THE ROLE OF A BILL OF RIGHTS IN A MODERN STATE CONSTITUTION

INTRODUCTION

In an era of public and private trespass upon fundamental rights, libertarians must refer back to and expand upon written principles, rather than resort to unauthorized self-help and poorly articulated outrage. Professors Countryman and Morris examine from distinct perspectives the contemporary need for and desirability of a State Bill of Rights.

Widespread discontent with the activism of the United States Supreme Court, and backlash by powerful political figures at the Court’s apparent circumvention of supposed “principles” of federalism, seem calculated to halt the era of judicial energy which prevailed during the leadership of Chief Justice Earl Warren. Yet, while the future of the Court as an adaptive organism may be cast in doubt by Congressional attempts at reversal and by Executive attempts at dilution, there is no question that the society which the Court serves cannot be suffered to stagnate in a pool of static rights. The internal motion of our society, constantly erupting under the pressures and conflicts engendered by the threat of nuclear destruction, unpopular wars, environmental contamination, racial hatred, glaring social injustice, and political ferment evidenced by totalitarian tendencies on both sides of the fence, requires untiring reinterpretation of our traditional rights and creation of new rights previously unknown. In the years ahead, it will be increasingly necessary for the States in our federal scheme to assume a role of activism designed to adapt our law and libertarian tradition to changing civilization.

In these papers, first presented at the State Constitutional Revision Conference at the University of Washington School of Law, June 13 and 14, 1968, Professors Countryman and Morris illuminate, respec-
tively, the need for a State Bill of Rights and the content which those rights must embrace.

John M. Steel

I. WHY A STATE BILL OF RIGHTS?*

Vern Countryman**

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

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

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1. For collections of, and rebuttals to, expressions of this view, see Choper, On the Warren Court and Judicial Review, 17 Catholic U.L. Rev. 20 (1967); Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Conn. L.Q. 436 (1964); Black, The People and the Court (1960).
2. The Senate acted to delete from S. 917, 90th Congress, 2d Session the so-called Omnibus Crime Control and Safe Streets Bill, provisions which would deprive the federal courts of habeas corpus jurisdiction over state criminal convictions and of jurisdiction to review in any manner state court rulings on the admission of confessions and of evidence of police line-up identifications. 114 Cong. Rec. S6037-S6045 (daily ed. May 21, 1968).
3. See Monroe, To Preserve the United States, 8 St. Louis L.J. 533 (1964).
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this proposal. Senator Sam Ervin, Jr. has announced that he will launch an investigation to determine whether the Supreme Court is exceeding its powers, because he finds the Court "faced with a crisis of confidence of a magnitude rarely equaled in its history"—which seems to me a rather heroic statement for a member of Congress to make. Richard Nixon, campaigning in Dallas, has castigated the Court for giving the "green light" to "the criminal elements" in our society—but that is about par for Mr. Nixon.5

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

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

7. Perhaps the ninth amendment is also on its way to incorporation. See Griswold v. Connecticut, 381 U.S. 479 (1965):
largely duplicate the provisions of the federal Bill of Rights. The default came when the state courts, generally speaking, gave an ungenerous interpretation to their own Bills of Rights.

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

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

I. FEDERAL GUARANTEES APPLICABLE TO THE STATES

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

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

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

First amendment rights have been incorporated into the fourteenth
amendment for more than forty years\(^9\) and those rights have recently
been broadly interpreted to protect freedom of association,\(^10\) religious
liberty,\(^11\) freedom to criticize public figures and public officials,\(^12\) free-

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


\(^12\) St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Rosen­

See also Time, Inc. v. Hill, 385 U.S. 374 (1967).
dom of access to information\textsuperscript{13} and, recently, freedom from a variety of loyalty oaths.\textsuperscript{14} But the loyalty oath decisions are recent and they leave standing in somewhat dubious status earlier decisions sustaining such oaths.\textsuperscript{15} A state might well conclude that in this and other respects it wished to give its citizens more freedom of belief, expression and association than the first amendment has yet been found to require.

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

\textsuperscript{13} Lamont v. Postmaster General, 381 U.S. 301 (1965).
sanctions for "hard-core pornography"—a term he cannot define—because he knows it when he sees it.19

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

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

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

means of electronic bugging,\textsuperscript{28} the use of informers\textsuperscript{29} and involuntary blood tests,\textsuperscript{30} the warrantless search of automobiles,\textsuperscript{31} the extension of the search to “mere evidence” as distinguished from contraband, fruits of crime and weapons,\textsuperscript{32} searches by such functionaries as building and health inspectors,\textsuperscript{33} or the use of illegally seized evidence for impeachment purposes.\textsuperscript{34}

The more recent application to the states of the sixth amendment’s rights to counsel\textsuperscript{35} and to a jury trial\textsuperscript{36} leave problems of a different order for the states. With respect to jury trial the Court was explicit that “the fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they tried in a federal court—would come within the sixth amendment’s guarantee.”\textsuperscript{37} Apparently the jury required by this guarantee is a jury of twelve, whose guilty verdict must be unanimous.\textsuperscript{38} Although the sixth amendment by its terms applies in “all criminal prosecutions,”\textsuperscript{31} neither it nor the overlapping guaranty of jury trial “of all crimes” in article III,\textsuperscript{39} is construed to apply to “petty offenses” as distinguished from “serious crimes.” For ordinary criminal cases, the distinction is based upon an appraisal of the nature of the offense and the extent of the penalty authorized. The dividing line falls somewhere between, on the one side, the offense of selling second-hand goods without a license, punishable by ninety days imprisonment or a $300 fine for which no jury is required,\textsuperscript{40} and, on

