SLEEPING BEAUTY WIDE AWAKE: STATE CONSTITUTIONS AS IMPORTANT INDEPENDENT SOURCES OF INDIVIDUAL RIGHTS

by
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In recent decades, state constitutions have experienced a reawakening as the Supreme Court adopted a less rights-friendly approach and as several advocates issued a call to arms for a revival of state constitutionalism. After reviewing the history and importance of state constitutions, this Essay explores the independent spirit of the constitutions of western states, particularly the Oregon Constitution as a rich state source of individual rights. As examples, this Essay examines three separate state constitutional provisions in relation to the death penalty in Oregon, Oregon's constitutional free speech provision, and several helpful statutory provisions, which demonstrate the broader protections of individual freedoms available under state constitutions. This Essay contrasts such broad individual protections with Oregon's unusual allowance of non-unanimous jury convictions in felony cases, showing the need for federal constitutional supervision over state constitutions, even those that are among the most progressive. By comparing the federal and Oregon constitutions, it becomes clear that both federal and state constitutions must be robust systems of constitutional protections, with states being willing to experiment with progressive policies and add more individual protections than the minimum required by the U.S. Constitution.

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I. INTRODUCTION

I commend Justice Levinson and Judge Schuman for their excellent papers and presentations. With tongue firmly in cheek, Judge Schuman averred that one of his opinions that changed the world involved an employee who broke a tooth while enjoying a Hot Tamale candy. In fact, both Justice Levinson and Judge Schuman, of course, have participated in and penned significant opinions that have enlarged the scope of human dignity and individual rights, and indeed have "changed the history of the world" for the better.[1]

In many respects, all three of our articles focus a good deal of attention on what I like to think of as the "Sleeping Beauty Period of State Constitutionalism." I mean to include in that description the partial history of constitutional development in our country from the 1960s almost to the present day. During the early portion of this fifty-year period, the United States Supreme Court aggressively began to give much more vitality to the Federal Bill of Rights and other federal constitutional protections for individual rights.[2] Regrettably, during the same time the state constitutions fell asleep or became unconscious—or more accurately—we became unconscious of them. Our legal culture developed a severe case of amnesia, a bit like the wider world around the unconscious Sleeping Beauty. Just in the nick of time, as the Supreme Court began to slow down and, in many instances, cut back and undermine some of the progress that had been made in federal rights development, several judicial and scholarly *princes* came forward to urge a revival of state constitutionalism. The rediscovery, or awakening, that followed was triggered by many factors, including a reaction to the Supreme Court's less rights-friendly approach, and to the prescient comments and analysis by a number of perceptive judges and scholars (princes), not least of whom were Oregon Supreme Court Justice and former law professor Hans Linde,[3] who has been mentioned already by Judge Schuman, and Justice William Brennan of the Supreme Court, who wrote an influential article expressing concern about what was happening

[1] Steven H. Levinson, *"There's No Place Like Home": Super-Sizing the State Constitution's Bill of Rights*, 15 LEWIS & CLARK L. REV. 773, 776 (2011).

[2] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment search and seizure protections and applying the exclusionary rule in state court); Reynolds v. Sims, 377 U.S. 533, 577 (1964) (enunciating the one person, one vote doctrine); Griswold v. Connecticut, 381 U.S. 479, 483–86 (1965) (recognizing a fundamental constitutional right relating to aspects of personal autonomy, privacy, and marital intimacy, and holding unconstitutional Connecticut statutes criminalizing the use of contraceptives); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (protecting inflammatory speech, unless it imminently incites actual violence).

[3] *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). *See also* Wayne V. McIntosh and Cynthia L. Cates, *The Power of Judicial Ideas: A Tribute to Justice Hans Linde*, 64 ALB. L. REV. 1147 (2001).

inside the Court from his perspective.[4] Justice Brennan issued a clarion call to arms to litigators and state courts to rediscover their own state materials and constitutions, and not to depend lazily upon the United States Supreme Court to solve all constitutional human rights problems.[5]

II. THE EARLY HISTORY OF STATE CONSTITUTIONALISM

I am pleased that Justice Levinson and Judge Schuman also have given some consideration to the status of constitutional rights before the 1960s. I want to talk about that earlier period, too, and draw some important lessons from the founding times of our nation and of our State of Oregon. History demonstrates that independent reliance on state constitutions to protect individual liberty is not some instrumentally constructed innovation that we have to foist upon society or our courts as an invented response just because the Supreme Court is not doing what it should be doing in every case. To the contrary, state constitutionalism was a central part of the original plan of the late eighteenth-century United States Constitution and Bill of Rights, and the mid-nineteenth-century Oregon Constitution.

At the beginning of our country, a number of the original states already had state constitutional bill-of-rights provisions before the United States Constitution was written in 1787, or adopted in 1789.[6] The nation did have the rights-oriented Declaration of Independence,[7] which was obviously very important but not formal constitutional law, and several years later the Articles of Confederation, which did not contain a true bill of rights. The states had their own bill-of-rights provisions, and people expected the states to secure and protect the rights of their own individual citizens. Because the states' primacy in protecting individual rights was so widely shared as the given wisdom of the day, the national framers engaged in a serious debate about whether there should be a bill of rights at all for the Federal Constitution.[8] One of the most pervasive

[4] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[5] *Id.* at 503.

[6] The Federal Bill of Rights, U.S. CONST. amends. I–X, was ratified two years later in 1791.

[7] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (asserting the fundamental principles of equality, political self-determination, and a system of inalienable individual rights including life, liberty, and the pursuit of happiness).

