it goes to show you there are three kinds of people in the world; there are those who can count and those who can't.

PROFESSOR WILLIAMS: If I remember, most of us who can't count went to law school.

Well, what do you think would be the value of a resort to constitutional history in a circumstance where we have something that really was not considered by the framers, or at least we can't tell that it was considered by the framers? Is there a role for constitutional history there?

JUDGE LANDAU: Well, that's a really good question. It kind of assumes a question that I didn't talk about in my article, but that we should discuss here; and that is: Does history matter at all? What I talk about in my article is: Let's assume that history matters, how should we be doing it right, and how are we doing it wrong? But I think it's an interesting and important question to ask whether history matters at all.

In a nutshell, I am of the opinion that history is always relevant. In a general sense, law cannot be understood apart from time and place and circumstance. Law is not a set of doctrines that exist apart from history. In a very real sense, you cannot understand law without reference to history. Ask anybody who's tried to understand the law of future interests.

In a more specific way, constitutions are legal documents, and all legal documents have to be understood in context. Meaning is always derived from context; and a relevant context, it seems to me, is the

¹⁹ State v. Cookman, 920 P.2d 1086 (Or. 1996).

history within which the words are used, in two specific ways, it seems to me, at the very least.

One is: The meanings of words change over time, and very, very quickly at that. I mean, anybody who's tried to read Shakespeare knows that, right? You're constantly looking at the little margins to figure out what the words mean. For example, I never could understand what Hamlet was saying to Ophelia when he said, "Get thee to a nunnery. Why wouldst thou be a breeder of sinners?" Well, a nunnery back at that time meant a brothel.

More recently, the Civil Rights Act of 1876 refers to discrimination on the basis of "race." What does "race" mean? In the *Saint Francis College* case,²⁰ the Supreme Court said, "race" means something very different now than it meant in 1876. Words change; meanings change. So, we always have to think about that when we're interpreting historical documents.

In a broader contextual sense, too, you have to understand the problems that the wording was designed to attack. That also can give meaning, particularly in a case of an ambiguous phrase. A phrase that can go one way or the other on its face can become very obvious once you understand the context in which it was enacted.

Finally, there's a very practical one for those of us on state court benches, and that is that history often provides an important tool for understanding how our constitutions may be interpreted separate and apart from the Federal Constitution. For many years, as an example, state equal privileges and immunities clauses that dated from the mid- to early-nineteenth century were interpreted in lockstep with the Equal Protection Clause. In the '70s and '80s, following some work done by a judge from the Oregon Supreme Court, Hans Linde, we began to understand that the privileges and immunities clauses were actually a product of Jacksonian concerns with conferring privilege, and not, as in the case of the Fourteenth Amendment, concerns about adverse discrimination against disfavored classes. It resulted in an entirely different analysis that we only came to appreciate as we understood the differences in the history.

²⁰ *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

Having said that history is relevant, though, doesn't mean that it determines meaning. That's the whole other question, and we can talk about that if you want; but I think history is relevant. Whether it is controlling, whether it limits what the words can mean, I'm much more skeptical about.

JUSTICE HOLLAND: Professor Williams asked about history in the context of something the framers might not have contemplated, and some state supreme courts have had to come to grips with this with regard to the confrontational language. In the United States Constitution, it provides you have a right to confront your accuser; but in many state constitutions, it provides you have to meet your accuser face-to-face. And after *Coy v. Iowa*²¹ and *Maryland v. Craig*²² were decided by the U.S. Supreme Court, where you didn't have to have a child witness actually present and you could do a lot of other things, state courts had to decide whether face-to-face meant face-to-face or with video conferencing and different things, you could really permit it under your state constitution.

I think state supreme courts have come out divided. For example, the Pennsylvania Supreme Court said face-to-face means face-to-face.²³ Then there was a movement to amend the Pennsylvania Constitution for child witnesses. Kentucky held face-to-face doesn't really mean that.²⁴

We faced that question in Delaware in the context of hearsay, where someone wanted to admit a dying declaration and the state constitution was raised and it was argued that the defendant can't meet this dead person face-to-face. We found some history that indicated at common law, dying declarations were recognized. Since our constitution gave you the right to the law of the land as it existed at common law, we held it incorporated the dying declaration exception.²⁵

PROFESSOR WILLIAMS: How much help did the lawyers give you in that case?

JUSTICE HOLLAND: They did not. Which is really the point of Judge Landau's article. We certainly all agree, it's easier to argue cases

²¹ 487 U.S. 1012 (1988).

²² 497 U.S. 836 (1990).

²³ See *Commonwealth v. Hanawalt*, 615 A.2d 432 (Pa. 1992).

²⁴ See *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003).

²⁵ See *Hall v. State*, 788 A.2d 118 (De. 2001).

under the United States Constitution, because you have a lot of help from all sorts of sources. But if you're going to make that state constitutional argument and use history, you really have to dig it out yourself. The state courts would love it if you would dig it out and help us, but frequently, the state court's doing a lot of independent research.

PROFESSOR WILLIAMS: Chief Justice Shepard.

CHIEF JUSTICE SHEPARD: I actually see some reason for optimism along those lines. I observe an increased interest in American law schools courses in legal history. They seem more numerous to me than they did 10 or 20 years ago. And there is a continuing build up in the amount of historical material that's available.

Judge Landau's quite right that people act as advocates, and the help they do give you is, by the nature of the adversarial process, adversarial. What's more useful is if you have other sources to resort to which are not generated in an adversarial setting.

Our court, about six or seven years ago, sponsored a symposium on Indiana legal history with the law school at Indianapolis. We generated a very substantial collection of articles for both a live symposium and a published volume. And there is now to be a set of volumes sponsored by the Ohio University Press on Midwestern legal history. The first one is about Ohio legal history. The second one is about Indiana legal history. And so the number of places where one can look continues to grow, and it seems to me, that it's good for litigators and judges.

PROFESSOR WILLIAMS: Judge Stith.

JUDGE STITH: There's an important distinction between the legal history that's available to you in different circumstances. If you're looking at constitutions, you often have the constitutional convention notes, where you have the debates of those who were writing the constitution at the time, and you can look at that for assistance; although, as Judge Landau has said, sometimes it's not always fully accurate or complete. A lot of you are familiar from law school with looking at statutory history, looking at committee reports and so forth for federal statutes and using that to guide you as to the meaning of certain terms in federal statutes.

