

A FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES: INDIVIDUAL RIGHTS, FREE GOVERNMENT, AND THE WASHINGTON STATE CONSTITUTION

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Abstract: Article 1, section 32, of the Washington State Constitution provides for a "recurrence to fundamental principles" as a means of protecting individual rights and free government. Since the adoption of the constitution in 1889, section 32 has been used infrequently by Washington's legal community. This Comment examines the role of section 32 in constitutional analysis by distilling four fundamental principles from the structure of the state constitution and the historical and legal environment existing in 1889. From these principles, this Comment concludes that the framers of the Washington Constitution intended that section 32 be used to expand the scope of individual rights protected by the constitution.

The Washington State Constitution contains a rarely-used tool for the protection and expansion of individual rights. This tool, the concluding section of the Declaration of Rights,¹ states:

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.²

Section 32 is composed of four basic elements: frequent recurrence,³ fundamental principles, individual rights, and free government. Section 32 designates fundamental principles as the means to secure individual rights and perpetuate free government. As an abstract proposition, however, section 32 offers little guidance to the practitioner. To effectively incorporate section 32 into Washington jurisprudence, practitioners need to understand the fundamental principles that define the scope of individual rights and free government. Once the term "fundamental principles" is given substance, and its relation to individual rights and free government is identified, section 32 can be more extensively incorporated into Washington jurisprudence.

This Comment attempts to provide substance to section 32 through an historical approach. Part I examines the historical environment and legal theories existing in Washington in 1889 and their relation to the contents of the state constitution. Part I also briefly notes the lim-

1. WASH. CONST. art. I; Washington's Declaration of Rights serves a purpose similar to the United States Constitution's Bill of Rights. See *infra* part I.C.1.

2. WASH. CONST. art. I, §32.

3. Frequent recurrence is interpreted throughout this Comment as a general admonition to constantly return to fundamental principles.

ited use of section 32 and the associated absence of a balanced historical approach to section 32 in the Washington judiciary. From this body of evidence, four fundamental principles are identified: liberty, democracy, natural law, and federalism. Part II analyzes the manner in which these principles fulfill section 32's mandate to secure individual rights and perpetuate free government.

I. THE HISTORICAL AND LEGAL BACKGROUND TO SECTION 32

Washington's citizens were poised at a crossroad of change when they drafted their constitution. A crossroad between the industrial age of robber barons and the rural frontier of the rugged individual, between the future and the past. In the ten years prior to the 1889 Constitutional Convention, Washington Territory evolved from a wilderness populated by 75,000 settlers, cut off by a month's travel time from the nation's capital, to a rapidly growing state of 350,000, linked by a three-day train ride to the eastern seaboard.⁴

The delegates at the 1889 Constitutional Convention⁵ faced two major challenges stemming from the territory's rapid transformation. First, Washington Territory experienced government corruption. Second, private corporate power grew tremendously over the latter half of the nineteenth century, bringing both progress and problems to Washington. The delegates addressed the turbulent changes wrought by these forces by protecting individual rights with a broadly phrased Declaration of Rights, and through specific constitutional restrictions on both governmental and private power.⁶ Additionally, the framers removed traditional powers from the legislative branch and placed democratic checks on all three branches, legislative, executive, and judicial.⁷ The parameters of these responses contribute to understanding the fundamental principles embraced by the constitution, and the manner in which the principles were intended to secure individual rights and perpetuate free government.

4. DOROTHY O. JOHANSEN, *EMPIRE OF THE COLUMBIA* 316-32, 507 (2d ed. 1967).

5. The delegates represented a wide cross section of citizens including farmers, bankers, lawyers, editors, and merchants. *See, e.g., id.* at 339.

6. *See infra* part I.C.

7. *See infra* part I.C.

A. *The Historical Context: Government Tyranny and Corporate Abuses*

Washington's citizens feared governmental tyranny, a tyranny they generally identified with the legislative branch.⁸ The settlers, who were primarily immigrants from other states, had extensive experience with and knowledge of legislative abuses.⁹ In addition, Washington Territory itself experienced legislative abuses.¹⁰ In 1862-63, the legislature reportedly passed no general laws, but enacted more than 150 pieces of special legislation for the benefit of "private interests against the general welfare."¹¹ The delegates to the Constitutional Convention carried these experiences with them; one delegate remarked that if a stranger were to step into the convention "he would conclude that we were fighting a great enemy and that this enemy is the legislature."¹²

While the legislature may have been the enemy, governmental corruption also existed in the executive and judicial branches. Washington's governors were criticized for abusing their patronage powers.¹³ Although Washington's citizens respected the level of justice provided by the judiciary, they vocally criticized the judiciary because of absentee judges, political manipulations, and the lack of local control over appointments.¹⁴

The presence of powerful corporations in Washington was often at the root of the governmental corruption.¹⁵ The late nineteenth century in America was an era of rapidly increasing concentrations of

8. Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 228 (1913) (Knapp's article is based in part on information obtained from interviews with delegates to the constitutional convention); Francis N. Thorpe, *Recent Constitution Making in the United States*, 2 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 160 (1891).

9. James L. Fitts, *The Washington Constitutional Convention of 1889* 28-29 (1951) (unpublished M.A. thesis, University of Washington) (citing TACOMA DAILY LEDGER, July 19, 1889; PORTLAND MORNING OREGONIAN, July 16, 17, 1889); JOHANSEN, *supra* note 4, at 351.

10. Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* 207-21 (1945) (unpublished Ph.D. dissertation, University of Washington).

11. *Id.* at 210 (citing WASH. STANDARD, Feb. 6, 1864). In 1879, Governor Ferry criticized the legislature for passing a "crude jumble of conflicting and inconsistent laws, which are incapable of being intelligently construed . . ." Elisha P. Ferry, *Speech to the Seventh Biennial Session of the Legislative Assembly, October 6, 1879*, in MESSAGES OF THE GOVERNORS OF THE TERRITORY OF WASHINGTON TO THE LEGISLATIVE ASSEMBLY, 1854-1889, at 205-07 (Charles M. Gates ed., 1940) [hereinafter MESSAGES OF THE GOVERNORS].