[8] The most prominent advocates for the two sides of this debate were Alexander Hamilton (opposing a federal bill of rights) and James Madison (supporting the desirability of a bill of rights and serving as the principal author of the draft bill-of-rights provisions for the first Congress). *Compare, e.g.*, THE FEDERALIST NO. 84, at 433 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("I go further and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous."), *with* James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, *in* THE RIGHTS RETAINED BY THE

arguments against a federal bill of rights was that it was unnecessary, and that the country would not have to worry about the federal government infringing individual rights, since that government was constructed as a limited, enumerated government, without authority to infringe anyone's rights.[9] The obvious corollary was that the states would shoulder the primary responsibility for protecting citizens' individual rights.[10] Opponents also argued that a federal bill of rights might even prove dangerous because the very listing of a necessarily incomplete set of rights might encourage, or at least allow, an overly textual construction in the future that any right that had not been listed expressly was by its omission excluded from protection.[11] To some extent, this perceived danger has become real in an unpredicted but somewhat analogous sense in those all too frequent circumstances when people and courts defer excessively to the Federal Constitution and eschew independent state sources of rights.

Oliver Ellsworth and James Wilson, two notables in the creation and discussion of the new national Constitution, made telling comments about the primacy and importance of state protections for the people within and by their respective states. Ellsworth said that "[h]e turned his eyes [to the states] for the preservation of his rights . . . ."[12] And in a 1791 lecture, the year in which the Federal Bill of Rights went into effect, Wilson said, "[O]ur [state] assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence . . . ."[13]

History has painfully demonstrated that some of the framers' confidence in the states was sadly misguided, as we now know. There can be no doubt of the need for an aggressive federal constitutional role, and we would forget that at our peril, even as we properly focus more of our attention on state constitutionalism. Ultimately, it took a bloody civil war and a partial alteration of the original plan of federalism to bring about some curing of the moral disjunction between the Declaration of Independence, whose lofty goals promised equality and inalienable rights, and our actual experience under the Constitution. Slavery and many other state depredations of human dignity are inescapable parts of

PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 51, 58, 60–61 (Randy E. Barnett ed., 1989).

[9] THE FEDERALIST NO. 84, *supra* note 8, at 431–33.

[10] *Id.* at 435.

[11] Madison's proposed solution to this problem was to include the Ninth and Tenth Amendments. U. S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U. S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[12] Ellsworth made this comment at the Constitutional Convention. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 492 (Max Farrand ed., 1911).

[13] 1 JAMES WILSON, *Of Government*, *in* THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D. 383, 398 (1804).

our national history. The Civil War, together with the subsequent adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, rebalanced our federalism. These changes were necessary—but not sufficient—to repair the original stain. It has taken an additional century to begin to seriously implement those amendments. And we still have a long way to go to redeem past errors and perfect the Union.[14]

III. A PROPER RESPECT FOR THE INTENDED DYNAMISM OF FEDERALISM

Progress has nonetheless unquestionably been made, especially on issues of equal opportunity, starting with the Court's landmark decision in *Brown v. Board of Education*.[15] With respect to the application of the Bill of Rights to the states, even many lawyers are surprised to learn that the very first provision incorporated was the Fifth Amendment Takings Clause in the 1890s.[16] The First Amendment was the next applied to the states, but the process stalled for an extended period of time thereafter.[17] The Warren Court period of incorporation finally gained steam in the 1960s, when most of the remaining clauses of the Bill of Rights provisions were incorporated one right after another.[18] Before incorporation, of course, state sources of law—state constitutions and statutes—were the primary legal materials that animated the decisions of our state courts. And those were the sources and precedents that litigators in state courts relied upon in making individual-rights arguments.

Reliance on state constitutions as independent sources of rights is hardly a new fad. Instead, there is a grand historic tradition and a principled basis for this approach as part of our dynamic system of federalism. As noted earlier, many lawyers regrettably forgot about this tradition in the 1960s, and the courts allowed them (or even encouraged them) to ignore it for several more decades.[19] It is a healthy, salutary

[14] U. S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . .").

[15] 347 U.S. 483 (1954).

[16] Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897); Miss. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896). It took at least 30 more years before the First Amendment free speech principles were applied to the states. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925); Whitney v. California, 274 U.S. 357, 372 (1927); De Jonge v. Oregon, 299 U.S. 353, 364–66 (1937).

[17] *See supra* note 16.

[18] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment search and seizure exclusionary rule); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment self-incrimination clause); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment cruel and unusual punishment clause); Duncan v. Louisiana, 391 U.S. 145 (1968) (Sixth Amendment jury trial right). Recently, the Supreme Court narrowly decided to fully incorporate the Second Amendment right to bear arms. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

[19] *See* Levinson, *supra* note 1, at 774.

development that we have recently reclaimed some of this lost heritage. The rebirth of state constitutionalism began tentatively in the 1970s, when innovative litigators in various parts of the nation made state constitutional law arguments and a few intrepid state courts anchored their rights-based decisions on these grounds.[20] Although this renewed approach was a national phenomenon, it had special resonance in the West. It is appropriate that at this first official conference involving the Northwest Regional Executive Directors of the ACLU, we are bringing together civil libertarians from this region. The northwestern states have much in common, and there are a number of reasons why we should be particularly attuned to state constitutional protections of rights—and to greater freedoms, civil liberties, and civil rights—than the nation as a whole.