In Missouri, at least, we do not have comparable legislative history for state statutes. So, we have really little history to guide us, which

sometimes is a benefit, because you can get misled by an incomplete legislative history. But the paucity of resources can also lead to some very innovative methods of trying to get history to you.

We recently had someone arguing about whether or not Missouri's law requiring you to provide education to persons with disabilities was broader than the comparable federal law or not, because there was a difference in language and what it meant. And they came up with a letter to the Governor signed by 70 legislators saying: This is what we intended when we passed this law. The court did not accept the letter as a relevant basis of discerning legislative intent.

PROFESSOR WILLIAMS: Now that they know what the question is before the court, this is what they meant.

JUDGE STITH: And one of the parties argues that even if we looked at the letter, it was signed by only 70—less than a majority.

CHIEF JUSTICE SHEPARD: Eighty or 90 might have done it.

PROFESSOR WILLIAMS: That's great. Chief Justice Durham.

CHIEF JUSTICE DURHAM: I'm just reminded by this discussion of a comment from a law professor who participated, I think it was the 1972 Illinois Constitutional Convention. You anthologized this in your textbook, Professor Williams. She comments that constitutional legislative history is a fable agreed upon. And that's, I think, the experience that you're having after the fact.

Also, I just wanted to comment on a point that I think Judge Landau makes quite forcefully in his paper, which is where I thought you were going with your comment in the first place; that there is often a difference between legal history and between history as historians do history. It's something that we, as lawyers, tend to be very unsophisticated about, and as judges also tend to be unsophisticated about.

History itself as a discipline is undergoing enormous hermeneutical debates these days, and so I think we have to be cognizant of the boundaries of our own discipline when we're doing constitutional history. Although the bottom line is, when we have to answer the question, we are going to go looking for our friends at the cocktail party.

PROFESSOR WILLIAMS: I think I remember Ann Lousin who was in the Illinois—

CHIEF JUSTICE DURHAM: Yes.

PROFESSOR WILLIAMS: —Constitutional Convention of 1970 said that they couldn't even agree when to go to lunch.

Judge Landau, one of the interesting things about state constitutional interpretation, in 49 out of the 50 states, not Delaware, if I remember, is that everything in the state constitution has been voted on by the electorate; so, one of the approaches that state courts use is to try to determine—and this is a difficult task—what the average voter would have thought they were adopting when they voted to ratify a state constitutional clause. In a way, it seems to me this could conflict with the use of state constitutional history.

So, I wonder what you would say, if the state constitutional history, say a committee report in the constitutional convention, or something else—not a letter signed by people after they knew what the problem was—relatively authoritative constitutional history pointed in one direction, and yet the plain meaning of the language or what it looks like the voters thought they were doing pointed in a different direction? Is there any way to resolve that, do you think?

JUDGE LANDAU: There are at least three different questions in there.

CHIEF JUSTICE SHEPARD: Take the one you like.

PROFESSOR WILLIAMS: I'm sure you do it to lawyers all the time.

JUDGE LANDAU: Just real quickly, just so that we can focus on at least what the questions are; one of them you raise and I think it's really interesting, is that the courts tend to focus on framer intent. There's a good argument to be made—I think you've written on this yourself—that the relevant level at which we should describe intention is the level of the ratifiers. There are some courts who have actually talked about that. They half apologetically have said, well, the framers' notes are at least a relevant indication of what the people probably intended.

In my state, for example, we have very little in the way of official notes about the convention. In fact, they were lost until about two years ago. Even at that, there wasn't that much; it was all in one box. The

framers in Oregon were a fairly thrifty bunch, and they decided not to spend the money to have an official reporter. So what we have is a compilation of newspaper articles that were collected by a lawyer in the early part of the twentieth century, and that's basically the bible for us in terms of framers' intentions.

PROFESSOR WILLIAMS: May I interrupt you, though?

JUDGE LANDAU: Yes.

PROFESSOR WILLIAMS: If I remember, these are newspaper articles that actually reported on the convention.

JUDGE LANDAU: *The Weekly*—right.

PROFESSOR WILLIAMS: They're almost verbatim, they're not official, but I have to say this because I have a new book coming out about this process in New Jersey, so I want it to seem legitimate. In those days, there were shorthand court reporters who actually took this stuff down.

JUDGE LANDAU: But it's real interesting about that, there were two papers, they didn't always see eye-to-eye—

PROFESSOR WILLIAMS: Oh, yes.

JUDGE LANDAU: —and the way they report the day's affairs don't always line up. But our courts have said that given that we're relying on newspaper accounts of the convention, that's a useful surrogate for the framers' intentions.

An other point that your question touches on is that we don't want to act as if all state constitutions are 200 years old. A lot of them aren't. Not all constitutions are like my state's constitution, which was ratified in 1859 and never revised. It's been amended a couple hundred times, but it hasn't been revised. (Welcome to west coast initiative politics. We have such wonderful things in our constitution as whether or not fraternal organizations can play bingo in our state. And the constitution is 69 pages long.) A number of states have entirely revised their constitutions several times over, and a number of them in the last 50 years; and they've done a remarkably good job of putting together an enactment history that in many ways makes the historians' and the judges' jobs a whole lot easier.

A third question has to do with conflicts between text and history, and that gets into an interesting philosophical debate about what you think law is and what you think a “constitution” is. There are people who think of a constitution—our constitutions in a sense has a little “c.” The constitution is a piece of evidence about a constitutional system in a kind of British sense that includes not just the constitution, but other doctrinal developments.

An example is *Marbury v. Madison*²⁶ and the doctrine of judicial review. You cannot, look as you may, find it at least explicitly referred to in the constitution; but it is a constitutional doctrine, so there are folks who would say that we need to look at the text as a more humbled instrument of constitutional analysis. In those cases, those courts might say that what the framers intended might have a much more significant role in the case of a conflict with constitutional text.

There are others who view the text as it. It’s Constitution with a big “C.”

PROFESSOR WILLIAMS: Positive law.

JUDGE LANDAU: That’s exactly right. And so intentions and historical analysis are interesting to resolve an ambiguity, but not to conflict with the text.

PROFESSOR WILLIAMS: Any other comments by panelists?

We’ll move on to Chief Justice Shepard, our host Chief Justice, who, as you know, has written about certified questions and whether they’re a good idea in the making of state constitutional law or not.

Can you summarize briefly for us what you’ve said?