\begin{itemize}
\item \textsuperscript{32} Warden v. Hayden, 387 U.S. 294 (1967).
\item \textsuperscript{34} Walder v. United States, 347 U.S. 62 (1954).
\item \textsuperscript{35} Gideon v. Wainwright, 372 U.S. 335 (1963).
\item \textsuperscript{36} Duncan v. Louisiana, 391 U.S. 145 (1968).
\item \textsuperscript{37} Id. at 149.
\item \textsuperscript{38} Thompson v. Utah, 170 U.S. 343 (1898). \textit{Cf.} Maxwell v. Dow, 176 U.S. 581 (1900).
\item \textsuperscript{39} U.S. Const., art. III, § 2, cl. 3.
\item \textsuperscript{40} District of Columbia v. Clawans, 300 U.S. 617 (1937).
\end{itemize}
the other side, the offenses of conspiracy to deprive persons of their livelihood ("an offence of a grave character"), where the punishment is only $25 or 30 days,\textsuperscript{41} and simple battery where the punishment is two years and $300,\textsuperscript{42} for which there must be a jury. In criminal contempt proceedings, in which the right to jury trial now also applies,\textsuperscript{43} where no maximum penalty is usually prescribed, the test must be based on the penalty actually imposed, and falls somewhere between six months\textsuperscript{44} and two years.\textsuperscript{45}

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

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

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

\textsuperscript{41} Callan v. Wilson, 127 U.S. 540 (1888).
\textsuperscript{42} Duncan v. Louisiana, 391 U.S. 145 (1968).
\textsuperscript{46} Malloy v. Hogan, 378 U.S. 1, 10 (1964).
\textsuperscript{47} See Maxwell v. Dow, 176 U.S. 581 (1900). Cf. WASH. CONST., art. 1, § 21 (1889).
\textsuperscript{49} Gilbert v. California, 388 U.S. 263 (1967).
\textsuperscript{50} Warden v. Hayden, 387 U.S. 294 (1967).
a doctrine of waiver which frequently leaves the witness on an uncharted sea? Should they settle for a privilege which can be withdrawn on the tender of immunity only from criminal prosecution, state or federal, but not from the other consequences of compulsory disclosure?

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

59. Like the incorporation of first amendment rights (see note 9, supra), incorporation of this guarantee was a two step process. First it was assumed, without deciding, that it was incorporated in a case where its requirements were found not to be violated. Francis v. Resweber, 329 U.S. 459 (1947). That case then became authority for the incorporation. Robinson v. California, 370 U.S. 660 (1962).
slavery and involuntary servitude, which probably does not reach all that is forbidden by your state constitution's prohibition against imprisonment for debt.61

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

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

65. ALASKA CONST., art. I, § 7; MICH. CONST., art. I, § 17.
66. ALASKA CONST., art. I, § 3; CONN. CONST., art. I, § 20; HAWAII CONST., art. I, § 4; MICH. CONST., art. I, § 2; PROPOSED N.Y. CONST., art. I, § 3(b) (defeated at 463
In the last analysis, constitutional conventions desirous of greater protection for individual rights at the state level will probably be best advised to do the best they can with a few formulations of general principles which do not confine the courts, which leave room for growth and application to new problems, and then to hope for a new era in state constitutional interpretation.

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

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

69. Coleman v. Alabama, 389 U.S. 22 (1967). See also Swain v. Alabama, 380 U.S. 202 (1965), where it was shown that in another Alabama county no Negro had served on a petit jury since about 1950.
threatened by one of them that he would be killed if he did not tell the truth, confessed "immediately" after the other one "fired his rifle next to the petitioner's ear."\(^{71}\)

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

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

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

The attitude of many state court judges, I am afraid, approaches that of the state Chief Justices who, in 1958, with only eight dissenting votes, adopted a remarkable resolution admonishing the Supreme Court that the division of powers between state and national governments "should be tested solely by the provisions of the Constitution of the United States" and calling upon the Court to exercise\(^ {80}\)

\(^{72}\) Betts v. Brady, 316 U.S. 455 (1942).
\(^{77}\) See Appendix to opinion of the Court in Elkins v. United States, 364 U.S. 206, 224-25 (1960).
\(^{80}\) The Chief Justices of California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia and Hawaii dissented, and the Chief Justices of New Jersey,
[t]he power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable.

The resolution did not mention the Bill of Rights.

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

II. FEDERAL GUARANTEEs NOT APPLICABLE TO THE STATES

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

81. In 1955 the American Bar Association reversed a five-year stand and indorsed coverage of self-employed lawyers under the Social Security Act, but on a voluntary basis only. 80 A.B.A. Rep. 154-55, 397 (1955). One year later it bowed to the inevitable and indorsed compulsory coverage if voluntary coverage was not obtainable. 81 A.B.A. Rep. 463-65 (1956).
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Incorporation in the future seems more likely for some than for others. Since all so far held to be incorporated have, save for first amendment rights, been related to criminal proceedings, it seems appropriate to consider omitted rights in that area first.

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

82. See notes 9 and 59, supra.
The applicability to the states of the eighth amendment's prohibitions against excessive bail and excessive fines has not yet been considered by the Supreme Court. But that Court has had little to say about excessive bail when required by the federal government\(^{90}\) and nothing about excessive fines, so for that reason alone the states should preserve their own requirements.

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

This leaves us with the fifth amendment's requirement of grand jury indictment for capital or otherwise infamous crimes, held inapplicable to the states almost eighty-five years ago.\(^{91}\) I would be willing to hazard a guess that this among the federal guarantees applicable to criminal proceedings is least likely to be incorporated into the fourteenth amendment. And since I am unpersuaded by the theory that the grand jury stands as a bulwark "between the prosecution and the accused, . . . to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will,"\(^{92}\) I do not propose to urge that states like Washington\(^{93}\) which authorize prosecution by information should change their ways.