12. Knapp, *supra* note 8, at 265.

13. Airey, *supra* note 10, at 180-86.

14. CHARLES H. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* 17 (1988); Airey, *supra* note 10, at 272, 290-93.

15. Airey, *supra* note 10, at 209-12.

wealth in the hands of relatively few individuals.¹⁶ Notably, Washington would probably not have contemplated statehood in 1889 if it had not benefitted from the economic growth, and associated population increase, that corporate wealth had provided.¹⁷

Numerous problems, however, also accompanied the expansion of corporate power in Washington. Chapters of national third-party political organizations such as the Grange, the Farmers Alliance, and the Knights of Labor sprang up in Washington Territory, partly in response to the expansion of corporate power.¹⁸ These organizations feared that uncontrolled concentrations of capital were threatening social stability and individual freedoms throughout the country.¹⁹ For instance, the populist-minded Washington State Grange lashed out at the "money Kings of the East," the trusts and monopolies that "were oppressing the laborer and robbing agriculture of its just rewards."²⁰ The Grange's concerns were not imagined;²¹ Washington's citizens had a history of conflict with corporations, primarily railroads.²² Excessive freight rates charged by railroad monopolies plagued Washington's farmers.²³ The territorial legislature's failure to set railroad rates further angered farmers.²⁴

16. JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 71-72, 81-85 (1956).

17. MARY W. AVERY, *WASHINGTON: A HISTORY OF THE EVERGREEN STATE* 200-01 (1965).

18. Carlos A. Schwantes, *Protest in a Promised Land: Unemployment, Disinheritance, and the Origin of Labor Militancy in the Pacific Northwest, 1885-1886*, 1982 W. HIST. Q. 373, 377; Harriet P. Crawford, *Grange Attitudes in Washington, 1889-1896*, 30 PAC. N.W. HIST. Q. 243 (1939); Stephen H. Peters, *The Populists and the Washington Legislature 1893-1900* 2-3 (1967) (unpublished M.A. thesis, University of Washington).

19. HURST, *supra* note 16, at 85-86.

20. *Journal of Proceedings*, 1891, 3RD ANN. SESSION OF THE WASH. ST. GRANGE 9-10.

21. See Gordon B. Ridgeway, *Populism in Washington*, 39 PAC. N.W. HIST. Q. 284-91 (1948); Avery, *supra* note 17, at 214.

22. Railroads were not the only culprits. Timber companies also came into conflict with Washington's citizens. See generally RICHARD WHITE, *LAND USE, ENVIRONMENT, AND SOCIAL CHANGE: THE SHAPING OF ISLAND COUNTY, WASHINGTON* 92 (1980) (paraphrasing PUGET SOUND ARGUS March 20, 1879: "Logging was wasteful; only the best timber was taken, the rest was left to rot or burn; lumbermen bled Washington dry for the benefit of San Francisco . . .").

23. Ridgeway, *supra* note 21, at 288; Peters, *supra* note 18, at 2.

24. See Eugene Semple, Speech to the Eleventh Biennial Session of the Legislative Assembly, October 9, 1887, in *MESSAGES OF THE GOVERNORS*, *supra* note 11, at 271-72; Crawford, *supra* note 18, at 249-50; Ridgeway, *supra* note 21, at 288-89. Distrust of the railroads also emanated from the large land grant Congress gave to the Northern Pacific Railroad in 1870. See 17 CONG. REC. 7562 (1886) (statement of Rep. Voorhees requesting restoration of certain railroad lands to public domain); JOHANSEN, *supra* note 4, at 308; Crawford, *supra* note 18, at 253-54.

Laborers and labor sympathizers expressed additional distrust and anger toward the growth of corporations.²⁵ A great deal of this anger stemmed from the conditions and disturbances in the mining camps around the state.²⁶ In 1886 and 1889, violence broke out in Roslyn and Newcastle when mining companies hired armed guards to thwart striking miners.²⁷ Dangerous working conditions faced by industrial workers around the state led to requests for constitutional provisions requiring the legislature to enact health and safety laws.²⁸

Despite citizens' demands that corporate power be controlled by the constitution,²⁹ the framers had a vested interest in encouraging corporate growth within the state.³⁰ The railroads increased Washington's wealth and population tremendously.³¹ The framers understood that economic prosperity would be threatened if corporations were driven from the state.³² Thus, one of the primary tasks of the convention was to efficiently protect individual rights without discouraging corporate growth.

B. Legal Context: The Unwritten Constitution and Natural Rights

The relation between individual rights, the growth of corporate power, and section 32 is further explained by the development of nineteenth-century constitutional law theories, particularly natural law. The idea that behind every written constitution there resides an unwritten constitution, based in part on natural rights, had long been a part of constitutional theory when the Washington Constitution was

25. See THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 58, 66 (Beverly Rosenow ed., 1962) [hereinafter JOURNAL]; JOHANSEN, *supra* note 4, at 348–50; Schwantes, *supra* note 18, at 374.

26. JOHANSEN, *supra* note 4, at 348–50.

27. *Id.* at 349–50; Fitts, *supra* note 9, at 27.

28. JOURNAL, *supra* note 25, at 58–59, 66–67. Additional proposals called for laws guaranteeing just compensation for labor performed. *Id.* at 58. The laborers' demands were partially included in the constitution. WASH. CONST. art. II, §35. ("The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.").

29. Fitts, *supra* note 9, at 9.

30. Knapp, *supra* note 8, at 240. The conflict between protecting citizens from corporate abuse and the economic pressures corporations placed on the delegates is apparent in the debates over the Railroad and Transportation Commission. The section authorizing such a commission was initially adopted, but after the railroad lobby made it clear to the delegates that the commission would prevent the completion of railroads in their own counties, the section was dropped. Airey, *supra* note 10, at 491–92; Fitts, *supra* note 9, at 106–16.

31. Elisha P. Ferry, Address to the Fourth Biennial Session of the Legislative Assembly, October 9, 1873 in MESSAGES OF THE GOVERNORS, *supra* note 11, at 174.

32. JOURNAL, *supra* note 25, at 733; Knapp, *supra* note 8, at 240.

created.³³ George Turner, who proposed section 32, viewed the existence of the unwritten constitution as a "higher, but none the less real branch of American constitutional law."³⁴ Turner recognized what many others of his day also believed; constitutional interpretation often required a return to natural law principles beyond the four corners of the constitution.³⁵

Two conflicting concepts of natural rights³⁶ were available to the framers in 1889, one focusing on personal liberty and one focusing on economic interests. Both concepts were grounded in an amorphous body of natural law principles that included the right to personal security, the right of personal liberty, and the absolute right to property.³⁷ The primary difference in the two concepts was the function natural rights served,³⁸ the protection of individual rights or the promotion of laissez-faire economics.³⁹

In revolutionary America, natural rights were most often expressed in terms of individual rights.⁴⁰ For example, Thomas Jefferson emphasized the individual's unalienable right to "Life, Liberty and the pursuit of Happiness" in the Declaration of Independence.⁴¹ Natural

33. See CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (New York, G.P. Putnam's Sons 1890); FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 310 (St. Louis, F.H. Thomas & Co. 1880).