Part of the explanation for this emphasis on greater freedoms in our region of the country comes from the inherent character of the West. Independence, liberty, and freedom have always been part of Western cultural history and tradition, influenced by the broad landscapes and the native and other peoples that settled here. The development of this region of the country, far from the original states and the political and economic centers of power, required an independent pioneer spirit that played its role in the evolving dialog about the relationship of government and its citizens, and the mediating influence of individual rights as checks on government power. Furthermore, this region is relatively young as part of the nation. All of the western states joined the Union well after the initial debates over the Federal Constitution and the Bill of Rights had long since been concluded.[21] This timing provided the new states with valuable observable experience with the successes and shortcomings of rights protection in the country's earlier years. In this regard, it is useful to examine the attitude of the framers of the constitution in Oregon. In discussing the development of their own state constitution in the late 1850s, they were indirectly speaking for the other northwestern states as well.

We lack the kind of detailed, contemporaneous records of the proceedings of the Oregon constitutional convention that exist for the Federal Constitution. But we do have newspaper articles, a very brief journal kept during the convention, and a retrospective account of the convention proceedings that was published later. From these reports, we know that a Mr. Smith, who was quite prominent during the Oregon convention, made a number of important statements about individual rights. He made clear that the Oregon constitution should begin with its own bill of rights, and that Oregon's Bill of Rights was to be "something

[20] *See, e.g.*, State v. Opperman, 247 N.W.2d 673, 674-675 (S.D. 1976); People v. Disbrow, 545 P.2d 272, 280 (Cal. 1976); State v. Texeira, 433 P.2d 593, 597 n.2 (Haw. 1967).

[21] Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 4–5 (2001) (describing the timeline of states' admission to the Union); *see supra* notes 6–13 and accompanying text.

more than [just] a Fourth of July oration,"[22] an empty flourish to be dusted off annually on one national celebratory day. The rights provisions were intended to have meaning, life, and importance to the fabric of the state, and to be enforced when necessary by state judges. Mr. Smith explained that although he and the other framers of Oregon's Bill of Rights drew heavily on the national experience and the Federal Bill of Rights, they also relied on the bills of rights that had been adopted in more recent years by the newer western states, especially Indiana. Smith praised Indiana's Bill of Rights as a worthy model:

> It is gold refined; it is up with the progress of the age. . . .
>
> . . . [Indiana] nobly reasserts what our fathers said about the natural rights of man . . . but [Indiana] proceeds to assert the civil rights of the citizens as ascertained in . . . 70 years of progress. . . .
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> . . . [T]he history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; that through the madness of party spirit they may infringe upon the rights of the individual . . . . Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this [state] constitution.[23]

It is abundantly clear that the Oregon drafters and the people who formed the states in the West understood that they were relying on an imperfect but continuing journey of progress in human development and human rights. Some restrictions of rights that their predecessors considered appropriate, or at least had been willing to live with, now were recognized as "blots upon [society's] escutcheon."[24] The state convention wanted to guard against these and other blots in the future and attempted to do so by crafting an up-to-date bill of rights in the state constitution to be enforced by the state courts, respected by the legislature, and adopted by the people of the state in order to move toward a more perfect society where individual rights were fully recognized and enforced.[25] For these reasons, it is appropriate that our part of the country has played a significant role in advancing the cause of state constitutionalism and individual liberty. Justice Levinson and Judge Schuman have given instructive examples from Hawaii and Oregon, and there are many cases where their own judicial opinions have measurably advanced these noble causes.

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[22] THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 101 (Charles Henry Carey ed., 1926)

[23] *Id.* at 101–02.

[24] *Id.* at 102.

[25] *Id.*

IV. THE DEATH PENALTY AND OTHER OREGON EXAMPLES

Several additional examples from cases in Oregon further illustrate and amplify the approach my two co-panelists and I are advocating, and they broaden our perspective on the rich variety of potential state sources of individual rights. My first set of examples comes from an area I was heavily involved in during the 1970s and early 1980s: the issue of the death penalty in Oregon. Oregonians have held rather fickle attitudes about the death penalty since inheriting it as the punishment for murder from pre-statehood territorial law.[26] Close votes by the people first abolished and then soon reinstated the death penalty in 1914 and 1920.[27] The voters much more decisively voted almost two-to-one in 1964 to abolish the death penalty by constitutional amendment, and Oregon was numbered among the abolitionist states by the time the United States Supreme Court got directly involved in the issue on a national level.[28] Capital punishment had ceased to be a substantial public issue in Oregon and there was very little local activity after the 1964 vote until the United States Supreme Court struck down the death penalty nationally in *Furman v. Georgia* in 1972.[29] Once *Furman* was decided, national death penalty proponents, particularly in those states that had capital punishment in place at the time of *Furman*, were energized and worked hard to re-establish the death penalty. Not surprisingly, these states, roughly two-thirds of all of the states, quickly enacted new statutes in a variety of forms to try to address the Supreme Court's constitutional concerns in *Furman*.[30] This activity, and the media coverage it generated, re-energized the previously dormant pro-death-penalty movement in Oregon.

In every legislative session thereafter, proponents made a serious push to get the Oregon legislature to re-enact the death penalty. Given the national narrative, it is really rather remarkable that each of these efforts failed. Serious hearings were held in the legislature's judiciary committees, and yet in each session, Oregon reaffirmed its commitment to a criminal justice system without the death penalty.[31] The wildcard eventually came from the initiative petition process, a common feature of western state constitutions.[32] As the number of measures on Oregon's

[26] For a brief history of capital punishment in Oregon from pre-statehood until 1981, *see* Stephen Kanter, *Brief Against Death: More on the Constitutionality of Capital Punishment in Oregon*, 17 WILLAMETTE L. REV. 629, 631–34 (1981) [hereinafter Kanter, *Brief Against Death*].