Of those unincorporated provisions of the federal Bill of Rights not applicable to criminal proceedings, less need be said. The second amendment's guarantee of the right of the people to keep and bear arms was held inapplicable to the states almost a century ago,\(^{94}\) and if the question is again raised I would be willing to predict that the National Rifle Association will be less effective with the Supreme Court than with the Congress. The similar provisions in the constitutions of most states\(^{95}\) including Washington\(^{96}\) have not been construed to prevent reasonable regulation of the possession and use of fire-

\(92\) Hale v. Henkel, 201 U.S. 43, 59 (1906).
\(93\) WASH. CONST., art. 1, § 25.
\(95\) Rankin, note 8 supra, at 162.
\(96\) WASH. CONST., art. 1, § 24.
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arms. The third amendment's protection against the quartering of soldiers in private homes seems to have been invoked only once—in an unsuccessful attempt to persuade a court that a federal rent control act "was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people"—but it also is duplicated in the constitutions of Washington and most other states.

I was tempted to suggest that the guarantees of both the second and third amendments were probably obsolete. But I am restrained by the example of another who voiced the opinion, shortly before the advent of marches on Washington and on state capitals, that the right to petition the government for redress of grievances, while "at one time considered fundamental," is now "viewed as a right of little importance.

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

100. Rankin, note 8 supra, at 162.
101. Id. at 164.
106. See particularly Frank, Courts on Trial (1949).
107. See Jakes, The Courts, the Public and the Law Explosion (1965); Zeisel, Kalvin & Buchholz, Delay in the Court (1959).
III. GUARANTEES NOT FOUND IN THE FEDERAL BILL OF RIGHTS

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

A. Democratic Theory of Government

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

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

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

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

111. Graves, What Should Constitutions Contain? 4, quoted in Rankin, note 8, supra, at 161.
ture as they do in most states, and where popular initiative does not provide an alternative as it apparently does in Washington, such a provision might be invoked to empower the people to act when the legislature fails to do so.

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

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

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

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

115. WASH. CONST., amends. 7, 30 and 36.
118. Id., Art. 6.
120. See note 66, supra.
121. WASH. CONST., art. 1, § 32.
B. Social and Economic Rights

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

These provisions have also been criticized as not enforceable,\textsuperscript{127} and insofar as they require the use of public funds it is doubtless true that neither constitutional conventions nor courts are equipped to make appropriations.\textsuperscript{128} But this is simply to say that these nontraditional rights should not be recognized because they cannot be enforced in the traditional way. It is nonetheless true that, if the promotion of such rights is viewed as proper, their inclusion in a Bill of Rights could serve some useful purposes. The very fact of their adoption should be viewed as a mandate to the legislature to act to implement them. Particularly if they included their own "necessary and proper clauses," they would make clear the authority of the legislature to act, just as the grants of power to Congress to implement the thirteenth, fourteenth and fifteenth amendments are construed to give it independent authority to legislate.\textsuperscript{129} And in a state like Washington which reserves to the people the right of initiative\textsuperscript{130} such provisions could serve the same authorizing function for the voters.

\textsuperscript{122} See Graves, A New Bill of Rights? 46 NAT. MUN. REV. 238 (1957).
\textsuperscript{123} Mo. CONST., art. 1, § 29; N.J. CONST., art. 1, § 19; N.Y. CONST., art. 1, § 17; PUERTO RICO CONST., art. II, § 18. Such a provision was also included in the National Municipal League's Model State Constitution, art. I, § 103 (5th ed. 1948). It was dropped from a later edition with the explanation that "under present conditions" these rights "appear to need no separate constitutional reflection," although it was recognized that "in some jurisdictions there may be need for the inclusion of such provisions." Id., art. II, § 18.
\textsuperscript{124} Id., art. II, § 16.
\textsuperscript{125} Id., art. II, § 18.
\textsuperscript{127} National Municipal League, Model State Constitution 37 (6th Ed., 1962). Insofar as such provisions would regulate private conduct, they are governed by what is said about that subject below.
\textsuperscript{130} WASH. CONST., amends. 7, 26, 30, and 36.
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Hence, I would suggest that a constitutional convention should consider the wisdom of incorporating some declarations of social and economic rights—cast, perhaps, in a larger focus than some of those I have previously cited, such as a right to an adequate standard of living, a right to full educational opportunity, and a right to a decent measure of leisure.\textsuperscript{131}

C. Regulation of Private Conduct

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

As Walter Gellhorn and Alexander Pekelis have pointed out,\textsuperscript{132} the growing concentration of economic power in our society means, among other things, that more and more of our lives are subject to the control of “private governments” against whose excesses we are also in need of a Bill of Rights. The proposed New York state constitution rejected last year took a modest step in this direction by providing that\textsuperscript{133}

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

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


\textsuperscript{132} W. GELLHORN, \textit{American Rights}, Ch. 9 (1960); A. PEKELIS, \textit{Law and Social Action}, 91-127 (1950).

\textsuperscript{133} Art. I, § 3b. I have previously indicated that, insofar as this provision applies to the state, it probably adds nothing to a state equal protection clause. But I would concede that, as a rule for private conduct, it should be more narrowly drawn than an equal protection clause.
be made "judicially enforceable" by express authorization of enforce­ment by public or private action.

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

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

II. NEW HORIZONS FOR A STATE BILL OF RIGHTS*

Arval A. Morris**

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

—WASH. CONST. art. I, § 32.

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

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down what they see as unwarranted expansion of federal power, and
to revitalize state government. They demand that state government
end its default in protecting fundamental rights, thus eliminating the
need for federal protection of fundamental rights and reducing the
scope of federal power. On the other hand, other persons, such as
Professor Countryman,2 see a continuing need for a state Bill of Rights
because (1) states can improve on existing federal interpretations of
federal constitutional guarantees, assuring their adequacy and opera­
tional effectiveness for the future; (2) states can include certain fun­
damental rights in their constitutions which are now found in the
federal Constitution but which do not apply to states; and finally
(3) states can add additional guarantees, necessary for the future,
but not now found in the federal Constitution.3

A new Constitution containing a clearly and precisely formulated
Bill of Rights should be drafted for the State of Washington. I sug­
gest that a short, simple and broad declaration can, and should, be
drafted for each guarantee, and fitted into a streamlined state Con­
mium. For example, a section covering free expression could be
worded as follows:

No state or municipal legislature, nor any official, agent, or
representative of government shall undertake any action, or
pass any law, depriving or abridging freedom of speech, press,
publishation, association, peaceful picketing, or the right of
the people peaceably to assemble, or the right of the people
to make peaceful use of public property otherwise open to the
public for public use, or the right of the people to petition
the government for a redress of grievances.