CHIEF JUSTICE SHEPARD: There is a device that’s not exactly a household word, but is a very interesting aspect of the federal system as it has evolved in America. As you know from the earlier discussion about *Erie*, a federal court sitting in diversity applies the law of the jurisdiction in which the case arises, and is bound by the decisions of the courts of that state, or certainly the highest court of that state. But there has been since about 1945, a mechanism sometimes used by federal

²⁶ 5 U.S. (1 Cranch) 137 (1803).

courts when they confront such a question and find no state court opinion that resolves it. That device is the certified question.

So a Federal Circuit or a U.S. District Court in 47 states can send the question that's on their plate to the highest court of the state and ask the court to give an answer. This doesn't happen every day, but it happens often enough that there is a uniform statute that most states use as the basis for their own procedures.

Now, as the state constitutional law movement has grown, a small piece of this business constitutes questions involving a matter of state constitutional law. And so inevitably, from time to time, the Federal courts ask the state court what is the answer to this or that constitutional question. I told Judge Easterbrook once that we don't always know the answers, but we're legally authorized to make them up.

PROFESSOR WILLIAMS: It's kind of like the way we operate.

CHIEF JUSTICE SHEPARD: Yes. But a lawsuit that comes in that setting, a state constitutional question that comes in that setting is very different from a statutory question that arrives even in the same setting. Many of these differences have to do with the fact that most courts adopt a jurisprudential attitude of restraint in deciding constitutional questions. That is, if somebody shows up in standard litigation, and has placed before you three or four grounds on which he or she ought to be entitled to judgment, and one of them let's say, is a statutory ground, or a ground based in a regulation or in common law, if that's a winner, you will answer that question and stop. I think it would be relatively rare that a court would say, well, you've won on that, but you've got this really interesting constitutional question here, and I think we're going to decide it anyway. That happens, but it doesn't happen very often.

Likewise, it would be a little unusual if the court would go straight to the constitutional question and not explore the others first. You normally work on the non-constitutional grounds first.

A certified question calls upon the state court not to do that. It comes as a nice tidy little package. Frequently, we don't know what else has happened in that lawsuit. We don't have the full record as it exists. Particularly when it comes from a U.S. District Court, the record might be rather sparse. So, again, we are called upon to do something we usually don't do, which is to exercise our constitutional authority at a

604 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

moment when we don't yet know whether, for us at least, the answer to the constitutional question would matter under these facts.

And the third thing may be more subtle. Most of the time a court resolving a legal question is taking responsibility for the outcome. Here are the facts we're fed, either by the jury or in a summary judgment proceeding, here they are established or taken as established; now, we will take the responsibility for applying the law, whatever it is, to these facts. In a certified question, we don't do that. A diminution of the weight of that responsibility is also a matter that ought make us think twice before we say, fine, here, we'll give you an answer.

Now, I have to say on the bottom line question is, do you vote to do it, yes or no, that I frequently do vote to do it, only when Justice Sullivan and Justice Dickson will let me,²⁷ but they often do. On the question whether it's wise or not, though, there are days when it doesn't seem wise, and the best thing to do is move onto something else.

PROFESSOR WILLIAMS: Very interesting.

Would it matter to you that a party had actually sought out the federal forum and then now seeks to ask that federal court to certify the question to you?

CHIEF JUSTICE SHEPARD: It does matter to me. We have had instances where a party, having the choice of either forum, decides he or she would rather play ball with the federales and then discovers that maybe this wasn't so smart, that the federal claims are losers, and that the last hope is some state constitutional claim or state law claim generally, and comes running back seeking refuge among courts of general jurisdiction.

This is only one aspect of whether you decide to take the case or not, and this happened to us fairly recently. This is voluntary on both ends. The Federal Judge's decision to ask the question is not compelled by any statute or practice, neither is our decision to take it or not. To the extent that it calls upon one to exercise discretion, the people who've chosen their forum and then been hoisted on the decision have a lower claim to our time, I think.

²⁷ *Valparaiso University Law Review* would like to thank all of the guests at this event, which included Justices Sullivan and Dickson of the Supreme Court of Indiana.

PROFESSOR WILLIAMS: Interesting.

What do you think are some of the implications for the federal system if the state court does not take the certified question?

CHIEF JUSTICE SHEPARD: You do what you do if certification weren't there. You'd fall back on other sources of more general law; try to draw principles from other places than a specific declaration of the highest court of the state. You would, quite obviously, look at what the intermediate court in the state had said about this question. Indeed, my guess is if you had something that looked fairly authoritative from the intermediate court, you wouldn't get a certification to begin with. You mostly get it where both the intermediate court and the highest court have not said anything. Anyway, the federal court would piece together, as we as lawyers would do on any occasion, authority that seemed to point in one direction or another, and use all the other tools that judges use.

CHIEF JUSTICE DURHAM: In other words, you would guess?

CHIEF JUSTICE SHEPARD: Right, you would guess.

PROFESSOR WILLIAMS: I guess the Federal Judges would have the option of abstention, or if it's a removal case—pardon my civil procedure—but possibly to remand the case. There would be some other mechanisms they could use, I suppose.

CHIEF JUSTICE SHEPARD: Could be.

PROFESSOR WILLIAMS: Well, do you consider a decision on a certified question to be binding precedent?

CHIEF JUSTICE SHEPARD: That's a very intriguing question. Although we have, to the best of my recollection, never been asked to answer the question you just posed, I have always assumed that they are. They seem to me to have a different quality, as our discussion earlier on this point indicated, a slightly different quality than what are usually called advisory opinions that some state courts issue.

Just within the last couple of weeks, the legislature of Massachusetts asked the Supreme Judicial Court for advice on whether a version of the statute under consideration would pass muster under their mandate about marriages. An answer given in a case that's actually litigated, seems to me, to be on firmer territory. I would be surprised if we would

606 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

pretend that that hadn't happened and start afresh. I expect that most courts would say, that's a decision; and if you want to reverse it, you ought to explain to me why, but we are not writing on a clean slate.

PROFESSOR WILLIAMS: As you know, the reason I asked that question is because most of the states that are authorized to grant advisory opinions say that they are not binding precedent, and this is true in Massachusetts. So that decision that came out several weeks ago under the law of Massachusetts is not a binding precedent. Having said that, I wouldn't want to go back in six months and argue to that court that they shouldn't follow it, as a practical matter, but technically it's not.

Members of the panel?