[27] *Id.* at 631–32.

[28] *Id.* at 634.

[29] 408 U.S. 238, 240 (1972).

[30] Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–48 (2007).

[31] Kanter, *Brief Against Death*, *supra* note 26, at 633.

[32] *Id.*; *see* Stefan Kapsch & Peter Steinberger, *The Impact on Legislative Committees and Legislative Processes of the Use of the Initiative in the American West*, 34 WILLAMETTE L.

electoral ballots often demonstrates, it is relatively easy to qualify measures by initiative petition, and this process allows citizens to alter the state's statutory and constitutional law by direct election.[33] The death penalty proponents in Oregon eventually got frustrated with their lack of success in the legislature, and after failing to achieve their objective again in the 1977 session, they decided to go directly to the ballot.[34] The proponents gained inspiration and credibility because the United States Supreme Court had just upheld three of the new state capital punishment statutes in 1976 in cases from Florida, Georgia and Texas.[35]

The proponents' approach was to take Oregon's ordinary murder statute and to simply graft onto its end the Texas capital sentencing scheme. Inexplicably, the drafters neglected to take account of the fact that while the 1977 legislature had rejected their entreaties to adopt the death penalty, the legislature did enact a new aggravated murder statute that was defined as a greater crime than murder with additional elements. The new aggravated murder offense provided for life imprisonment with significant mandatory minimums (at least twenty years) before a convicted individual could even be considered for parole, let alone released.[36] The poorly crafted death penalty statutory initiative measure passed with no acknowledgement that there was an aggravated murder statute.[37] Oregon was left in the anomalous situation of having statutes authorizing capital punishment for the lesser crime of ordinary murder, while the newly created greater crime of aggravated murder carried a less severe maximum sentence of life in prison.

Even before passage of the initiative measure, I had started to write about the death penalty and planned to challenge the constitutionality of the 1978 statute if it passed. Three of my arguments, and the provisions of the Oregon Constitution upon which they were based, elucidate some of the main themes of independent interpretation of state constitutional rights provisions. The first Oregon constitutional provision relied upon was article 1, section 15, which at that time read: "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."[38] Indiana has a similar constitutional

REV. 689, 689–90 (1998) (exploring the development of the initiative petition in western state constitutions).

[33] Kapsch & Steinberger, *supra* note 32, at 701–02.

[34] Kanter, *Brief Against Death*, *supra* note 26, at 633.

[35] Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Of these three new statutory approaches, the Texas scheme is universally considered to be the worst, and the one that gave the Court the most trouble. *See, e.g.*, Charles L. Black, *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. U. L. REV. 1, 2 (1976) (arguing that the Texas statute at issue in *Jurek* set the "constitutional outpost" for state death penalty laws).

[36] Act of July 14, 1977, ch. 370, 1977 Or. Laws 303, 303–04.

[37] Kanter, *Brief Against Death*, *supra* note 26, at 633.

[38] OR. CONST. art. I, § 15 (amended 1996). This section now provides: "Laws for the punishment of crime shall be founded on these principles: protection of society,

provision that was the source for the Oregon framers, but there is no similar language anywhere in the Federal Constitution.[39] Second was our cruel and unusual punishment provision, article 1, section 16, which, in addition to having language similar to the Eighth Amendment to the U.S. Constitution, also has an express proportionality clause, prohibiting disproportionate penalties.[40] The third provision that is relevant to this discussion is Oregon's jury provision, article 1, section 11.[41] The particular jury trial clause that I relied upon is quite like the Federal Sixth Amendment; the textual language is parallel. The three arguments therefore provide one example of utilizing a state constitutional rights provision with no federal analog, one example of reliance on a provision that is similar to a federal provision but which also has an additional and more specific clause, and one example where the text of the state and federal provisions are essentially the same.

Relying on article I, section 15, I made an extensive argument that combining the extant Eighth Amendment cruel and unusual punishment jurisprudence of the United States Supreme Court with Oregon's express prohibition on "vindictive justice" rendered the death penalty *per se* unconstitutional in Oregon.[42] This involved proposing a methodology for interpreting and applying a state constitutional provision without a federal textual analog. I presented this argument to the Oregon Supreme Court in *State v. Quinn*,[43] and remain convinced that it was persuasive. At the end of the day, however, the court found it unnecessary to decide the broad issue of *per se* constitutionality in *Quinn*. Instead, the justices relied on the narrower right to jury trial argument pertaining to the particular initiative statutory provisions, and unanimously struck down only the flawed 1978 statute.[44]

In addition to *Quinn*, which was the first case under the 1978 statute that advanced to the Oregon Supreme Court where the death penalty had been imposed, there was another case, *State v. Shumway*, in which the defendant was initially charged with capital murder and convicted of the offense, but the judge did not sentence him to death.[45] Mr. Shumway was sentenced to the alternative sentence under the 1978 initiative statute of life imprisonment with a required twenty-five year mandatory

personal responsibility, accountability for one's actions and reformation." This amendment regrettably removed Oregon's original ban on vindictive justice from the state constitution.

[39] IND. CONST. art I, § 18.

[40] OR. CONST. art. I, § 16 ("Cruel and unusual punishments shall not be inflicted, but *all penalties shall be proportioned to the offense.*") (emphasis added).

[41] OR. CONST. art. I, § 11 (providing that "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury").

[42] Stephen Kanter, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1, 4–52 (1979).

[43] 623 P.2d. 630, 632 (Or. 1981).

[44] *Id.* at 644*; see infra* notes 48–49 and accompanying text.