I have intentionally phrased this provision to eliminate references
to religion which, in Washington, requires special consideration and
a special constitutional provision. Washington’s religious guarantees,

2. Id. at 456.
3. I agree with these views, but feel they omit another significant reason for sup­
porting a state Bill of Rights. The United States Supreme Court began protecting
fundamental rights from state interference by default. Furthermore, even though state
judges are obliged to apply the United States Constitution to state cases (because of
the supremacy clause, art. VI, § 2), they are too frequently reluctant to do so. Possibly
nothing short of changing the type of man selected for the state judiciary will correct
the hesitation to protect individual liberties, but there is hope that a clear precise state
Bill of Rights would assist state judges in protecting fundamental freedoms.

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assuring greater religious freedom than those of the United States Constitution, should be collected and reformulated directly and simply in a separate constitutional provision.4

I see no reason why guarantees applying to criminal procedure and other areas could not be streamlined and formulated like the guarantee of free expression. They should be set forth in simple terms and drafted to cover the substantive areas necessary for protection during the next one hundred years.

Professor Countryman made reference to the desirability of state constitutions containing a provision eliminating ineffective, obnoxious and demeaning oaths.5 He is clearly correct on this point, and a provision could be added to a state Bill of Rights stating:

No state or municipal legislature, nor any official agent, or representative of government shall require of any person, public or private, under any circumstances, any oath other than that set forth in this constitution.

Then, of course, there should be set forth a provision requiring an oath which apparently could read as: “All officials, employees, agents and representatives of government shall be bound by oath or affirmation to support this constitution and the Constitution of the United States and to obey the constitutional laws of this state, and Nation; no religious test shall ever be required as a qualification to any office or public trust under the State of Washington.” My suggested language is almost identical with the language of the Constitution of the United States, art. VI, § 3.

NEW CONSTITUTIONAL RIGHTS NEEDED FOR A LIVABLE FUTURE

Washington’s existing constitution was adopted in 1889, and is nearly eighty years old. If this experience is predictive, a new state

4. The guarantees are found in WASH. CONST. art. I, § 11, art. XXVI, § 1 and amend 4. I have two reasons for advocating separation of the religious guarantees: (1) they have served the state well in the past and have demonstrated that they are right for the State of Washington and (2) this is an emotional area and if one were to modify and reduce Washington’s existing guarantees of religious liberty, risks of subsequent failure at the polls would be substantially increased.
5. Countryman, supra note 1, at 458.
Constitution should be designed for the next eighty to hundred years. I ask you: What will the State of Washington be like in 2068? Consider what it was like in 1889.

In 1889, Washington was a frontier state. The population of the United States in 1890 was only 63 million; today it is over 200 million, and by the year 1990, America's population is expected to rise to 300 million. Washington's 1890 population was a mere 360,000; in 1965 it stood at three million and is growing rapidly. The people who formulated Washington's existing Constitution did not foresee our modern population explosion and crowded cities. They lived in a world without automobiles, radios, television or airplanes. Railroads had just come to the Northwest, and Washington's economy was based on exploitation of natural resources. The people were hardy and imbued with a populist spirit that reflected a general suspicion and distrust of government, perhaps because so many private businessmen had commercial interests in political decision-making and sought to use government for their own ends.

What will the next hundred years bring? While no one knows for sure, some trends are clear, and a new state Constitution should deal with them.

I. RACE

We know that we not only have a population explosion, but also, that our population is redistributing itself. Non-white population is increasing more rapidly than white, and by 1985 non-whites should number 13 to 14 percent of total American population instead of the current 11 to 12 percent. After 1985 the rate of natural increase of the non-white population may be somewhat in excess of two percent whereas the white rate will

9. HISTORICAL STATISTICS, supra note 6, at 12 (1961).
10. STATISTICAL ABSTRACT, supra note 8, at 12 (1967).
be about 1\frac{1}{3} percent. Should that rate differential persist, around one-fourth of the nation’s population would be non-white by 2085.

Most Northern non-whites live in our central cities which are rapidly becoming all black, as whites flee to the suburbs. By 1980, seven or more of our large cities will be predominantly non-white (mainly black) and perhaps thirty more will be over one-third non-white. It has been predicted that if this population redistribution trend continues, by year 2000 only Houston and Los Angeles, of our Nation’s ten largest cities, will be predominantly white.\textsuperscript{12}

Washington and Washington’s cities are not immune from these forces. In 1940, the number of black people in the State of Washington stood at 7,424, but twenty years later, in 1960, there were 48,738 blacks in Washington; and today, it is believed there are 40,000 blacks in Seattle alone.\textsuperscript{13} But, blacks are not the only minority group in Washington. Until 1960, American Indians and persons of Japanese ancestry constituted the dominant minority grouping. In 1960, Washington had 52,801 persons who were both non-white and not black. With the exception of American Indians who live in rural areas, the remaining members of minority groups—well over 90 percent—live within the inner cores of Washington’s cities. Seattle, Spokane and Tacoma have racial ghettos, and they share in our national trends. Conditions in the ghettos of these cities are worsening and are creating an explosive mixture that in other cities has produced race riots. Clearly, we must eliminate the evils of racial discrimination in employment, housing, education, public accommodations and elsewhere, if we are to survive as a unified society. Any new state constitution must contain clear and strong provisions designed to eliminate all aspects of racial discrimination from our State.

II. PRIVACY\textsuperscript{14}

Threats to privacy increased in the first half of the twentieth century, but today, have grown beyond imagination. These threats
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can be divided into three basic categories: 15 (1) physical surveillance consisting of the observation of a person or his records without his knowledge, either through listening or watching devices; (2) data surveillance consisting of the collection, storing and exchange of information through computers and other data processes; (3) psychological surveillance consisting of the use of mental tests, drugs or polygraphs to obtain information from persons.