JUSTICE HOLLAND: Delaware makes an interesting distinction. On certified questions, we have a provision in our state constitution where the question is certified to the court. We allow certifications from the United States Supreme Court, the court of appeals, district courts or the state highest court, but we can answer that as a court. On advisory opinions, the law provides that those opinions are asked of us as individual justices, and when we send back the answer, it's each of our individual opinion, it's not an opinion of the court; although the theory is that the people who wrote the opinion as individuals would agree with that later if it came before the court.

PROFESSOR WILLIAMS: So, in Delaware, you can answer certified questions from other states? So far we've talked about the federal system.

JUSTICE HOLLAND: Other states, I think in part, that was motivated by the interests in the many corporate cases that are decided in Delaware and go to federal courts. But we have had certified questions from all around the country, and as I said, it's federal courts of appeals, federal district courts and any other state supreme court. I was joking with Justice Stith, because we once had to answer a question on Missouri law, and Missouri won't allow anyone to certify questions to the Missouri Supreme Court.

JUDGE STITH: You can ask me now, though.

JUSTICE HOLLAND: I had to figure it out. But I think I like these reciprocal relationships. So we may amend our constitution and not take questions from Missouri.

JUDGE STITH: I think we're one of just a few who don't; you said, 47 states allowed it, so Missouri is in a minority.

PROFESSOR WILLIAMS: Sounds like the Brazilian officials when they decided to photograph and fingerprint American tourists last month.²⁸

JUSTICE HOLLAND: As you know, the Missouri Supreme Court said if they have a case in controversy requiring it, and they couldn't give advisory opinions, and that's why this provision is in the Delaware Constitution that says you can answer certified questions.

CHIEF JUSTICE DURHAM: It should be noted that many state constitutions contain no case in controversy requirement. So you are starting from a different base when you are looking at the advisory opinion problem, and related standing issues.

JUDGE STITH: You were noting that many of the questions are certified from federal courts. Another comment that you made is that most of the certified questions are certified because the parties request that the issue be certified to the state court.

I've had two personal experiences with certified questions where the court did it *sua sponte*. One was as a litigant, where we kind of wished they hadn't, but the Seventh Circuit certified an issue of Wisconsin state law in the course of issuing a full opinion on the other issues. And the case came down to a really subtle question, where it seemed that Wisconsin law might be different than other law, and they weren't quite sure how to resolve it; so they certified it on their own just as a legal question without any factual background, other than what was in the opinion.

²⁸ Frank James, *U.S. Begins Closer Watch of Foreign Visitors: The Homeland Security Department Launches a Program to Fingerprint and Photograph Millions of Visa Carriers at 115 Points of Entry in Hopes of Preventing Terrorists from Slipping Through*, CHI. TRIB. ONLINE, (Jan. 5, 2004), at <http://www.chicagotribune.com/news/nationworld/chi-0401050172jan05,1,5923469.story?coll=chi-newsnationworld-hed> ("Last month, a Brazilian federal judge, angrily calling U.S.-VISIT as 'xenophobic' and 'absolutely brutal,' ordered police to fingerprint and photograph Americans entering the country starting Jan. 1.").

608 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

And the second one was when I was a Court of Appeals Judge in Missouri and we had a question of Kansas's statutory law regulating utilities. Why that was in Missouri State Court, I don't know. But it was—

JUSTICE HOLLAND: It sounds like poetic justice to me.

PROFESSOR WILLIAMS: You deserved it.

JUDGE STITH: We did. —and they argued it was governed by a 1915 case dealing with telegraph regulation, where the result was somebody had to pay \$5 or \$10, and this dealt with the question of tort liability for the consequences of the power going out and some company losing multi-millions of dollars. We felt that perhaps the Kansas courts would want to reconsider the issue under current circumstances, and so we certified that question and we did it our ourselves—

PROFESSOR WILLIAMS: *Sua sponte*.

JUDGE STITH: —so it wasn't addressed by the parties. We framed the question.

PROFESSOR WILLIAMS: Well, speaking of poetic justice, why don't we reach your position on the panel. As you know, Judge Stith has written about federal and state habeas corpus, and if you'll give us a brief outline of that, I'll follow it up with a couple of questions.

JUDGE STITH: The issue I addressed came about because of two cases that were decided by the Missouri Supreme Court last year,²⁹ and they raised the issues about the difference between federal and state habeas corpus review. As most of you know, as criminal cases go on appeal, they'll go through the state system from the trial level up to the court of appeals, generally to the state supreme court. Then if someone claims they didn't have adequate assistance of counsel or other constitutional claims, they may file for post conviction relief in their own state trial courts. It's often called habeas, it often may be done under a state rule, and that will go up, again, through the appellate process in the state.

²⁹ See *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003).

Then you'll get to the federal courts and have federal habeas corpus review of the state law claim and go up to the federal court of appeals and perhaps ultimately to the Supreme Court. And that generally is it. The federal courts, particularly in the last number of years, have said that once they have reviewed a claim in the post-conviction context, they will not review it again unless certain very limited exceptions exist.

One of those exceptions is where you can show cause for not raising the issue in a timely manner, and prejudice as a result. For instance, there was a case in Missouri where it turned out the prosecutor had a tape of someone else confessing or admitting that someone else had done the crime; and they didn't turn it over until long after the case had gone through the regular review process. Well, that certainly was cause for not raising it timely and prejudice as a result of it, so the federal court entertained the claim.

The other situation in which they entertain such claims is where there's a claim of actual innocence. But in both those contexts, in the federal courts, you first have to prove that there's a constitutional violation in the trial before the court will go ahead and consider your claim. The reason is because federal courts don't just interfere with or announce state law. They don't go read a Missouri Supreme Court decision and say, gosh, we would have done this differently; or you're wrong; or this would have been different under federal law, but they must enforce your federal constitutional rights.

So if, for instance, in the instance of the person who had exculpatory evidence concealed, there was a constitutional claim there; therefore, the federal courts were willing to look at it because you had a constitutional claim and there was cause for failing to raise it early, and prejudice as a result. Or if you claim you were innocent and you claim there was an underlying constitutional violation, the federal court will look to see if you can make a credible claim of actual innocence; and if you can, they'll go ahead and consider your underlying claim of constitutional violation.

We had a case before us, which had gone through the entire state and federal process, where the person really had no viable constitutional claim, but they claimed they were actually innocent, and there was substantial evidence that they were.³⁰ Everyone who said that he had committed the crime—it was a jailhouse murder—had recanted. There

³⁰ See *Amrine*, 102 S.W.3d 541.