[45] 630 P.2d. 796, 797 (Or. 1981).

minimum.[46] Even though Shumway did not receive the death penalty, the twenty-five year mandatory minimum meant that he received a more severe penalty for the lesser charge of murder than he would have received for the greater legislatively crafted crime of aggravated murder (with a mandatory minimum of twenty years), had he been so charged and convicted. *Shumway* was moving through the courts rather slowly, while *Quinn* was understandably getting much more attention and publicity. It seemed to me that *Shumway* therefore presented a quiet and nearly ideal case in which the court could indirectly eliminate the death penalty without a great deal of controversy and without relying on the Federal Constitution at all. I filed an *amicus curiae* brief in *Shumway* on behalf of the Oregon ACLU foundation, and took a very simple position. The argument was that Oregon precedent and the express proportionality clause of article I, section 16 prohibited a more severe sentence for a lesser offence than the punishment authorized for a legislatively graded greater offence. Not surprisingly, the Oregon Supreme Court agreed, and of course the same principle would have barred the death penalty for murder, since that punishment was not available for the greater crime of aggravated murder. The *Shumway* path provided a less controversial route compared with *Quinn* for the Oregon Supreme Court to reject the 1978 death penalty statute, and I was hopeful that *Shumway* would reach the court before *Quinn*. In the end, the court decided *Quinn* first and directly struck down the death penalty. *Shumway* turned out to be anticlimactic in the effort to defeat the death penalty. But the point is that the *Shumway* court properly relied on the more expansive express proportionality language of article I, section 16 of the Oregon Constitution as an independent source of authority that was not available, at least textually, under the Eighth Amendment.[47]

The actual ground upon which the Oregon Supreme Court struck down the 1978 death penalty statute related to the provisions of the initiative measure that allocated to the trial judge, rather than the jury, the life or death decisions as to whether the defendant had acted deliberately, presented a future danger, and lacked sufficient provocation for the homicide.[48] The court accepted my argument that *deliberation* was of sufficient consequence and essentially served as the

[46] *Id.* at 802.

[47] There is an implicit proportionality requirement in the United States Supreme Court's cruel and unusual punishment jurisprudence under the Eighth Amendment, but subsequent events have shown the wisdom of both the court and the litigants in relying on the express Oregon provision. First, reliance on federal rather than state grounds would have subjected the court's decision to federal court review and possible reversal. Second, the U.S. Supreme Court has constructed the implicit proportionality principle rather weakly in some circumstances. For example, the Supreme Court has refused to require comparative analysis of the severity of cases in which defendants actually get the death penalty compared with those who do not in a particular state. *See* Pulley v. Harris, 465 U.S. 37, 53–54 (1984).

[48] *Quinn*, 623 P.2d at 644.

functional equivalent of an additional element of the crime, even though it was listed as a sentencing factor in the statute, and therefore the court concluded that *deliberation* had to be determined by the jury under article I, section 11 of the Oregon Constitution.[49] Twenty years later, the U.S. Supreme Court finally adopted a similar Sixth Amendment approach in the *Apprendi*[50] and *Ring*[51] decisions. But at the time *Quinn* was decided, there was no analogous federal precedent, and it would have been unlikely to prevail under the Sixth Amendment federal jury trial right. The case might well have been lost but for the independent state constitutional law arguments. So for all the reasons that have been suggested, and based on the decades of collective experience that the regional executive directors bring from their states, it is mandatory for lawyers to depend upon and advance arguments to encourage their courts to give independent interpretation to state-constitution rights provisions with and without federal analogs.

Our primary focus thus far has been on principles of state constitutionalism, but now I want to suggest that we also need to explore other state sources of civil liberties and individual rights and the procedural vehicles for getting these claims before the state courts. State statutes and regulations provide additional fertile ground for protecting civil liberties. In Oregon, Andrea Meyer, coordinating the lobbying effort for the ACLU affiliate, often effectively reminds legislators that *they* have their own responsibility to uphold constitutional rights and that *they* should sometimes go further in protecting the privacy and liberty of Oregonians than might be required by the courts. Those of you doing legislative work in other states should also be making similar arguments in your respective legislatures.

State constitutional arguments can sometimes beneficially influence legislators, governors, and even high school principals without the need for intervention by the courts. I suspect that many of you are familiar with the "Bong Hits 4 Jesus" case, in which the United States Supreme Court—erroneously in my judgment—refused to afford First Amendment protection to a high school student who displayed a somewhat nonsensical banner across the street from his school while the Olympic parade was passing through Juno, Alaska, on a wintry January day.[52]

It is interesting that twenty years earlier, Oregon's Tigard High School confronted a somewhat similar circumstance, but the controversy did not become a legal case at all. The situation developed after Tigard's new principal decided to forbid students from displaying alcohol or drug

[49] *Id.* at 643–44.

[50] Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that every fact that increased the maximum punishment, except for evidence of a prior conviction, had to be proved beyond a reasonable doubt to a jury).

[51] Ring v. Arizona, 536 U.S. 584 (2002) (applying the *Apprendi* principle to capital sentencing proceedings).

[52] Morse v. Frederick, 551 U.S. 393 (2007).

logos on the clothing they wore to school. Being very clever teenagers, the students responded by wearing all sorts of provocative T-shirts to school, including a variety of home-made creations. My favorite still is one that was imprinted with large letters spelling "BEER" with tiny letters above it spelling "root." The school faced a difficult dilemma in interpreting and enforcing its policy.