34. 32 CONG. REC. 783, 785 (1899) (statement of Sen. Turner against United States imperialism in the Philippines).

35. *Id.* at 789.

36. The use of the term natural rights in place of natural law is characteristic of American interpretations of natural law. CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 58 (1930).

37. Charles G. Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 *YALE L.J.* 617, 637; see also DAVID G. RITCHIE, *NATURAL RIGHTS: A CRITICISM OF SOME POLITICAL AND ETHICAL CONCEPTIONS* (George Allen & Unwin Ltd. 1952) (1894) (Professor Ritchie writing in 1894 identified additional natural rights: the right to life, toleration, public meeting and association, freedom of contract, resistance to oppression, equality, and pursuing and obtaining happiness).

38. W. Lair Hill implicitly recognized this distinction and brought it to the attention of the delegates in his essay on natural rights. Hill commented on the growing difficulty in finding any common ground when the issue of the natural right of property is being discussed. W. Lair Hill, *Washington: A Constitution Adapted to the Coming State*, 8-9 (typed manuscript, copied from *THE OREGONIAN* (Portland), July 4, 1889, at 9 available at the University of Washington Law Library). Hill's constitution served as the working draft for the delegates at 1889 convention. Arthur S. Beardsley, *The Sources of the Washington Constitution as Found in the Constitutions of the Several States*, in *CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF WASHINGTON* app. (Belle Reeves ed., 1955).

39. Economic laissez-faire is the doctrine that the economy will run most efficiently if governmental interference is kept to a minimum.

40. See HAINES, *supra* note 36, at 53.

41. *Id.* at 52-54.

rights during the revolutionary era served as an idealistic doctrine, the primary purpose of which was to safeguard individual rights.⁴²

In the late nineteenth century the concept of natural rights was transformed by state and federal judiciaries, using concepts such as due process and liberty of contract, into a tool for promoting a laissez-faire economy.⁴³ By 1889, instead of preserving life, liberty, and the pursuit of happiness, natural rights primarily served as a conservative check on the progressive measures emanating from state legislatures in response to the rapidly advancing industrial age.⁴⁴ Often this use of natural rights resulted in the expansion of corporate power at the expense of social progress and individual rights.⁴⁵

C. *The Washington State Constitution*

Washington's constitution reflects the influence of the historical and legal forces of the late nineteenth century and responds to those forces by incorporating various fundamental principles within its text and structure. The constitution exhibits three basic structural characteristics. First, it emphasizes the protection of individual rights. Second, the constitution is legislative; it resolves specific problems with constitutional provisions instead of leaving the problems for future legislative action. Third, it contains a democratic element designed to check and balance the three traditional branches of government.

1. *The Constitution and Individual Rights*

At the heart of the Washington Constitution is the emphasis on protecting individual rights. Washington, like other states, begins its constitution with a Declaration of Rights. The Declaration of Rights sets the tone for Washington's government by proclaiming the paramount purpose of government; "governments . . . are established to protect and maintain individual rights."⁴⁶ The Declaration of Rights then lists twenty-seven rights ranging from traditional legislative restrictions, such as the prohibition of bills of attainder and ex post facto laws,⁴⁷ to specific proclamations of individual liberty, including a right

42. *Id.* at 217, 220.

43. *Id.* at 104-40, 211-13; BENJAMIN F. WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW* 298-99 (1931).

44. HAINES, *supra* note 36, at 220.

45. *Id.* at 157-58, 223.

46. WASH. CONST. art. I, § 1.

47. *Id.* § 23.

to privacy,⁴⁸ and a right to speak freely on all subjects.⁴⁹ Section 32 concludes the Declaration of Rights by reaffirming the paramount purpose—protecting individual rights.

Section 32 had historical precedents, but the precise language incorporated in section 32 was unique to the Washington Constitution.⁵⁰ Constitutional admonitions to heed fundamental principles originated in the first American Declaration of Rights written by George Mason in 1776.⁵¹ By 1889, nine states had adopted similar provisions.⁵² Section 32, however, differs from its predecessors in other states.⁵³ Washington did not limit itself to returning to fundamental principles “of the constitution” as did Massachusetts and New Hampshire.⁵⁴ In addition, unlike other states, Washington used section 32 to ensure the “security of individual right.” The connection of fundamental principles with individual rights was unique to the Washington State Constitution.⁵⁵ Section 32’s emphasis on individual rights is consistent with and contributes to Washington’s constitutional commitment to the protection of individual rights.

The emphasis on individual rights reflected in section 32, and in the Declaration of Rights in general, is also consistent with the principles of federalism existing in 1889.⁵⁶ The Federal Bill of Rights, in 1889, protected individuals from the actions of the federal government, but

48. *Id.* §7.

49. *Id.* §5.

50. See Elliott R. Ohannes, A Modest Discourse on the Origins and Meanings of Article One, Section Thirty-Two of the Washington State Constitution (Nov. 20, 1989) (unpublished student paper on file with the *Washington Law Review*) (comparing Washington’s fundamental principles provision with its predecessors).

51. VA. CONST. art. I, §15 (“Qualities necessary to preservation of free government.—That no free government, nor the blessings of liberty can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; by frequent recurrence to fundamental principles”).

52. ILL. CONST. of 1870, art. II, §20; MASS. CONST. pt. 1, art. 19; N.H. CONST. pt. 1, art. 38; N.C. CONST. art. I, §35; OHIO CONST. of 1802, art. VIII, §18 (repealed 1851); VA. CONST. art. I, §15; VT. CONST. ch. I, art. 18; W. VA. art. III, §20; WIS. CONST. art. 1, §22. Of the other three states adopting constitutions in 1889 only South Dakota included a fundamental principles provision. S.D. CONST. art. VI, §27. Since 1889, Arizona and Utah have adopted fundamental principles provisions both of which are almost identical to Washington’s. ARIZ. CONST. art. 2, §1; UTAH. CONST. art. 1, §27.

53. See Ohannes, *supra* note 50.

54. MASS. CONST. pt. 1, art. 19; N.H. CONST. pt. 1, art. 38 (both provisions call for “a frequent recurrence to the fundamental principles of the constitution . . .”).

55. Beardsley, *supra* note 38 at x (even Wisconsin and Illinois, from which Beardsley believes Washington borrowed section 32, did not mention individual rights).