Physical surveillance techniques are undergoing constant refinement. State and federal law has not kept pace, resulting in constantly increasing threats to privacy. Miniaturization and compactness brought on by the development of the transistor and printed circuit 16 have vastly aided electronic surveillance.

A suspect no longer need be "shadowed." Radio transmitters the size of a quarter can accomplish the task. By eliminating the antenna, radio transmitters can be put into a man's glasses, his watch, or his coat, on his car or in his brief case. Today, pills are manufactured that will transmit signals after they have been swallowed, and radioactive dyes are similarly available. 17 Objects can be inspected by one-way mirrors, solid walls that are actually mirrors, closed circuit TV, and long-range cameras. 18 The clandestine eavesdropper may easily obtain most of these items by mail order. 19

The latest development in physical surveillance is an electronic device "capable of tracking the wearer's location, transmitting information about his activities, communicating with him, and perhaps modifying his behavior. . . ." 20 The next major development is predicted to be an electronic device that can hover 100 to 1,000 feet

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15. This information is from an extensive article on privacy by Westin, Science, Privacy and Freedom: Issues and Proposals for the 1970's, 66 COLUM. L. REV. 1003 (1966) [hereinafter cited as Westin].
18. See Westin, supra note 15. Westin has completed a four-year study on privacy - including a great deal of work in the area of types of surveillance devices. See A. WESTIN, PRIVACY AND FREEDOM (1967).
19. A. WESTIN, in his book PRIVACY AND FREEDOM (1967), has found numerous stores and shops and mail order businesses thriving by selling those devices.
20. This gadget has been developed by a Harvard professor and is in experimental use by its developer, Dr. Schwitzgebel. 80 HARV. L. REV. 403 (1966).
above ground and keep an entire neighborhood under sight and sound surveillance.\textsuperscript{21}

Data surveillance represents an even greater threat to privacy than physical surveillance. Data gathering ability, as well as processing, storing, and retrieving is common to our scientific era.\textsuperscript{22} The vast need for information has led to developments in data sharing and pooling of information in numerous economic and political areas.

Predictions for the next decade indicate the growth of central, computerized data banks containing enormous amounts of personal information, such as birth and marriage records, school records, passport data, credit ratings, job experience, military records, medical and psychiatric reports, income and social security returns, etc.\textsuperscript{23} Miniaturization and computerization have currently developed to the point where all the books of the Library of Congress can be computerized and placed in six four-drawer filing cabinets.\textsuperscript{24} A new laser-recording process makes it possible to put on a single roll of plastic computer tape, 4,800 feet long, and to store for swift recall, twenty pages of typed information about every man, woman and child in the United States.\textsuperscript{25}

A national data center to pool information for all federal agencies and state governments has been proposed.\textsuperscript{26} The dangers of such a system are obvious. A neighbor's subjective evaluation and opinions come out of the computer as fact; the computer may tend to be the sole source relied upon; access will be available at the flip of a switch; and someone may, by flipping another switch, add or delete data as he sees fit.\textsuperscript{27}

\begin{footnotesize}
\textsuperscript{22} Witness the computerization of nearly all individual tax returns in 1960.
\textsuperscript{23} News Release, supra note 21.
\textsuperscript{24} See Westin, supra note 15.
\textsuperscript{25} News Release, supra note 21.
\textsuperscript{27} For excellent commentary on this problem see Miller, \textit{Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information Oriented Society}, 67 MICH. L. REV. 1091 (1969). See also, Karst, \"The Files,\" Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 LAW \& CONTEMP. PROB. 543-44 (1966) [hereinafter cited as Karst].
\end{footnotesize}
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Much of the information currently being gathered is willingly given, while the rest is compiled surreptitiously or by putting together various records to gain a more “complete picture.” Access to a great deal of this information can be obtained by nearly anyone. Private investigators can often obtain “private” records with relative ease.28

Psychological surveillance extracts information from an individual which, frequently, he does not wish to reveal or which he does not know he is revealing. Polygraphs,29 although not recognized as admissible in courts, have been increasingly used by private industry. Companies, today, use this technique in their attempts to eliminate security risks,30 criminals, and “undesirables.” Police have used it to detect bigotry, dishonesty, and loyalty.31 Many state and municipal administrators use modern surveillance and eavesdropping techniques, although not as extensively as private industry.

Given these developments and the breadth and depth of the information32 acquired, it is clear that the next 100 years will witness even greater threats to privacy. It is equally clear that a citizen’s right to privacy is fundamental and that any new Bill of Rights should contain a provision protecting every citizen’s right to privacy.

III. DISPLACEMENT AND RELOCATION RIGHTS

If we consider our likely social and economic history for the next fifty to one hundred years, we can see one necessary and inevitable change. America must rebuild her cities. This means that people must be moved around, usually against their wills. Each year federal and state governments, through urban renewal and other programs, displace many people from their homes, and this is only the beginning. Before 1965, direct federal programs displaced 2,350 families per

29. The polygraph measures body responses in order to see if the subject is answering questions truthfully. Trained operators claim to be able to distinguish the lying person from the truthful.
30. News Release, supra note 21. Of 208 corporations which responded, 47% of them use personality tests.
year, while federally aided programs, usually administered by states, displaced 70,570 families per year. An estimate for the immediate future indicates that the yearly displacements of families will rise to 4,880 and 106,200 respectively.\textsuperscript{33} Another report shows that in one hundred cities having a population of 100,000 or more, 36,979 families were uprooted in 1963 by federal, state and local governments.\textsuperscript{34} The efforts to rebuild America's cities, including Washington's cities, are intended, in part, to improve the overall housing situation. But, we must face the fact that severe hardships are frequently forced onto people who must move.