The principal, being aware of the Oregon free speech provision, article I, section 8, with its broader protection compared with the Federal First Amendment, prudently decided that instead of just suspending these kids and potentially ending up in court, he was going to take a more creative approach. The principal and some of his teachers enlisted lawyers, law professors, and several other people from the community to serve as a mock court and turned the controversy into a valuable teaching moment. I served as chief justice for the moot court. Teams of students represented each side. They took their responsibility quite seriously and did an incredible job. After considering the student briefs and oral arguments, we wrote an opinion upholding the students' view that the particular measure was constitutionally deficient on a number of grounds, including vagueness and overbreadth. The principal was not bound by our decision, but he agreed to abide by the result and withdrew the sanctions that he had imposed on the students. The students learned valuable civic and constitutional lessons and skills, and the school was spared a potentially expensive and divisive court battle. The Tigard events were a reflection of Oregon doing things independently—and right. Certainly the fact that the Oregon courts had already begun to interpret article I, section 8 as a more robust protection of free expression compared with the First Amendment made it easier for the principal to accept the mock court's judgment and defuse what could have become a potentially acrimonious legal fight.[53]

Another useful example arises from certain U.S. Supreme Court decisions giving broad authority for office searches in some circumstances.[54] These decisions led to a number of ill-advised searches of law offices in different parts of the United States. A police trainer somewhere undoubtedly read the Supreme Court cases, or should I say misread them, and must have given police officers a message of permission along the following lines: "Hey, no problem. If you want to search a law office, (although you do need a warrant) you can search. The Supreme Court has implied that lawyers' offices are not off limits." Oregon law enforcement was not immune to this temptation, and

[53] *See generally* Stephen Kanter, Bong Hits 4 Jesus *as a Cautionary Tale of Two Cities*, 12 LEWIS & CLARK L. REV. 61 (2008) (discussing both the Alaska Bong Hits and the Tigard T-shirt controversies); Nancy Blodgett, *Law Suits Students to a T-(Shirt)*, ABA JOURNAL, May 1, 1988, at 22.

[54] *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (allowing the search of a newspaper office for evidence against third parties without a showing that the student newspaper itself was involved in the crime); Andresen v. Maryland, 427 U.S. 463 (1976) (allowing the search and seizure of incriminating business records).

Portland police officers obtained a warrant based on an inadequate bare-bones affidavit to search a Portland law office.[55] The police seized a significant quantity of attorney-client material during the search. The lawyer whose office was searched could have filed a 42 U.S.C. § 1983 civil rights action in federal court. But this approach would likely have led to a lengthy, drawn out process during which the government might have retained the client materials that had been seized. Since no criminal charges were filed, a motion to suppress evidence was not an option. The immediate question, then, was whether there was a way to challenge the search right away in Oregon in order to recover the materials before they were opened or distributed. By the morning after the search, we were already representing the lawyer in the state trial court under an Oregon statute specifically authorizing the filing of a motion, even when there is no criminal proceeding, for the return and restoration of improperly seized materials.[56] The state trial judge took jurisdiction, promptly ordered the materials transferred to the court under seal, and after a vigorous three-day hearing, returned them to the attorney unopened. A great deal of additional harm that could have been done to attorney–client privilege was prevented because of prompt reliance on the procedural statute in Oregon that provided immediate access to a trial-level court and a specific remedy for the unconstitutional search.

As a final example, I want to call attention to another Oregon statutory provision that many lawyers do not know about. In Oregon, when a criminal defendant is charged with a felony and has a preliminary hearing, the defendant has the right to make an unsworn statement without being subjected to cross-examination.[57] That statement, which is to be recorded but not sworn, is admissible at the trial. The defendant makes this statement without giving up the latter choice about whether to be a witness at trial or not, and without waving her self-incrimination rights under the Oregon Constitution. Very few defendants utilize this statutory provision. Of course it takes a great deal of care to decide whether it is tactically advisable for a defendant to make such a statement in an individual case, but there is one set of circumstances where the availability of this statutory procedure is vitally important in protecting the self-incrimination principles of our constitutions. In cases where only the defendant can articulate the facts crucial to rebut the state's case or make out a legitimate defense, but the defendant cannot afford to take the stand because of impeachment material on unrelated matters, such as prior convictions, the statute allows the individual to get her own version of events into evidence without facing damaging impeachment

[55] For a general discussion of this search of attorney Milt Stewart's Oregon office and similar searches in other parts of the country, and the more general implications of this type of law enforcement activity, *see Privacy Protection Act: Hearing on S. 115, S. 1790, and S. 1816 Before the S. Comm. on the Judiciary*, 96th Cong., 2d Sess. 104–08 (1980).

[56] OR. REV. STAT. § 133.633 (2009).

[57] OR. REV. STAT. §§ 135.095–135.115 (2009).

on collateral matters. Of course, the unsworn statement is not likely to carry the same weight as one delivered through testimony under oath and subject to the prosecutor's cross-examination, but it is much better than nothing.

V. FEDERALISM GONE WRONG

I have emphasized the positive attributes of state constitutions and other state law materials as independent sources for rights, but I do not want to lose sight of the fact that sometimes even good states with progressive habits of constitutionalism, like Oregon, go awry. In those situations there is a need for federal constitutional supervision. I want to share an example where, in my judgment, this process of federal supremacy or reverse federalism failed.