56. Judge Cooley, writing in 1880, defined federalism as a system in which “the nation is possessed of supreme, absolute, and uncontrollable power in respect to certain subjects throughout all the States, while the States have the like unqualified power, within their respective limits in respect to other subjects.” THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF*

not from the actions of state governments.⁵⁷ The protection of individual rights remained, as it had been since the colonial era, primarily a function of state constitutions.⁵⁸

2. *A Legislative Constitution*

In response to the troubled record of Washington's territorial legislature,⁵⁹ the framers addressed numerous issues with constitutional provisions, issues traditionally left for the legislature to resolve.⁶⁰ The legislative character of the constitution was particularly prevalent in the regulations placed on corporations.⁶¹ The Declaration of Rights also includes specific restrictions on corporations.⁶² The framers' reluctance to entrust future legislatures with these traditionally legislative decisions was typical of state constitutions in the late 1800s.⁶³

3. *A Democratic Constitution*

The Washington Constitution, in addition to being legislative in nature, also contains democratic checks on the legislative, executive, and judicial branches of the state government. Unlike the Federal Constitution, the state constitution delegates numerous decisions to the voters. For example, the framers removed the majority of state administrative officials from the patronage rolls and placed them before the voters.⁶⁴ The framers also adopted an elected judiciary,

CONSTITUTIONAL LAW 21–22 (Boston, Little Brown & Co. 1880). One subject traditionally reserved to the states was the protection of individual rights. *Id.*

57. See, e.g., *id.* at 18; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 480, 493 (1977).

58. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380–81 (1980).

59. See *supra* notes 8–12 and accompanying text.

60. Knapp, *supra* note 8, at 228; Thorpe, *supra* note 8, at 160–61; see, e.g., WASH. CONST. art. VIII (establishing parameters for public indebtedness); *id.*, art. II, § 24 (preventing legislature from authorizing lotteries and granting divorces); *id.*, art. XVI (controlling disposition of school and granted lands); *id.*, art. XII (controlling non-municipal corporations).

61. See, e.g., WASH. CONST. art. XII, §§ 14 (repealed 1977), 16, 22 (prohibiting formation of trusts and monopolies); *id.*, art. XII, § 6 (prohibiting issuance of watered stock); *id.*, art. II, § 33 (repealed 1965), (“The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state . . .”); *id.*, art. II, § 28 (prohibiting legislature from granting special privileges); *id.*, art. II, § 39, art. XII, § 20 (prohibiting government officials from accepting free transportation passes).

62. *Id.*, art. I, § 16 (“Private property shall not be taken for private use . . .”); *id.*, art. I, § 24 (prohibiting formation of private militias).

63. Knapp, *supra* note 8, at 230; Thorpe, *supra* note 8, at 161.

64. WASH CONST. art. III, § 1; see generally Thorpe, *supra* note 8, at 165. Traditionally, state constitutions allowed the executive branch to appoint all administrative officers. Professor Thorpe considered the change to an elective system to be indicative of a triumphant democracy.

rejecting various proposals for an appointed judiciary.⁶⁵ Additionally, the framers inserted democratic controls over the purse strings,⁶⁶ and expressed confidence in the people and in the principles of local self-government by instituting municipal home rule.⁶⁷ The initiative, referendum, and recall amendments to the state constitution⁶⁸ represent a further extension of the democratic principles adhered to by the framers. Since 1912, the people of Washington have held the power to pass laws, reject laws passed by the legislature, and remove elected officials on their own accord.

D. The Use of Section 32 in the Washington Judiciary

No judicial decisions have explored the relation of section 32 to the historical and legal events that shaped the state constitution. Nor has the judiciary commented on section 32's origins or its unique emphasis on individual rights. The use of section 32 by the Washington judiciary represents the efforts of a small number of litigators and judges.⁶⁹ It has been cited in twenty-five judicial opinions, only ten of which were majority opinions. Three broad themes emerge from the cases that cite section 32. First, section 32 has been used as a principle of interpretation. Second, individual judges, often in dissent, have invoked section 32 as a substantive basis for rights not specified in the constitution. Finally, section 32 has been cited in dicta and dissenting opinions as a justification for the rejection of the principle of stare decisis.⁷⁰

65. WASH. CONST. art. IV, § 3.

66. *Id.*, art. VIII, § 3 (amended 1965, 1971) (requiring that special elections be held before the state can incur indebtedness for one-time projects).

67. *Id.*, art. XI, § 10 (amended 1964) (the home rule provision allowed any city with a population of 20,000 or more to frame its own government, thus transferring to the people another power traditionally reserved to state legislatures); Michael M. K. Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 157-59 (1989).

68. WASH. CONST. amend. VII, amend. VIII.

69. Section 32 has appeared in the opinions of 16 separate judges and justices.

70. The use of section 32 in this manner is beyond the scope of the present article. For examples see: *Pennock v. Reeves*, 27 Wash. 2d 739, 747, 179 P.2d 961, 965 (1947) (Schwellenbach, J., concurring); *State ex rel. Kennedy v. Reeves*, 22 Wash. 2d 677, 679, 157 P.2d 721, 722 (1945); *State v. McCollum*, 17 Wash. 2d 85, 96, 136 P.2d 165, 170 (1943) (Millard, J., dissenting), *overruled by State v. Ringer*, 100 Wash. 2d 686, 674 P.2d 1240 (1983); *State v. Mark*, 36 Wash. App. 428, 436, 675 P.2d 1250, 1255 (1984) (Ringold, J.) (addendum opinion). Section 32 has also been used to justify the rejection of nineteenth century precedents as too outmoded to form an adequate basis for deciding twentieth century problems. *Foote v. Grant*, 55 Wash. 2d 797, 806-07, 350 P.2d 870, 876 (1960) (Foster, J., dissenting) (automobiles should not be governed by horse and buggy laws); *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 407, 348 P.2d 664, 665 (1960), *overruled by Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964).

Section 32 is most commonly used as an interpretive mechanism. Section 32, certain judges have argued, requires an historical analysis of a wide variety of sources to elucidate the purpose and intent behind various constitutional provisions.⁷¹ For example, judges have cited section 32 as a reason for analyzing the principles supporting the right to privacy,⁷² the right to free speech,⁷³ the right to an insanity defense,⁷⁴ and the restrictions on search and seizure under the Fourth Amendment to the Federal Constitution.⁷⁵

Beyond being an interpretive tool, section 32 is occasionally recognized as a substantive provision.⁷⁶ The substantive use highlights the extensive possibilities section 32 holds for expanding the scope of protection for individual rights. Two cases provide excellent examples of the substantive use of section 32. In *Southcenter Joint Venture v. National Democratic Policy Committee*,⁷⁷ the Washington Supreme Court resolved a conflict between the free speech rights of the

71. Senear v. Daily Journal-Am., 97 Wash. 2d 148, 152, 641 P.2d 1180, 1182 (1982) (recognizing principle that a case should be decided on "other than constitutional grounds" when possible); State *ex rel.* Toll Bridge v. Yelle, 61 Wash. 2d 28, 65, 377 P.2d 466, 488 (1962) (Donworth, J., dissenting) (applying art. 8, §3); Carpenter v. Moore, 51 Wash. 2d 795, 800-01, 322 P.2d 125, 128 (1958) (Finley, J., dissenting) (common law forms of action not a principle of Washington's jurisprudence); State v. Montgomery, 31 Wash. App. 745, 762, 644 P.2d 747, 757 (1982) (Andersen, C.J., dissenting) (attempting to define the parameters of a disturbance of the peace).