610 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

were eight witnesses, three had said that he had done it, five not. During the course of the post conviction process, all three of them recanted; so there was no one left saying the person did it. But there was no procedure in place under Missouri or federal law for that case to be looked at again, and the State was ready to have an execution date set.

So the person asked for the Missouri Supreme Court to nonetheless grant an additional habeas review to address that issue, claiming that because they were innocent, Missouri should look at that claim. The Attorney General's office said, you couldn't do that, because you couldn't do it in federal court. In federal court, you have to have an underlying constitutional claim. They didn't have it, so it didn't matter if the person was innocent or guilty, Missouri couldn't look at it. And so we asked the question, so you're saying even if this person is innocent, we have to allow them to be executed? And the Assistant State Attorney General said, yes, you must.

But that was the logical result of saying that state courts are bound by the same rules federal courts are. But if you look at it more closely, as our court did, we said that's really not the case because federal courts have to be concerned about principles of comity, principles of federalism. They can't interfere with what state courts do unless the state court has violated the federal constitution or federal law.

State courts are not so limited. We have the authority and the obligation, we held, to look at our own state law and decide what's appropriate under it; so that's what we did.

PROFESSOR WILLIAMS: Sounds like a place to say, quite literally, thank the Lord for the federal system.

I think we all know that when the United States Supreme Court decides federal constitutional claims, there often arises a question about the extent to which those must be applied retroactively. To what extent are state courts actually free to apply federal rulings retroactively, but in a different way from that required by federal law?

JUDGE STITH: That was addressed in another case that came to our court last year. The United States Supreme Court has held that when they announce new constitutional decisions, they apply to cases that are on direct appeal or currently in process and being tried. Previously, in

the *Stovall* case,³¹ they had held that the same applied to cases on collateral review in many instances.

But in the *Teague* case³² from 15 years ago, they said that that would no longer be the case; and again, it was out of concern for principles of comity and federalism. *Teague* narrowed the review federal courts will give; it narrowed the way that federal courts will apply new constitutional principles.

The rationale makes some sense if you think about it. Assume the state court, for instance, did not grant the right to jury trial on some issue and federal law did not require that at the time the state court acted. Then later on the federal law change said you were required to have a jury trial on that issue, would it be fair to the state courts to go back and make them retry all those cases when they were following what appeared to be the proper federal law at the time they made their decision? There's a case before the U.S. Supreme Court right now I believe in the Ninth Circuit that will be addressing the issue in the federal context.

But what we said, in our case, was based on the meaning of the *Ring* decision³³ that had just come down. The *Ring* decision said that juries must decide all factual questions, all factual elements that are necessary for imposition of the death penalty. So, for instance, if it's required that there be an aggravating factor to impose the death penalty, the jury must decide whether or not that aggravating factor is present. In some state constitutions or state laws, including Missouri, some of them must also decide if there are mitigating factors that are present that outweigh the aggravating factors.

Applying *Ring* in this case, we said that the jury must decide all those factual questions, not the judge, because those are elements of imposing the death penalty. But then the State argued, well, even if that's the law and even if that's going to be the law in future cases, it shouldn't apply to Mr. Whitfield, because at the time the *Whitfield* case was decided, the federal courts had not yet announced that juries rather than judges have to find all the factual elements necessary to impose death.

³¹ *Stovall v. Denno*, 388 U.S. 293 (1967).

³² See *Teague v. Lane*, 489 U.S. 288, 304 (1989) (discussing *Griffith v. Kentucky*, 479 U.S. 314 (1987)).

³³ *Ring v. Arizona*, 536 U.S. 584 (2002).

612 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

We again looked at the issue of are we really bound just because the federal court would not apply the *Ring* decision retroactively because they wouldn't want to impinge on state court prerogatives, because that means the state court can't do it. In that case we held that no, the state court's not bound by principles of comity and federalism, that we can look to our own state law to decide whether or not this decision should be applied retroactively.

Traditionally in Missouri, we've looked at what would be the effect of applying the law retroactively, would it disrupt the judicial system; would it require hundreds and hundreds of trials; or was it something that could be done without disrupting the system. We found there are only six convicts who had been given the death penalty in Missouri where the jury had not made those factual determinations, the judge had. And we found it would not be unduly disruptive in light of the seriousness of the situation where death was at issue, and so we did apply it retroactively.

CHIEF JUSTICE SHEPARD: But you didn't permit the State to retry the case.

JUDGE STITH: Right.

CHIEF JUSTICE SHEPARD: I thought you just said that it would be not disruptive to not make them retry it.

JUDGE STITH: No, what the majority held in this case—and it was a 4-3 decision on that particular aspect of that case—was that because Missouri's statute required the jury to unanimously find all the necessary elements, the aggravating factors, lack of mitigating factors, in order to impose death, in those six cases there was a hung jury, and they couldn't reach a decision; therefore, the judge decided, and decided to impose death. We held that the jury being unable to reach a decision on that was the equivalent of an acquittal of the death penalty, since the statute required the jury to find those factors present in order to impose death.

CHIEF JUSTICE SHEPARD: Is that the rule you would apply generally, that is, a person in Missouri who had a hung jury would be released?

JUDGE STITH: No. It's because of the unique nature of the statute that it said unless the jury unanimously finds these factors, then you give a life sentence.

CHIEF JUSTICE DURHAM: The sentence, not the conviction.

JUDGE STITH: Right.

CHIEF JUSTICE DURHAM: That would be a lot easier.

JUDGE STITH: A lot easier.

PROFESSOR WILLIAMS: You know, I think there are not very many places in law school that you would actually study these kinds of things. Here's an example of ancillary rules about administering the substantive rules of constitutional law that are literally life and death choices, so, these kinds of questions are very important.

Judge Stith, I'm sorry.

JUDGE STITH: Well, I wanted to add, what was kind of unique about these cases, at least for me, is when I went through law school, I always thought of federal courts as having a lot more power than state courts and within a short time, I was confronted with two different cases in which because we didn't have to worry about federalism issues, the state courts really had a lot more authority than federal courts to deal with these issues.

PROFESSOR WILLIAMS: What about retroactivity in state constitutional decisions, not the federal constitution, would you see any difference?

JUDGE STITH: Well, it's interesting, I did. And the article goes through a review of other states and other state courts and how they've dealt with this retroactivity issue, and many, many state courts just automatically assume that whatever the U.S. Supreme Court said it applies, that's what they have to apply. So they say, if I'm dealing with a Federal Constitution issue, I've got to do what *Teague* did, I've got to apply it retroactively only when the Supreme Court says it and I don't, and I am not allowed to apply it retroactively when the Supreme Court will not.