Oregon is one of only two states in the union that permit non-unanimous jury convictions in felony prosecutions.[58] Unanimity is required to convict for murder, and interestingly, in six-person juries for misdemeanors, but not for felonies. This rule is embedded directly in Oregon's constitution.[59] This is another instance where our constitution is textually different than the federal constitution, but in this case the different text is not to the benefit of the accused individual. There can be no Oregon constitutional violation when an individual is convicted of a felony by an 11-to-1 or 10-to-2 verdict, since that precise procedure is expressly authorized by Oregon constitutional text. Louisiana, the other state permitting non-unanimous verdicts, originally went even further and allowed 9-to-3 determinations of guilt.[60]

These two state practices of allowing non-unanimous verdicts in criminal cases were challenged in the United States Supreme Court as violations of the Sixth Amendment jury trial right as applied to the states through the Fourteenth Amendment. The Supreme Court rejected these challenges in 1972 and upheld the defendant's convictions in *Apodaca v. Oregon*[61] and *Johnson v. Louisiana*.[62] The reasoning of the different Justices and the decision in *Apodaca* created an odd circumstance that presents the answer to a clever riddle for a legal cocktail party.

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[58] *See* OR. CONST. art. I, § 11; LA. CONST. art. I, § 17.

[59] The Oregon Constitution, article I, section 11 provides in part: "in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . ." Section 136.210 of the Oregon Revised Statutes provides twelve-person juries for capital and other felony cases, to which the above constitutional provision applies, but only six-person juries for misdemeanors. Six-person juries must be unanimous to reach a verdict. Burch v. Louisiana, 441 U.S. 130, 138 (1979).

[60] The Louisiana Constitution was amended in 1974 and now requires a 10-2 verdict to determine guilt. LA. CONST. art. I, § 17.

[61] 406 U.S. 404 (1972).

[62] 406 U.S. 356 (1972).

The riddle would be: What decision of the United States Supreme Court involved an individual making a constitutional claim depending only upon the truth of proposition A *and* proposition B, where a majority of the Justices found each proposition to be true, but the individual still lost? *Apodaca v. Oregon* is the correct answer. How did this anomalous circumstance occur?

The Supreme Court had previously decided that the Sixth Amendment jury trial right was fully incorporated in state criminal trials through the Fourteenth Amendment.[63] The Justices in *Apodaca* divided 4-1-4 on the question of unanimity. Eight of the Justices agreed that whatever the jury trial right in the Sixth Amendment required in federal court was also required in state court. This is proposition A from the riddle. These Justices were simply and properly applying *Duncan* and standard incorporation doctrine that once a clause of the Bill of Rights is deemed sufficiently "fundamental" to be incorporated against the states, it applies identically to the states with all of its interpretive precedent. These eight Justices (the four members of the plurality and the four dissenters), therefore, overwhelmingly supported proposition A of Mr. Apodaca's argument that he was entitled to all of the protections of the federal jury trial right as that right would be interpreted and applied in a federal criminal prosecution in federal court.

Five of the Justices also supported proposition B of the riddle. This was Apodaca's central argument that the Sixth Amendment jury trial right implicitly includes a requirement of unanimity. These five Justices, a majority of the court, relied on historical practice, original understanding, and the functional purposes of the jury right in reaching their conclusion.[64] And yet, the Supreme Court held 5-4 that although defendants are guaranteed a unanimous jury in federal court under the Sixth Amendment, Oregon and Louisiana could continue to convict and punish defendants in their respective states with non-unanimous 10-2 and 9-3 verdicts.[65] The explanation for this anomaly is that the one Justice who held the fifth and decisive vote on the outcome of the case, concurring Justice Powell, joined the four dissenters, making a majority of five, in their view that the Sixth Amendment jury trial provision contemplated and required unanimity, but then refused to apply standard incorporation methodology and voted to allow the states to use a more relaxed version of the Sixth Amendment without a unanimity requirement. Justice Powell's view was anachronistic and hearkened back

[63] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[64] *See Apodaca*, 406 U.S. at 414–415 (Stewart, J., dissenting). ("[I]t has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial."); *Johnson*, 406 U.S. at 369–71 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*); *Id.* at 380–94 (Douglas, J., with whom Brennan, J., and Marshall, J., concur, dissenting in both *Johnson* and *Apodaca*); *Id.* at 395–96 (Brennan, J., with whom Marshall, J., joins dissenting in both cases); *Id.* at 399–403 (Marshall, J., with whom Brennan, J., joins dissenting in both cases).

[65] *Apodaca*, 406 U.S. at 414.

to an older time and the views, *inter alia*, of Justices Frankfurter, Harlan and Fortas.[66] Those Justices did not believe in incorporation, and certainly not that part of the doctrine that applied incorporated provisions identically in state as well as federal court. Because the other Justices were split four-to-four about whether unanimity was part of the Sixth Amendment jury trial guarantee, Justice Powell was able to determine the outcome of the case with his outmoded view that incorporation of one of the clauses of the Bill of Rights did not really mean complete *incorporation* of that provision.

To this day, even though *Apodaca* is an unstable opinion and did not command a true majority when decided, it has not been revisited. The Supreme Court recently had an opportunity to reconsider the question of non-unanimous criminal juries in *Bowen v. Oregon*.[67] Bowen was convicted by a 10-to-2 vote of an Oregon jury. The evidence at trial basically involved the defendant's word against the victim's word.[68] Without expressing any opinion on which of the two were telling the truth, this seems like the kind of case where our confidence in a verdict of guilt beyond a reasonable doubt would especially benefit from unanimity. The United States Supreme Court apparently was sufficiently interested in the petition for certiorari that they requested from the State a reply brief as to whether they should grant certiorari.[69] Unfortunately, the Court eventually decided not to take the case.[70] *Apodaca* remains the law and the issue of its propriety is still unsettled.