72. WASH. CONST. art. I, §7; State v. Curran, 116 Wash. 2d 174, 189, 804 P.2d 558, 566 (1991) (Utter, J., dissenting); Bremerton v. Smith, 31 Wash. 2d 788, 800, 199 P.2d 95, 101 (1948) (Simpson, J., dissenting); *McCollum*, 17 Wash. 2d at 96, 136 P.2d at 170 (Millard, J., dissenting).

73. State v. Reece, 110 Wash. 2d 766, 790, 757 P.2d 947, 960 (1988) (Utter, J., dissenting).

74. State v. Strasburg, 60 Wash. 106, 113, 110 P. 1020, 1021 (1910).

75. State v. Mark, 36 Wash. App. 428, 436, 675 P.2d 1250, 1255 (1984) (Ringold, J.) (addendum opinion); State v. Broadnax, 25 Wash. App. 704, 718, 612 P.2d 391, 399 (1980) (Ringold, J., dissenting), *rev'd on other grounds* 98 Wash. 2d 289, 654 P.2d 96 (1982).

76. Goodnoe Hills Sch. Dist. v. Forry, 52 Wash. 2d 868, 875, 329 P.2d 1083, 1086 (1958) (using section 32 in context of principles of local state government); State *ex rel.* Swan v. Jones, 47 Wash. 2d 718, 742, 289 P.2d 982, 996 (1955) (Donworth, J., dissenting) (using section 32 to establish separation of powers argument); State *ex rel.* McFerran v. Justice Court of Evangeline Starr, 32 Wash. 2d 544, 548, 202 P.2d 927, 929 (1949) (using section 32 to support the right to an impartial trial before justice of the peace); State *ex rel.* Robinson v. Fluent, 30 Wash. 2d 194, 240, 191 P.2d 241, 267 (1948) (Simpson, J., dissenting) (using section 32 to establish separation of powers argument); Wheeler Sch. Dist. v. Hawley, 18 Wash. 2d 37, 38, 137 P.2d 1010, 1015 (1943) (using section 32 in context of principles of local state government); State *ex rel.* Short v. Hinkle 116 Wash. 1, 12, 198 P. 535, 538 (1921) (Holcomb, J., dissenting) (using section 32 to argue in favor of judicial review and for recognition of separation of powers), *overruled by* State *ex rel.* Robinson v. Reeves, 17 Wash. 2d 210, 135 P.2d 75 (1943); State *ex rel.* Mullen v. Howell, 107 Wash. 167, 171, 181 P. 920, 922 (1919) (using section 32 to establish separation of powers argument); State v. Espinoza, 51 Wash. App. 719, 722, 754 P.2d 1287, 1288 (1988) (using section 32 to support the right to an impartial trial before court commissioner) (citing *McFerran*, 32 Wash. 2d 544, 202 P.2d 927) *rev'd, in part, en banc*, State v. Espinoza, 112 Wash. 2d 819, 774 P.2d 1177 (1989).

77. 113 Wash. 2d 413, 780 P.2d 1282 (1989).

National Democratic Policy Committee (NDPC) and the private property rights of the owners of Southcenter Mall. NDPC attempted to distribute literature and solicit contributions inside the Mall despite the Mall's policy against allowing groups to solicit contributions. The *Southcenter* majority rejected the free speech claims of the NDPC by applying the state action doctrine⁷⁸ to Washington's free speech clause.⁷⁹ The majority held that the Declaration of Rights applied only to actions against the state.⁸⁰

Justice Utter, concurring in result only, used section 32 to criticize the majority's application of the state action doctrine to the state constitution.⁸¹ Utter argued that section 32 was evidence of the framers' belief in natural law,⁸² a belief existing prior to the state and, therefore, "incongruous" with state action.⁸³ Utter's concurrence recognized that section 32 can be used as a substantive basis for the protection of individual rights. In this instance, section 32 expanded the scope of constitutional protections to cover infringements of individual rights by private actors.

Section 32 was also recognized as a substantive provision in *Dennis v. Moses* where the court related section 32 to natural law principles.⁸⁴ In *Dennis*, the supreme court assessed the constitutionality of a statute restricting a mortgagee's right of recovery to the value of the property mortgaged.⁸⁵ The court objected to the statute, in part because it discouraged loans to individuals with good credit but small amounts of property.⁸⁶ In order to overturn the statute, the court used section 32 to construct a constitutionally-based right of contract and private property.⁸⁷ The statute in question, the court concluded, was "void as being an undue restraint upon the liberty of the citizen affecting his property rights."⁸⁸ Property rights, aside from the eminent domain

78. Under the state action doctrine, individual rights are only protected from infringement by actions instigated by the state, not from the actions of private parties. See generally *The Civil Rights Cases*, 109 U.S. 3 (1883); Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 U. PUGET SOUND L. REV. 157, 159 (1985).

79. WASH. CONST. art. I, §5.

80. *Southcenter*, 113 Wash. 2d at 422-23, 780 P.2d at 1286-87.

81. *Id.* at 439-40, 780 P.2d at 1294-95.

82. *Id.*; see also *infra* part II.C (establishing relation between section 32 and natural law).

83. *Southcenter*, 113 Wash. 2d at 439-40, 780 P.2d at 1295.

84. *Dennis v. Moses*, 18 Wash. 537, 571, 52 P. 333, 339 (1898).

85. *Id.* at 568, 52 P. at 338.

86. *Id.* at 569, 52 P. at 338.

87. *Id.* at 571-77, 52 P. at 339-41.

88. *Id.* at 577, 52 P. at 341.

provision,⁸⁹ and contract rights are not enumerated in the text of the constitution. The court in *Dennis*, however, incorporated these natural law principles through the fundamental principles of section 32.