Missouri held, and a few other states have held, wait a minute, that simply sets the minimum, sets the floor. The federal cases say this is when you must apply federal principle retroactively. They have not said you cannot apply it more broadly. Thus, a few states have done so.

614 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38

But interestingly, a few other states have felt so bound by the federal rule that when they announced a new rule of state law, they felt like they had to look at the federal rules and apply the federal retroactivity rules in deciding whether their own state decision applied retroactively. There's a lot of confusion and disagreement in this area.

PROFESSOR WILLIAMS: It strikes me that this is an area for the lawyers of the new generation to be especially attentive to these kinds of problems and help state judges avoid making these kinds of mistakes.

Can you see other areas where there's special differences between federal courts and state courts, such as discovery of new evidence, the new DNA technology, or things like that, that would raise different concerns about federalism?

JUDGE STITH: I think everybody's heard about the DNA cases where you find DNA evidence that seems to conclusively show that someone is actually innocent who's been convicted of a crime. There's a strong movement in many states, both in the courts and in the legislatures, to say that, well, we are going to reconsider those cases because it seems so fundamentally unfair. That, to me, is just really a specific application of this freestanding claim of actual innocence concept, that those are cases where you say, yes, there is a substantial basis to their claims of innocence.

One possible lesson is that if there are other instances, such as the case I discussed earlier, *Amrine*, where it seemed really clear from the record that a person had a real claim of actual innocence, that those, too, should be looked at. I think that might be a growing area where now that we recognize the principle in the DNA context of actual innocence, it will be extended slowly to other areas.

PROFESSOR WILLIAMS: Interesting.

JUDGE STITH: However, we do apply a higher burden of proof in that instance, because the petitioner has already been convicted by a jury. The petitioner can't just come in with some countervailing evidence. We require clear and convincing evidence.

PROFESSOR WILLIAMS: I see.

Well, I think our audience has been very patient. I've certainly learned a lot myself. But I think we have a shot at learning a bit more if

we open this up to questions from the audience. I understand there's a video audience, as well. It might reach all the way around the world, but probably not.

But I hope you have some questions. It's not often that even I get to ask questions like this of sitting judges, so, what do you say? Yes.

AUDIENCE QUESTION: I have a question, I guess, for Judge Landau.

PROFESSOR WILLIAMS: Can you hear her back there?

AUDIENCE QUESTION: Okay. I have a question about judicial activism. That's often something that's ferociously fought over at this school. You said, Judge Landau, that there's a question between history being relevant and history being controlling, and I'm wondering how you decide.

JUDGE LANDAU: Oh, you had to ask the hardest question. I don't know the answer. Honestly. It's the reason I didn't write about it in my article. I'm still working it through, and I've been at it for a long time.

We can talk a little bit about some of the arguments though. There are arguments that are based principally on popular sovereignty that when the framers take the trouble to put the constitution in a text, and when the text is voted on and ratified by the people, that deserves some respect. There needs to be a check on what the judges would like to do. So, we don't have this kind of freestanding system in which the judges can make it up as they go; I think everybody agrees that there are limits, and the limits come from that kind of thinking.

On the other hand, there are folks who question how that works in the real world, and how it works theoretically, too, to be honest. First, a common question that is asked is: If we're concerned about the framers' intentions, doesn't that engage in a form of question begging, that the framers intended that their intentions would control? Well, that turns out to be an interesting and difficult historical question depending on when your constitution was adopted.

In the early nineteenth century through the mid-nineteenth century, there is evidence that suggests that constitutional interpretation hadn't quite progressed to a point where a kind of intentionalism had really

gained a foothold as the predominant method of constitutional interpretation. That's a highly debated issue.

Second, if you assume the framers did intend that their intentions control, are their intentions ascertainable? From a theoretical perspective, can historians in any meaningful sense recreate the mind-set of framers who lived 200 years ago, back when they thought that people could be owned as property, and women could not vote, and the suffrage could be conditioned on wealth qualifications? Trying to recreate what the framers intended in this larger context is very problematic. There are also practical problems of coming up with source materials, depending again on where you're at in terms of the documents.

Then there's a third problem that we've talked a little bit about; and that is: Even assuming that you can find the history, and even assuming that you can describe it, there is often an endless array of levels of abstraction with which you can describe it. Just a quick example: My state has a right-to-bear-arms clause, and the question was whether or not you have a right to carry an AK47.³⁴ The proponents relied on the fact that there was this rifle, a Volcanic rifle, that was a repeating rifle, and some had made it to the Willamette Valley by 1859. What's the historical significance of that fact?

A majority on my court said that the Volcanic, which could fire several rounds a minute was not the same in any meaningful sense as an AK47? The dissent said, you bet, the Volcanic repeated, AK47s repeat, they're the same.

The problem is that there is no legal principle and there is no historical principle that will tell you what the correct level of generalization is that you can use to describe the historical fact. So, personally, while I'm very sympathetic, as a judge, I'm more comfortable when there are rules that constrain what I do. I look for rules, because I don't want to just be a legislator with a black robe on. On the other hand, I see tremendous tension with those other problems. That's the best I can give you.

³⁴ See generally *Oregon State Shooting Ass'n v. Multnomah County*, 858 P.2d 1315 (Or. App. 1993).

2004]

Panel Discussion

617

PROFESSOR WILLIAMS: I guess I would say, too, one wonders whether a judge would adopt a position on this to cover all cases, or whether one might tailor-make an approach. This is what some people think makes you a legislator in a black robe, but it depends case-by-case how these things shake out.

Did you have a comment?

CHIEF JUSTICE SHEPARD: Although it is very intriguing to sort through what's good and bad about historical analysis, the question in the end becomes, relative to what? If you decide that you're completely uninterested in that, all you're interested in is the words in this section of the statute, and you don't care what they meant to the people who wrote them; you don't care what problem they were trying to resolve; you don't care whether they were written in the nineteenth century or the twentieth century; it's just the words, not a question of what does that word mean to you.

CHIEF JUSTICE DURHAM: What does it mean today as opposed to what it meant twenty years ago.

CHIEF JUSTICE SHEPARD: Right. So I think you're onto something when you say it sort of depends on the case. There are some times when the historical evidence is very good, other times when the language of the statute seems inescapable, and trumps the historical. There are other times when the case law itself helps you a lot, and it's historical in a slightly different fashion. So, fraught as it is with pitfalls, the historical analysis is not alone in that respect.