Many times displaced persons are not relocated adequately, and we can expect this condition to become aggravated, especially in light of our chronic housing shortage. Moreover, the poor and non-whites are most commonly displaced. They experience the greatest difficulty in relocating. The poor are usually confronted with large increases in rent, and black people besides being poorer than whites, suffer the further obstacle of racial discrimination practiced by real estate dealers, apartment owners and lending institutions. Many displaced persons move from substandard housing to housing that is only one step above that which they left. The result frequently is that their new housing is doomed for redevelopment purposes, and they are soon displaced again. Increasingly, poor and black people will go through this process in the next 50 to 100 years with devastating psychological results. Friendships are broken and relatives parted. Inevitably, pervasive loneliness sets in, and a fragmented personal identity and social life become their fate. One of the chief consequences of the severe hardships forced onto displaced persons is that elderly displacees die much younger than their non-displaced contemporaries.\textsuperscript{35}

\textsuperscript{33} This entire area is reviewed in \textit{Government Displacement and Relocation Rights in a Proposed State Bill of Rights}, \textit{1 Columbia Survey of Human Rights Law} \textit{143-54} (1968) [hereinafter cited as \textit{Government Displacement}].

\textsuperscript{34} \textit{Id.} at 143, note 1. It should be noted that of the 130,271 families displaced by urban renewal programs through Sept. 30, 1963, at least 81,686 of the families were non-white (not all families reported their color). \textit{Advisory Commission on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments}, (Report A-26, 1965) 25, Table 3.

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Currently, government contends it gives fair compensation for encroachments on private property. But, the fact is that the compensation actually paid to displacees is insufficient to compensate them for harm done. Inflation works its way into values, and legal remedies are inadequate because those that are available are geared in accordance with the governmental act in question and not according to the nature of the harm inflicted. Thus, to remedy this inequity, the following provision has been proposed for a state Bill of Rights: 36

No person shall be displaced by governmental action from his dwelling without provision for immediate, satisfactory relocation and full compensation for all losses and expenses incurred.

IV. PUBLIC BENEFITS, FAIRNESS, AND OPENNESS

Each person reasonably can expect a guaranteed annual income in the not very distant future. This development in public welfare will be followed by many more, as our national economy becomes more automated and computerized. I am on safe grounds when I predict that our welfare programs will expand markedly in the next one hundred years. For the individual citizen the most significant aspect of welfare programs is the fact that government plays a dominant, and sometimes a domineering, role in his day to day existence. The types of federal and state government largess already distributed ranges from welfare payments to defense contracts, and is growing constantly. 37 More and more, government will come to supply directly, or will indirectly control the supply, of medical care, housing, licensed jobs, insurance direct income, and perhaps, licenses to drive automobiles upon crowded streets during certain hours. Many of the functions of the welfare state necessarily will be performed by state government. Government controls will operate largely through the mechanism of eligibility requirements. The individual Washington citizen who receives benefits will lack control over the benefits he receives. As the welfare process grows, individual citizens will become more and more dependent upon government because increasingly it

will be the source of their wealth. Thus, possibilities for severe hardship arise from the opportunities for governmental abuse in the distribution of largess.\textsuperscript{38} Decisions must be made about eligibility, continuation and termination of benefits, and these decisions will become more and more important.\textsuperscript{39} Thus, it seems wise to include a constitutional provision on this point dealing with the due process aspects of public benefits. It turns out that the proposed provision is highly similar to the "due process of law" provision already contained in Washington's existing constitution.\textsuperscript{40}

No official agent or representative of government shall deny any person public benefits without due process of law, nor deprive any person of life, liberty, property, or public benefits without due process of law.\textsuperscript{41}

I believe Washington will need a constitutional provision like the one suggested in order to protect her citizens from administrative abuses during the next 50 to 100 years.

The concepts of fairness and openness are closely allied with due process of law. However, there remain areas where government dealings with its citizens are neither fair nor open. Thus, I would propose a provision in a state Bill of Rights declaring that estoppel operates


\textsuperscript{39} Free men are those who have and use the power to manage their affairs in accordance with their own judgement; they determine for themselves whether their needs are being met. That must be the direction in which power is accountable in a free society. But the basis upon which welfare benefits are distributed is directly contrary to these assumptions: Need is judged not by the recipient of the grant, but by its dispenser; moreover, the grant varies with the dispenser's judgment of the existence, size, and character of the need and also the character of the recipient. The means test or charity principle upon which welfare assistance is based, thus violates and is utterly incompatible with the right to privacy because the latter is centrally concerned with the freedom to be an individual, ... while the means test renders impossible "the direction of one's affairs, the whole basic principle of self-management."

\textsuperscript{40} This entire area is reviewed in \textit{Due Process and Public Benefits}, 1 \textit{Columbia Survey of Human Rights Law} 123-42 (1968).

\textsuperscript{41} A distinction is set up between the concept of deprivation, \textit{i.e.}, depriving a citizen of something, meaning to take away something a person already has, such as life, liberty, property or public benefits, and the concept of denial, \textit{i.e.}, denying a citizen something in the first instance, meaning a refusal to give him something to which he is entitled.
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against government and its agents exactly as it operates between private parties. Also, as far as practical, legislative committee sessions should be open to the public and even where openness is impractical, a public record of the way each legislator votes in committee should be available.

V. EDUCATION

In the immediate future, education will become America's number one industry. By education, I specifically mean to include university and college education. Machines will work and people, who are lucky enough to have jobs in an automated society, will think. A person's opportunities are already directly limited by his education. More and more our major industries, e.g., Boeing, are becoming dependent upon people having well educated minds. Industry recruiting on university campuses has never been more intensive. Education is a subject of such clear importance that Washington's Constitution already provides for free, public education up through the common school. I believe the time has come for Washington to assure equal opportunities to education beyond the common schools, by the not too costly elimination of tuition and a few other expenses. I propose the following provision:

The state shall provide for the maintenance and support of a system of free education from kindergarten through university, of excellent quality, where all students who are residents of the state may be educated to their fullest potential free from all charges.