II. THE FUNDAMENTAL PRINCIPLES OF SECTION 32

Despite the possibilities section 32 offers for the protection of individual rights, as suggested in *Southcenter* and *Dennis*, Washington jurisprudence has yet to witness the development of a consistent approach to section 32. By its own dictates, section 32 will provide effective protection to individual rights and free government only if practitioners and judges can provide substance to the phrase “fundamental principles.” The framers expressed fundamental principles both in the enumerated principles of the Declaration of Rights and through the general structure of the constitution. The following analysis focuses on four principles: liberty, democracy, natural law, and federalism. This section explains how these principles are incorporated into the constitution and how, in conjunction with section 32, they can contribute to the protection and enhancement of individual rights and free government.

A. *Fundamental Principle: Liberty*

The Washington State government was founded with the express purpose of protecting and maintaining individual rights.⁹⁰ The origins and unique language of section 32 emphasizes the framers’ commitment to the liberty interests of individuals.⁹¹ In order to enhance and expand individual liberty the framers included in the constitution the necessary mechanisms for protecting individual rights from both governmental infringements and from the threats posed by private institutional power.⁹²

In 1889, threats to individual rights and free government came from both corporate and governmental powers.⁹³ In attempting to respond to the threat posed by corporate power the framers placed themselves in a difficult position. Their constituents demanded that individual rights not be sacrificed in favor of corporations or private speculators.⁹⁴ The framers, however, had to meet these demands without

89. WASH. CONST. art. I, §16.

90. *Id.*, art. I, §1.

91. See *supra* part I.C.1

92. See *infra* text accompanying notes 96–115

93. See *supra* part I.A.

94. Fitts, *supra* note 9, at 9 (citing PORTLAND MORNING OREGONIAN, May 8, 1889).

simultaneously driving necessary corporate capital out of the state.⁹⁵ The framers responded to the conflicting pressures by building two levels of protection into the constitution. First, they placed a limited number of specific constitutional restrictions on corporations.⁹⁶ Second, the delegates framed a Declaration of Rights that protected individual rights from corporate as well as governmental actions.⁹⁷

The specific restrictions on corporations primarily responded to known corporate abuses.⁹⁸ The mining disturbances in Eastern Washington generated a direct prohibition on the formation of private militias.⁹⁹ The eminent domain section¹⁰⁰ restricted the power of land hungry railroads.¹⁰¹ Finally, the constitution prohibited the corruptive influence of railroads on the legislative branch¹⁰² by prohibiting the legislature from granting special privileges or immunities to corporations¹⁰³ and from accepting free transportation passes.¹⁰⁴ Because the framers recognized the need to encourage corporate growth, however, these provisions were consciously limited in their scope.¹⁰⁵

The framers responded to this limitation by creating a Declaration of Rights that protected individual rights from corporate power. Both the specific restrictions placed on corporations and the language used in the Declaration of Rights suggests that the framers believed that individual rights should be secured from corporate power. The thirty-two sections of the Declaration of Rights are primarily expressed as positive declarations of individual rights.¹⁰⁶

Among the individual rights arguably secured from private as well as governmental infringements is the right of free speech. The original

95. JOURNAL, *supra* note 25, at 733-34; Knapp, *supra* note 8, at 240; *see also* Fitts, *supra* note 9, at 106-16.

96. *See infra* text accompanying notes 98-105.

97. *See infra* text accompanying notes 106-15.

98. These restrictions protected individual rights but did not place too heavy of a burden on corporations.

99. WASH. CONST. art. I, §24; *see supra* notes 26-27.

100. WASH. CONST. art. I, §16.

101. *See supra* note 24.

102. *See* Knapp, *supra* note 8, at 239.

103. WASH. CONST. art. I, §12.

104. *Id.*, art. II, §39.

105. The end result of the corporations article was best summed up in an article in the Spokane Falls *Northwest Tribune*: "The feeling toward regulating corporations is changing and from the talks in the lobbies and around the hotels it is evident that while the rights of the people will be strongly protected, nothing that will keep capital out of the state will be enacted." Fitts, *supra* note 9, at 98 (quoting NORTHWEST TRIBUNE (Spokane Falls), Aug. 2, 1889); *see also* Knapp, *supra* note 8, at 239-40.

106. Only three rights enumerated in the Declaration of Rights were expressed solely as limitations on the power of government. *See* WASH. CONST. art. I, §§8, 12, 23.

draft of Washington's free speech provision read "that *no law* shall be passed restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject."¹⁰⁷ This version of the right to free speech, similar to the First Amendment to the United States Constitution, would have prohibited only governmental infringements. The framers ultimately chose not to establish such a narrowly defined right, however, as this language was deleted from the final version.¹⁰⁸ Instead, the framers adopted a broadly phrased provision, that, by not limiting itself to governmental infringements, also protected free speech from infringements by corporate power.¹⁰⁹

Washington's Declaration of Rights also contains a broadly phrased right to privacy.¹¹⁰ The right to privacy forbids an invasion of privacy without "authority of law."¹¹¹ This broad phrasing prohibits invasions of privacy by those not exercising a valid police power of the state. Corporations, unless specifically granted such powers by the state, do not exercise police power and thus are prohibited from invading individual privacy.

Similarly, the declaration that the right to petition and assemble "shall never be abridged" does not take aim solely at the government.¹¹² This provision, similar to section 24,¹¹³ was arguably a reaction to the use of armed guards to break mining strikes in Eastern Washington.¹¹⁴ In 1889, corporations were as capable of infringing the right to assemble as was government.¹¹⁵ Thus, the framers evidently believed that individual rights were to be protected from institutional power, whether governmental or private.

The principle that individual rights are to be protected from corporate power directly conflicts with the application of the state action doctrine to the state Declaration of Rights. Under the state action doctrine, individual rights are only protected from infringements by actions instigated by the state, not from the actions of private par-

107. Utter, *supra* note 78, at 172 (citing TACOMA DAILY LEDGER, July 13, 1889) (emphasis added).

108. WASH. CONST. art. I, § 5 ("Freedom of Speech: Every Person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.").

109. Utter, *supra* note 78, at 178-79.

110. WASH. CONST. art. I, § 7.

111. *Id.*

112. *Id.*, art. I, § 4.

113. *Id.*, art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.").

114. See *supra* notes 26-27.

115. See *supra* notes 26-27.

ties.¹¹⁶ The framers, however, by adopting section 32, incorporated the fundamental principle that the Declaration of Rights prohibits infringements by private as well as state actors, thereby denying the applicability of the state action doctrine to the Declaration of Rights. Justice Utter cited section 32, as evidence of the framer's belief in natural law, to reach a similar conclusion in his concurring opinion in *Southcenter Joint Venture v. National Democratic Policy Committee*.¹¹⁷ Thus, by incorporating section 32 into state constitutional jurisprudence, practitioners can expand the scope of personal liberty to include protection from infringements by private as well as state actors.