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[66] *See, e.g.*, Adamson v. California, 332 U.S. 46, 62–68 (1947) (Frankfurter, J., concurring); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466–472 (1947) (Frankfurter, J., concurring) (refusing to apply the double jeopardy or cruel and unusual punishment prohibitions of the Fifth and Eighth Amendments to the states, and thereby dramatically providing the decisive fifth vote to allow Louisiana to try a second time to execute Mr. Resweber after a botched first attempt when he was placed in the electric chair, the switch thrown, electricity passed through his body, but due to a malfunction he did not die.). The situation is even more macabre given that the Court hastily published its opinion to let Louisiana proceed, and the first paragraph of Justice Burton's opinion for the four dissenters reads unmistakably like a majority opinion, suggesting strongly that at one time there was a fifth justice, possibly Justice Frankfurter, prepared to prohibit the execution. *Id.* at 472 (Burton, J., dissenting). *See also Duncan*, 391 U.S. at 173–183 (Harlan, J., dissenting) (rejecting both total incorporation and "jot-for jot and case-for-case" selective incorporation); Bloom v. Illinois, 391 U.S. 194, 211–215 (1968) (Fortas, J., concurring in this case and in *Duncan*) ("There is no reason . . . to conclude that . . . we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage . . . . [The Fourteenth Amendment Due Process Clause] does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, . . . we should . . . allow the greatest latitude for state differences.").

[67] 168 P.3d 1208 (Or. App. 2007), *cert. denied*, Bowen v. Oregon 130 S. Ct. 52 (2009).

[68] Petition for Writ of Certiorari at 4–5, Bowen v. Oregon, 130 S. Ct. 52 (2009) (No. 08-1117).

[69] Brief for Respondent State of Oregon in Opposition at 3, Bowen v. Oregon, 130 S. Ct. 52 (2009) (No. 08-1117).

[70] *Bowen*, 130 S. Ct. at 52 (denying certiorari).

My contention is that the current disposition of the issue of non-unanimous criminal jury verdicts presents an example of federalism gone wrong. I am a proponent of federalism and of the consequent state flexibility to serve, as Justice Brandeis put it, felicitously as experimental laboratories.[71] But this experimentation properly can only be in the room above the floor of federally guaranteed rights, and never below that floor. Even if one were to consider the Oregon and Louisiana divergence from the national norm to have been a useful, or at least tolerable, experiment in 1972 at the time of *Apodaca* and *Johnson*, that experiment has now run its course. In the 38 years since the states were expressly given constitutional permission to use non-unanimous verdicts in *Apodaca* and *Johnson*, not a single other jurisdiction in our country has adopted non-unanimity. Furthermore, non-unanimous jury verdicts undermine the functional purposes of the jury right and introduce potential structural problems in jury deliberations. Non-unanimity undermines the notion of moral clarity and moral certainty that animates the proof beyond a reasonable doubt standard, and it dilutes the justification for the stigma we impose with criminal sanctions. Another problem arises, especially in a state like Oregon, which is not as ethnically diverse as some other states, because there are often juries with only one or two members of a minority group on the jury.[72] In that circumstance, the possibility of a 10-to-2 verdict allows for the jury to quickly reach a snap decision without full discussion or consideration of the views of the minority jurors. I am not saying that this occurs on a regular basis, but even the perception of unfairness that it may be occurring, and the reality that it undoubtedly does occur in some cases, undermines respect for the law. And so it seems to me that this issue still merits reconsideration by the Supreme Court, and the Court should accept review in an appropriate case and rule that the Sixth Amendment requires unanimity and trumps Oregon and Louisiana's contrary view. I hope that someday we will get there.

VI. CONCLUSION

The lesson of history is that there is a need for robust systems of protection of individual rights from both the Federal Constitution and the constitutions of our states. It is not axiomatic that either system alone will provide sufficient protection for individual rights, or that state constitutions will be interpreted progressively or well at all times. The law

[71] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[72] The United States Census Bureau estimates that in 2010, 78.5% of Oregon's population was White not Hispanic, compared with 63.7% nationally. That is, Oregon's total percentage of minorities was only 21.5% (approximately one in five), nearly 15 percentage points below the national average of 36.3%. The data with respect to African-Americans is even more dramatic. The Census Bureau estimates that only 1.8% of Oregonians are African-American, compared with 12.6% nationally. *Oregon QuickFacts from the U.S. Census Bureau*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/41000.html (last updated June 3, 2011).

always has the capacity to ennoble or to enslave. There are lots of dangers out there. Apathy must certainly be counted among them. Each generation has an obligation to rediscover the freedoms of the Bill of Rights and the state constitutions—and our important role in safeguarding them. The recent removal of well-respected justices on the Iowa Supreme Court in response to the court's decision on same-sex marriage, like the attack some decades ago against Rose Bird and other members of the California Supreme Court, presents a considerable threat to state judicial independence. But with the diligent efforts that all of you make on a regular basis, the prospects for state and federal civil liberties in the future, by nature always somewhat tenuous, remain strong.

I close with a brief quote from my own writing: "If the objective of federalism is to be achieved, states must be willing to commit themselves at least on occasion to experiment with more progressive social policies and with increased sensitivity to human rights compared with the minimum requirements of the United States Constitution. . . . Oregon [and a number of the other western states have] been among the more intrepid states in this regard. Perhaps this ought to be our proper inspiration . . ."[73] as we continue the tireless and noble quest for human dignity in our region in coming years.

[73] Stephen Kanter, *Our Democracy's Balancing Act: American Federalism Reexamined*, OR. HUMAN., 1995, at 2, 8.