CONCLUSION

It is scarcely possible to exaggerate the importance of the role to be played by the state Bill of Rights during the next 100 years. A new Bill of Rights should not catalogue every possible protection society may offer its members. That is the function of statutory law. A Bill of Rights should set forth those fundamental propositions that

42. WASH. CONST. art. IX, §§ 1-4, and art. XXVI, § 4.

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regulate the basic relationships of a state to its citizens, or citizen to citizen. To be truly fundamental and meaningful any new Bill of Rights must aim for two goals: (1) preserve that enduring heritage of the past that has served us well, and (2) anticipate the fundamental trends of the future and safeguard human dignity and liberty for that era.

SUGGESTED BILL OF RIGHTS

For

THE STATE OF WASHINGTON

Arval A. Morris

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

Art. II. Rights Reserved. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

Art. III. Right To Vote And Administration Of Elections. Every citizen of the age of twenty-one years who shall have been a resident of the state for three months next preceding an election shall be entitled to vote in secret in that election for all officers elected by, and upon all questions submitted to the people of the election district in which he resides; but the legislature may reduce the minimum voting age to no less than eighteen years, disqualify from voting persons convicted of a felony or determined to be mentally incompetent, prescribe minimum periods of local residence for non-state-wide elections not exceeding two months next preceding an election, and reduce the residence requirements in the case of presidential elections. There shall be no property, or literacy qualification for voting for any public office or on any question. Statutes shall define residence for voting purposes, and provide for the registration of voters, absentee voting, the nomination of candidates, and the administration of voting.

Art. IV. Freedom Of Elections. All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.
Art. V. *Supreme Law Of The Land.* The Constitution of the United States, and the laws of the United States made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of land; and the judges and all other officers of government of this state shall be bound thereby, anything to the contrary notwithstanding.

Art. VI. *Limitation On Military Power.* The military shall be in strict subordination to the civil power.

Art. VII. *Religious Freedom.* Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: *Provided, however,* That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Art. VIII. *Freedom Of Expression.* No state or municipal legislature, nor any official agent, or representative of government shall undertake any action, or pass any law, depriving or abridging freedom of speech, press, publication, association, peaceful picketing, or the right of the people peaceably to assemble, or the right of the people to make peaceful use of public property otherwise open to the public for public use, or the right of the people to petition the government for a redress of grievances.

Art. IX. *Oath Or Affirmation.* No state or municipal legislature, nor any official agent, or representative of government shall require of any person, public or private, under any circumstances, any oath or affirmation as a condition of employment or as a qualification to any office or public trust under this Constitution or the laws of the State of Washington other than that oath or affirmation set forth and required by this constitution.

Art. X. *Required Oath Or Affirmation.* All officials, employees, agents and representatives of government, at the discretion of the
legislature, shall be bound by the following oath or affirmation: "I
(swear) (affirm) that I will obey this constitution and the Constitu-
tion of the United States and that I will obey the laws of this state
and Nation that have been passed in pursuance of the Constitution
of the State of Washington and the Constitution of the United States
of America."

Art. XI. Oaths—Mode Of Administering. The mode of administer-
ing an oath or affirmation, shall be such as may be most consistent
with and binding upon the conscience of the person to whom such oath,
or affirmation, may be administered.

Art. XII. Unreasonable Invasions Of Privacy And Searches And
Seizures, And Interception Of Communications. The right of the
people of their privacy and to be secure in their privacy, and in their
persons, communications, houses, papers and effects, against unreason-
able searches and seizures, shall not be violated; and no warrants shall
issue, but upon probable cause, supported by oath or affirmation, and
particularly describing the place to be searched, method of search,
and the persons or things to be seized. Eavesdropping by electronic,
mechanical or other devices shall not be allowed. Evidence obtained in
violation of this section shall not be admissible against a defendant in
a criminal trial.

Art. XIII. Administration Of Justice. Justice in all cases shall be
administered openly and without unnecessary delay.

Art. XIV. Trial By Jury. Trial by jury in all civil cases in which it
has heretofore been guaranteed by the constitution, and in all criminal
cases, including cases of criminal contempt, shall be preserved; but
statutes may provide for waiver by the defendant in a criminal case or
by both parties in a civil case, and that a jury may be composed of
six or twelve persons in a civil case and that in such event a verdict
may be rendered by not less than five-sixths of the jury in a civil case.
All verdicts in criminal cases can be rendered only by a unanimous
jury.

Art. XV. Habeas Corpus. Habeas corpus shall not be suspended,
unless, in case of rebellion or invasion, the public safety absolutely
requires it.

Art. XVI. Bail; Detention Of Witnesses; Fines; Punishments, And
Double Jeopardy. Excessive bail shall not be allowed nor excessive
fines imposed, nor shall witnesses be detained except for their own
protection, nor shall cruel and unusual punishments be inflicted, nor
shall any person be twice put in jeopardy for the same offense.

Art. XVII. Bail, When Authorized. All persons charged with crime
shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.

Art. XVIII. Prosecution By Information. Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Art. XIX. Rights Of The Accused. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to have a copy thereof, to appear, testify and defend in person, or by counsel, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and to the assignment of counsel to represent him at every stage of the proceedings and to the assignment of the services of any other persons necessary to aid him, as determined by the court, and the right to appeal in all cases. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Art. XX. Self-Incrimination; Duty Of Public Officials. No person shall be compelled to give testimony which might tend to incriminate him, but when questions of fact, but not authorizing or allowing questions of opinion or belief, are put to a public officer concerning his official conduct or performance of his official duties he shall acquire no immunity from prosecution by virtue of his appearance or testimony; and if he refuses to answer factual questions that are strictly restricted to his official actions or to the performance of his official duties, then he shall forfeit his office and be ineligible for public office for a period of three years.

Art. XXI. Imprisonment For Debt. There shall be no imprisonment for debt, except in cases of absconding debtors.

Art. XXII. Bill Of Attainder; Ex Post Facto Law, Etc. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

Art. XXIII. Grand Jury. No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

Art. XXIV. Treason. Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

Art. XXV. Due Process; Public Benefits. No official agent or repre-
sentative of government shall deny any person public benefits without
due process of law, nor deprive any person of life, liberty, property
or public benefits without due process of law.