B. Fundamental Principle: Democracy

Democratic principles permeate the Washington State Constitution.¹¹⁸ The convention halls echoed with the voices of delegates who were willing "to trust the people but not the Legislature."¹¹⁹ Washington citizens' experiences with governmental corruption¹²⁰ moved them to create a government that incorporated democratic checks into the traditional tripartite system of checks and balances.¹²¹

The democratic checks responded to the prevailing distrust of government by placing limitations on all three branches.¹²² The constitution manifested a distrust of the legislature and pessimism regarding legislative frugality by requiring special elections before the state could take on indebtedness.¹²³ Territorial dissatisfaction with the appointed judiciary¹²⁴ resulted in a popularly elected judiciary. The elective judiciary also reflected the belief that the state courts should be held accountable to more than the judges' consciences.¹²⁵ Finally, the framers gave to the people the power to elect various state officials, who had traditionally been appointed by the executive.¹²⁶ Thus, the balancing of governmental powers in Washington requires a consideration of democratic principles as the democratic checks alter the tradi-

116. See *supra* note 78.

117. 113 Wash. 2d 413, 439-40, 780 P.2d 1282, 1295 (1989) (Utter, J., concurring); see also *supra* text accompanying notes 77-83.

118. See *supra* part I.C.3.

119. JOURNAL, *supra* note 25, at 673.

120. See *supra* part I.A.

121. See *supra* part I.C.3.

122. See *supra* part I.C.3.

123. WASH. CONST. art. VIII, § 3 (amended 1965, 1971).

124. See *supra* note 14 and accompanying text.

125. See WASH. CONST. art. IV, § 3.

126. *Id.*, art. III, § 1.

tional powers of the executive, legislative, and judicial branches. In essence, the framers created a government based on four, not three, branches of government.¹²⁷

The recognition of a democratic branch in Washington's government, through section 32's linkage of fundamental principles with free government, also fills the gap created by the absence of a separation of powers article.¹²⁸ Two of the primary sources used by the delegates to draft the 1889 constitution—Washington's 1878 Constitution and W. Lair Hill's proposed constitution—contained separation of powers articles.¹²⁹ The framers' inclusion of democratic checks, however, altered the functions of the executive, legislative, and judicial branches¹³⁰ and rendered the traditional separation of powers an incomplete description of Washington's idea of free government. The government created by the Washington Constitution requires practitioners and judges to balance and separate the powers of four, not three, branches. The incorporation of these democratic principles, pursuant to section 32, appears to be essential to the perpetuity of free government in Washington. In effect, section 32 provides a substantive basis for each individuals' right to participate in government.

The initiative, referendum, and recall amendments emphasize the necessity of recognizing the people as a fourth branch of government. Section 32 was used to recognize the powers of the fourth branch in a 1919 state supreme court decision, *State ex rel. Mullen v. Howell*.¹³¹ The issue in *Mullen* was whether a referendum would be permitted to challenge the state legislature's ratification of the prohibition amendment to the Federal Constitution.¹³² Although the court did not cast

127. The characterization of democratic checks as creating a fourth branch is not meant to suggest that the framers of the Washington Constitution rejected centuries of political theory by crafting a completely new philosophy of government. The characterization merely recognizes that the framers gave the people, in their democratic capacity, a substantial role in the structure of Washington's government.

128. Similar to Washington's constitution, the Federal Constitution does not contain a separation of powers article. The federal judiciary, however, has implied its existence. In contrast, most state constitutions, including those drawn on by the framers of the Washington Constitution do include specific separation of powers clauses.

129. Hill, *supra* note 38, art. III at 30; WASHINGTON'S FIRST CONSTITUTION, 1878, AND PROCEEDINGS OF THE CONVENTION art. III, at 64 (Edmond S. Meaney & John T. Condon eds., 1919) (reprinted from 1918–19 WASH. HIST. Q.) [hereinafter 1878 CONSTITUTION]. The 1878 Constitution represents Washington's first attempt at framing a constitution. The 1878 Constitution was adopted in a general election but statehood was not granted and the 1878 Constitution never took effect. The document was heavily drawn on by the Delegates in 1889. Beardsley, *supra* note 38, at iv.

130. See *supra* text accompanying notes 122–27.

131. *State ex rel. Mullen v. Howell*, 107 Wash. 167, 171, 181 P. 920, 922 (1919).

132. U.S. CONST. amend. XVIII (repealed 1933).

the issue in terms of a conflict between the democratic branch and the legislative branch, that was precisely the issue. The fourth branch, through the referendum, was challenging a legislative act. The court resolved the issue in favor of the democratic branch. Citing section 32, the court reasoned that the peoples' purpose in amending the constitution with the referendum power was to make the legislature more responsive to the "popular will."¹³³ In essence, the court recognized that the referendum was a valid exercise of power by the democratic fourth branch.

C. *Fundamental Principle: Natural Law*

Section 32, in addition to broadening the enumerated rights of the constitution as reflected in the preceding two sections, also incorporates natural rights into the state constitution as an additional level of security for individual rights. The framers chose not to include language that limited section 32 to fundamental principles of the constitution, as did many of section 32's predecessors.¹³⁴ In addition, the idea of the unwritten constitution,¹³⁵ together with section 32's unique combination of fundamental principles with individual rights,¹³⁶ suggests that the framers viewed natural rights as another tool for protecting individual rights.

References to natural rights were a traditional component of declarations of rights in state constitutions,¹³⁷ yet the framers of Washington's constitution specifically omitted natural rights language. Both W. Lair Hills' draft and Washington's 1878 Constitution included natural rights in their Declarations of Rights.¹³⁸ Additionally, the first draft of Washington's Declaration of Rights proclaimed: "All men are possessed of equal and unalienable natural rights, among which are life, liberty and the pursuit of happiness."¹³⁹ Neither the journals, nor the newspapers, explain why the language was eventually omitted.

The historical and legal context which shaped Washington's constitution suggests one explanation for the absence of natural rights language. The framers were distrustful of corporate and governmental power.¹⁴⁰ The framers responded to the distrust with democratic

133. *Mullen*, 107 Wash. at 172, 181 P. at 922.

134. See *supra* text accompanying notes 50-55.

135. See *supra* text accompanying notes 33-35.

136. See *supra* text accompanying note 55.

137. See WRIGHT, *supra* note 43, at 183-85.

138. Hill, *supra* note 38, at 12 (art. I); 1878 CONSTITUTION, *supra* note 129, at 66 (art. V).

139. JOURNAL, *supra* note 25, at 51.

140. See *supra* part I.A.

checks on government,¹⁴¹ and by protecting individual rights from corporations.¹⁴² By 1889, however, natural rights had largely become a tool of the courts often associated with the protection of corporations from progressive social legislation.¹⁴³ Given the framers' distrust of corporations, it is possible that they feared natural rights language would be used in this manner and consequently chose to omit the potentially troublesome language of natural rights.