PROFESSOR WILLIAMS: Thanks.

Yes, sir.

AUDIENCE QUESTION: This question is to Judge Stith. First of all, how do you know when the Supreme Court is only giving you the minimum standard, and not the standard as a precedent to be applied? I'm talking about the *Whitfield* and retroactivity case. Is the Supreme Court's precedent no longer controlling on that issue?

And then second, when is it okay to guess what the Supreme Court will do in the future, such as the *Simmons* case that's up on cert right now?

JUDGE STITH: Well, in terms of the habeas context that I'm talking about, and I was looking for the reference, but—you just have to read the article—but they specifically have stated that in various contexts in dealing with these issues, that they're setting floors.³⁵ They're simply saying what the states have to do and that the states must offer this minimum level of habeas review, and have said that states are free to do more. But states have simply not picked up on this often. For one thing, it's much easier to follow what the federal courts have done; you have a consistent rule from state to state.

But what's kind of ironic, as one of the state chief justices put it, is that the reason that the federal courts are not offering more review is they want to defer to state courts, that many people say the federal courts just interfere too much with state courts and they should back off. So they are backing off, and the state courts are following them backwards.

So this is the state courts' opportunity to step forward. They can step forward in many different ways. There's no right way or wrong way to step forward, but I think the first step is to recognize that in many of these areas, they can act.

I think the second part of your question dealt with the *Simmons* case that Missouri decided earlier this year, and the U.S. Supreme Court just took cert.³⁶ That was a case dealing with the juvenile death penalty. And back in 1989, the U.S. Supreme Court held that—in 1988, I believe they had held that those who were 15 and under could not be executed. That would be a violation of our norms, of our national consensus as to fairness. That was simply not acceptable. But in 1989, they said that was all right for 16 and 17 year olds and in another case that year said it was all right for those who are mentally retarded.³⁷

Last year in *Atkins*, the U.S. Supreme Court relooked at the issue in terms of those who were mentally retarded, looked at the change in the national consensus over that time, the growth of laws in different state legislatures barring such executions, and said that it's changed, and

³⁵ Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 437-38, 448-49 (2004).

³⁶ *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), cert. granted, *Roper v. Simmons*, No. 03-633, 124 S. Ct. 1171 (Jan. 26, 2004).

³⁷ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

under the consensus as it existed in I think it was 2002, such executions are not acceptable.³⁸

Missouri had a case before it where the same issue came up regarding someone who was 17 when they committed a murder for which they received the death penalty, and the State argued that we needed to follow the *Stanford* case decided in 1989, which said that it was constitutional to execute those who had committed crimes when they were 17. And Missouri said, well, no, that all the Justices have recognized that what we need to do is look at the national consensus, and they've recognized just this year in *Atkins* that that national consensus had changed. So Missouri did a similar analysis and found that, indeed, execution of juveniles did violate the national consensus. And we'll find out what the U.S. Supreme Court thinks sometime next fall.

PROFESSOR WILLIAMS: May I ask a follow up? I'm sorry.

No, you go ahead, please.

CHIEF JUSTICE DURHAM: I just wanted to observe by way of follow up that generally speaking, when interpreting federal constitutional rights, that is all the United States Supreme Court does is to establish a floor.

JUDGE STITH: Right.

CHIEF JUSTICE DURHAM: You have to think about political science, and the history of the whole notion of a dual constitutional system. The Federal Constitution essentially enshrines a system of negative rights. It prohibits acts by the government that would infringe upon rights that citizens of the United States have.

In the state context, state constitutions tend to be documents of affirmative rights. In other words, they're the residual holders in theory of the people's rights, which are often expressed in affirmative terms in state declarations in their state constitutions.

The automatic assumption should not be that the feds will control the ceiling as well as the floor—but to the contrary. Unless there is an explicit federal prohibition that affects the ceiling, the states are always

³⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

free to act within the textual and historic confines of their own constitutions.

PROFESSOR WILLIAMS: Judge Stith, just a follow up if I may. In a case like that – is it *Simmons* or *Simons*?

JUDGE STITH: *Simmons*.

PROFESSOR WILLIAMS: Why not base it on the Missouri Constitution where the consensus is within the territory of Missouri, and not worry about the national consensus and not worry about U.S. Supreme Court review? That would, therefore, be based on an adequate and independent state ground.

I'm not sure you can answer this question. I apologize if you can't.

JUDGE STITH: Missouri's provision has been interpreted to be identical to the federal, so it was really the same issue, and that's how it was argued.

PROFESSOR WILLIAMS: That felt binding on the current court?

JUDGE STITH: That's how the current court decided it.

JUSTICE HOLLAND: Your question brings up another doctrine; and that is in the propriety of anticipatory overruling, and generally we would be bound by what the United States Supreme Court said; although in this 1989 case, they seemed to be more fluid. And I think what the Missouri Supreme Court was saying is that this was not a hard and fast standard, but one that would evolve; and what they did was consistent with that. What would have been problematic is if they had said, we predict the United States Supreme Court will overrule it and then they wouldn't be following a settled precedent rather than an evolving one.

AUDIENCE QUESTION: I have a question for Chief Justice Shepard. You talked about the idea that if a federal court certified question of state constitutional law, that might cause a problem. Isn't there kind of a reverse side of that problem if [a] Federal Circuit court decided not to certify the question of constitutional law? It would seem to me that the federal system would have a warping effect.

CHIEF JUSTICE SHEPARD: I think you've put your finger on one of the principal reasons for accepting questions in general, not simply the

constitutional questions. The ability of the state courts to be the principal developers of their own law is a reason to accept such questions. And we almost always do. That's not the only reason we almost always do, but district courts will get to a question before it can go through the state appellate system. The same question may be pending in some other state-based lawsuit—but it gets to the Federal Supplement earlier for the reason that federal trial court opinions are published and state trial court opinions generally are not. Then the next person who researches this question opens up his or her annotated code and says, well, the only thing here is the Northern District of Indiana opinion, that's good enough, we'll use that.

By the time that's happened on two or three iterations, and it finally gets to the highest court of the state, you almost wonder whether you're doing the wrong thing by going the other way. You know, all these other people have decided that A is the answer, who are you to say B? And it looks odd. So, one of the benefits from the state court system is providing an early opportunity to resolve new and novel questions. And there's another reason my colleague, Justice Sullivan, will often say with respect to our own intermediate court, they shouldn't have all the fun and neither should the feds.