Art. XXVI. Displacement And Relocation Rights. No person shall
be displaced by governmental action from his dwelling without provi­sion for immediate, satisfactory relocation and full compensation for
all losses and expenses incurred.

Art. XXVII. State Responsibility To Protect Social And Economic
Rights. The State of Washington through its legislature and other
divisions of government shall foster the health and welfare of its
citizens, through a partnership of public agencies and voluntary
organizations wherever practicable, by providing: care for the helpless,
the needy, and the sick; protection against physical and mental illness;
conditions encouraging maximum realization of the individual’s inde­pendence; freedom from discrimination, unemployment, and the
anxieties of old age; personal safety; and decent housing, recreation
facilities and aesthetic surroundings.

Art. XXVIII. Discrimination In Civil Rights. No person shall, be­
cause of race, color, creed or religion, be subjected to any discrimina­tion in his civil rights by any other person or by any firm, corporation,
or institution, or by the state or any agency or subdivision of the state.
All divisions of state government shall take affirmative action to elimi­nate discrimination wherever it may exist.

Art. XXIX. Hereditary Privileges Abolished. No hereditary emolu­ments, privileges, or powers, shall be granted or conferred in this state.

Art. XXX. Special Privileges and Immunities Prohibited. No law
shall be passed granting to any citizen, class of citizens, or corporation
other than municipal, privileges or immunities which upon the same
terms shall not equally belong to all citizens, or corporations.

Art. XXXI. Irrevocable Privilege, Franchise Or Immunity Prohib­ited. No law granting irrevocably any privilege, franchise or immunity,
shall be passed by the legislature.

Art. XXXII. Labor Not A Commodity; Right To Bargain. Labor
of human beings is not a commodity nor an article of commerce and
shall never be so considered or construed. Employees shall have the
right to organize and to bargain collectively through representatives
of their own choosing.

Art. XXXIII. Eminent Domain. Private property shall not be
taken for private use, except for private ways of necessity, and for
drains, flumes, or ditches on or across the land of others for agri-
State Bill of Rights

cultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Art. XXXIV. Education. The state through its legislature and other divisions of government shall provide for the maintenance and support of a system of free education from kindergarten through college, of excellent quality, where all the people of the state capable of such education may be educated to their fullest potential free of all charges. Neither the state nor any subdivision shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denominations or in which any denominational tenet or doctrine is taught.

Art. XXXV. Conservation. All divisions of state government shall preserve the forests, waters, wetlands, wildlife and beauty of the state. Except as approved by referendum submitted to the people by act of the legislature, the lands of the state constituting the forest preserves shall be kept forever wild and in a natural condition.

Art. XXXVI. Recall Of Elective Officers. Every elective public officer in the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentages required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office

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must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

The legislature shall pass the necessary laws to carry out the provisions of this article, and to facilitate its operation and effect without delay: Provided, That the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be, state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five percent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five percent.

Art. XXXVII. Public Legislative and Committee Sessions. The Legislature of the State of Washington, and each of its committees or body of persons or person to whom some trust or charge is committed, shall conduct all business in open and public session, and make a record thereof available to the public, except that upon a vote of three-fourths of those members eligible to vote, the Legislature or any of its committees or groups may conduct business in executive session; however in such event, a record shall be kept of the executive session and made available to the public at the end of the meeting, such record shall contain all motions, resolutions or other proposals recorded by name of maker, and also shall show the names of those persons present and whether and for what position each person voted, or whether he abstained.

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

Art. XXXIX. Enforcement Of Constitution. The provisions of this Constitution are mandatory. A violation of any provision of this Constitution including the making of unconstitutional expenditures, may be restrained by the courts of this state at the suit of the people or of any citizen, and the courts shall have jurisdiction regardless whether the lawsuit is instituted in accordance with a manner provided by statute, common law or any other requirement.

Suggested Provision

| Art. I. | WASH. CONST.—art. I § 1 |
| Art. II. | WASH. CONST.—art. I § 30 |
| Art. III | WASH. CONST.—amend. 5 and PROP. N.Y. CONST. |
| Art. IV. | WASH. CONST.—art. I § 19 |

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A BIBLIOGRAPHICAL NOTE

Despite the prevailing lack of public interest in state constitutional law, there are a few notable toilers' works that will prove helpful to the newcomer to the field.

Organizations active in the field include the following:
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47 East 68th Street
New York, New York 10021
NATIONAL CIVIC REVIEW (published monthly except August).
STATE LEGISLATURES PROGRESS REPORTER (published "at intervals" since 1965).
The Future Role of the States (1961).
The Council of State Governments
36 West 44th Street
New York, New York
Book of the States (biennial).
Citizens' Conference on State Legislatures
910 Pennsylvania Avenue
Kansas City, Missouri 64105
U.S. Advisory Commission on Intergovernmental Relations
State Constitutional and Statutory Restrictions upon the
State Bill of Rights

STRUCTURAL, FUNCTIONAL AND PERSONAL POWERS OF LOCAL GOVERNMENT (1962).

UNSHACKLING LOCAL GOVERNMENT (1966).

Materials prepared for, and the records of, previous constitutional conventions are useful sources of information. Particularly helpful should be the studies prepared for the following states: Alaska, California, Maryland, Michigan, Missouri, New Jersey, New York and Rhode Island. These materials may be found by consulting the bibliography by B. HALEVY, STATE CONSTITUTIONAL REVISION (National Municipal League 1963 and M. Fink Supp. 1966).

In addition, the 1967 New York Temporary Commission on the Constitutional Convention issued reports in January, 1967. The first report discusses the issues which the Convention faces, and the second makes recommendations relating to the organization of the Convention.

Other references, on a highly selective basis, include the following:

C. ADRIAN, GOVERNING OUR FIFTY STATES AND THEIR COMMUNITIES (2d ed. 1967).

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