The use of natural rights to protect corporations from social legislation was inconsistent with many of the framers' actions. For example, the framers gave express constitutional sanction to the legislature to enact health and safety laws for industrial workers.¹⁴⁴ This provision permitted legislation similar to the type being overturned by state courts on a natural rights basis as violating the right of contract between employee and employer.¹⁴⁵ Additionally, Washington prohibited land ownership by aliens,¹⁴⁶ arguably a violation of the right of private property being protected by courts across the country.¹⁴⁷ The constitution also required the enactment of laws regulating transportation rates,¹⁴⁸ a provision affecting the liberty of contract and in violation of the laissez-faire economic policy fueling court activism.¹⁴⁹

Although the framers dispensed with the language of natural rights, the language they chose for section 32 suggests that they retained the notion that natural rights should be considered when protecting individual rights. Section 32 designates extra-constitutional fundamental principles as essential to the security of individual rights.¹⁵⁰ This unique choice of language linked natural rights, in the form of fundamental principles beyond the constitution, with individual rights. In effect, by tying fundamental principles together with individual rights section 32 limits the use of natural rights to the protection of individual rights.

141. *See supra* part II.B.

142. *See supra* part II.A.

143. *See supra* text accompanying notes 38–46.

144. WASH. CONST. art. II, §35.

145. Haines, *supra* note 37, at 645–46.

146. WASH. CONST. art. II, §33. This provision was inserted in response to the fears of many delegates that foreign corporations already owned too much American land and that the land should be protected for American citizens. JOURNAL, *supra* note 25, at 549–51.

147. Haines, *supra* note 37, at 645–46.

148. WASH. CONST. art. XII, §18.

149. *See supra* text accompanying notes 38–45.

150. *See supra* text accompanying notes 50–55.

Section 32's link of natural rights with individual rights influenced the court's analysis in *Dennis v. Moses*.¹⁵¹ The court rationalized overturning a statute restricting the recovery rights of creditors by focusing on the statute's effects on the individual rights of debtors, not in terms of its effects on creditors.¹⁵² Ironically, by overturning the statute, individual debtors were deprived of the protection afforded by the statute. A debtor faced with losing far more than his farm to the "money kings of the east,"¹⁵³ probably did not consider the decision in *Dennis* to be consistent with the protections of individual rights promised by section 32.

The court's reasoning, however, was faithful to the framers' intentions. The court did not focus on the protection that the statute provided to debtors; rather the court used section 32 to protect the individual rights of small landowners and merchants to obtain loans greater than the value of their property.¹⁵⁴ The court, by focusing its attention on the infringement of individual rights, was able to base its decision, through section 32, on the natural rights of contract and private property.¹⁵⁵ Thus, as *Dennis* suggests, section 32 offers practitioners the ability to expand individual rights in Washington through its incorporation of a substantive body of natural rights.

D. *Fundamental Principle: Federalism*

The three principles discussed above highlight the fundamental principle at the heart of section 32; the state constitution, not the Federal Constitution, is the primary safeguard for Washington citizens' individual rights. The framers' adoption of a Declaration of Rights suggests that they considered the state constitution to be the primary safeguard for individual rights. Indeed, the framers believed the Declaration of Rights was necessary for two primary reasons. First, under the general principles of federalism, the framers understood that the Federal Bill of Rights would not protect the citizens of Washington from the threats posed by state government or corporate power.¹⁵⁶ Second, the Federal Bill of Rights did not contain the broad protections that Washington citizens believed the times warranted.¹⁵⁷ The

151. *Dennis v. Moses*, 18 Wash. 537, 571, 52 P. 333, 339 (1898); see *supra* text accompanying notes 84-89.

152. *Dennis*, 18 Wash at 569, 574, 52 P. at 338, 340.

153. See *supra* note 20 and accompanying text.

154. *Dennis*, 18 Wash. at 569, 574, 52 P. at 338, 340.

155. *Id.* at 571-74, 52 P. at 339-40.

156. See *supra* text accompanying notes 56-58.

157. See *infra* text accompanying notes 159-61.

broadly phrased protections of the Declaration of Rights represented an effort to combat governmental and private institutional power with tools not present in the Federal Constitution.¹⁵⁸ One of the tools, section 32, expanded the protections to individual rights by requiring consideration of the three fundamental principles previously analyzed.

The democratic branch of government, for example, provides an additional level of protection for individual rights by further checking the excesses and abuses of the three traditional branches of government, legislative, executive, and judicial.¹⁵⁹ The democratic branch, however, is recognized only in the state constitution, not the Federal Constitution. In response to the distrust of corporate power, the framers adopted a Declaration of Rights that applies to private actors as well as state action.¹⁶⁰ This broad protection is available only under the state constitution. Finally, not content with the broad protections specifically enumerated in the constitution, the framers adopted section 32 and effectively incorporated natural rights as an ally in the ongoing fight to secure individual rights.¹⁶¹ Broadening the base of individual rights through section 32 by including natural rights further distinguishes the state constitution from the Federal Constitution.

The additional protection that section 32 offers for individual rights and free government demonstrates the value and the need for interpreting the state constitution independently of the Federal Constitution.¹⁶² The fundamental principles that the framers believed would secure individual rights and perpetuate free government are expressed in the history and in the pages of the state constitution. The absence of a state action requirement, the integral role of natural rights, and the democratic branch of government all distinguish Washington's constitution from the Federal Constitution. While the Federal Constitution will undoubtedly still play a role in determining the extent of civil liberties in Washington, the scope of that role can be determined only after returning to the fundamental principles reflected in the state constitution.

158. See *supra* parts II.A–C.

159. See *supra* part II.B.

160. See *supra* part II.A.

161. See *supra* part II.C.

162. The Washington Supreme Court has recognized the validity of independent state constitutional analysis. See *State v. Gunwall*, 106 Wash. 2d 54, 720 P.2d 808 (1986); James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099 (1991).

III. CONCLUSION

Section 32 requires a frequent recurrence to fundamental principles for the security of individual rights and the perpetuity of free government. These principles, deeply rooted in the history and values of Washington State, provide substantive rights for the state's citizens. If practitioners incorporate section 32 into Washington's constitutional jurisprudence, the end result will be a legal system that is more responsive to the individual rights of the citizens of Washington State. If section 32 is neglected, individual rights will continue to receive less protection than the state constitution is capable of providing.