PROFESSOR WILLIAMS: Yes, sir.

AUDIENCE QUESTION: I was just going to ask, because you were talking about new and novel questions, some opponents of the—or criticism or critiques of *Erie v. Tompkins* is that if an attorney has a case that is dependent on bad but old state law, that they will try to get diversity and go to federal court, will try to apply the bad state law and be bound to apply it because of *Erie* and its progeny. Now, do you find—have you ever had any situations where people have certified questions to the court that have been decided on older cases that may be bad law or don't fit in with the national consensus as was discussed earlier?

CHIEF JUSTICE SHEPARD: There isn't anything that comes to mind. It seems a very interesting prospect. We get asked to review old law all the time, to reexamine this mountain of authority out there. Indeed, we get asked to review things we did last year; it doesn't have to be old. So, there are usually plenty of opportunities in any given moment to reexamine whether you've done the right thing.

622 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 38]

CHIEF JUSTICE DURHAM: In theory, though, that shouldn't be the subject of a certified question, should it?

CHIEF JUSTICE SHEPARD: That's true, yes.

PROFESSOR WILLIAMS: Why not?

CHIEF JUSTICE DURHAM: Because it's not an unanswered question.

CHIEF JUSTICE SHEPARD: There is authoritative state law on the question.

PROFESSOR WILLIAMS: So, essentially the question said, y'all are not going to really stick with that law, are you? I'm originally from the South, so excuse my –

Yes, sir.

AUDIENCE QUESTION: What if in your search for constitutional history or common law, [] you discover really ugly constitutional law, like we know a lot exists on race issues, it's unbelievable, like even the Indiana Constitution has some unbelievable clauses according to race. So, figure on race and perhaps gender, the Supreme Court has usurped that. But there is tons of other areas where in your discovery of constitutional history, you find something really backward, ugly, or I'll think of a better word, do you apply it or would you use one of your other options if in your discovery of state constitutional law, and it's really bad, or your interpretation of it is that if it existed then, it's really bad?

JUDGE LANDAU: I assume that's directed at one of my colleagues.

JUSTICE HOLLAND: We should give Professor Williams a chance to talk, because he has a very good example in his case book of a decision by the United States Supreme Court, that it interpreted a provision in the Alabama Constitution that was written in 1901. And there was a provision that appeared to be neutral on its face in the Alabama Constitution, but the legislative history was absolutely clear that it was intended to be discriminatory.

And even though that case went to the U.S. Supreme Court in the 1970s or something, they said notwithstanding its neutral language, it's

invalid because of its intent. And I think most state supreme court justices would do the same thing.

But do you want to comment on that, Professor Williams?

PROFESSOR WILLIAMS: I think that's right. It actually illustrates some of the protections of the federal system. Madison said this federal system will be a dual system of protections. I don't think he was actually talking about courts at the time. Right now, we're in a time of what many people think of as a retrenchment by the United States Supreme Court, but they've done some amazing things lately.

And so here's a case where you have federal doctrine in the case Justice Holland was talking about, federal doctrine that says if there's intentional race discrimination, it's unconstitutional. The constitutional history in Alabama was clear that this ban on voting by people convicted of felonies that involved moral turpitude was absolutely a racist provision. They tried to defend it by saying they were going to try to disenfranchise poor whites, as well, but they lost nine to nothing in the U.S. Supreme Court.

There are some other examples of this, *Romer v. Evans*³⁹ was mentioned before, and many people would think that was a vicious attempt in Colorado to cut certain kinds of people out of political participation. There is a safety net that goes the other way, and that's the United States Constitution.

California amended its constitution in the 1960s purporting to let people sell or rent their real estate to whomever they wanted. That was seen as an attempt to constitutionalize the right to discriminate. This is quite a reciprocal system, and the lesson I think for lawyers is to look to where the doctrines are at any certain moment, where the avenues are to best seek relief for clients in these kinds of circumstances.

But you're absolutely right. When you look at state constitutional history, there's some ugly stuff; in California, there was an awful strand of anti-Chinese attitudes in the 1870s. Interestingly, at the same moment, some women went into the California Constitutional Convention and got two clauses in the 1879 constitution that protected women. It looks like they may have, frankly, joined forces with the anti-Chinese folks – real

³⁹ 517 U.S. 620 (1996).

politics. So it's a checkered story, there's no question about it. I think that's right.

I think, though, with a lot of these things, one has to remember, that these were different times, as Judge Landau said. If you're reading transcripts of debates, you're looking at the words of people who thought it was okay to own people, and not to let people vote, and all sorts of things that we don't believe in today.

But I liked your—at least from a lawyer's point of view—your illusion to using other techniques. This is what I want to say about tailor-making a resolution to a case, and you know, I teach statutory interpretation, too. I'm neither a textualist nor an intentionalist, I'm certainly not a dynamic interpreter, because no judge has ever done that and admitted that that's what they were doing.

But I think it depends on the case, what you argue. Every case is different in some respects, and sometimes you're going to be a true believer. For example, in the text of a state constitution, in New Jersey we have a clause that guarantees the right to collective bargaining. It's right in the constitution. When I represented the migrant farm workers union, I was a textualist! I argued that the court didn't have to make law—this is not some weird claim about asking it to interpret some general provision—I mean, this is 1947, there is a right to collective bargaining right in the constitution.

But in the next case you might be an intentionalist. You say, well, I don't know, it's kind of general, but what were they talking about? It sounds cynical, and I don't mean it that way. I mean, it's not just a hired gun approach, it's not just gamesmanship or games-personship.

Plus we have to get our arguments by judges, anyway. They're not going to accept crazy arguments that we make up—well, they do accept a few crazy arguments. But it's one of the wonders of our federal system, which really doesn't exist in more than 12 or 14 other countries in the world. Where you have a unified system, that's it. In France, when they decided to bar kids from going into school with yarmulkes and scarves, they have only one claim, and it's the French national law. We don't know where it will come out. Here in the U.S. you would have two claims, it seems to me.

I think I'm going to be unplugged by Curtis here. We had a chance to look into the inner sanctum of the state judiciary here. Some people

2004]

Panel Discussion

625

would call it the belly of the beast. I know we had a great time. We were hosted by wonderful, hospitable folks. Thank you for having us, and I certainly learned a lot today. I hope you did. Thanks.

[Resounding Applause]

MR. JONES: Yes, I agree. This event definitely lived up to its billing, and I'm going to invite all of you to join us for a reception out in the atrium.

