COMMENTARY

Reliance on State Constitutions—Away From a Reactionary Approach†

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Introduction

There is a popular misconception that a case of *constitutional* dimension is not final until passed upon by the United States Supreme Court.[1] It is also commonly thought that in order for a doctrine of constitutional law to prevail, it must at least be recognized somewhere on the pages of the *United States Reports*. It should come as no surprise, therefore, that it took a federal judge[2] to remind the states of what they once knew all too well; namely, that the state charters have an important role to play in the constitutional process of American government.[3] In the four years since Justice William Brennan's article was published, appellate courts in over fifteen states have cited it, and

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† This commentary is respectfully dedicated to the memory of Kantilal Tuljashanker Shukla (1922-81), who for over two decades made life possible and asked for very little along the way. *See* M.K. GANDHI, DISCOURSES ON THE GITA 18-19 (1960).

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1. *But see* Scripto, Inc. v. Carson, 362 U.S. 207 (1960); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875). *See also* Herb v. Pitcairn, 324 U.S. 117 (1945).

2. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For an earlier statement to the same effect, see Brennan, *Address to the New Jersey Bar*, 33 GUILD PRAC. 152 (1976).

3. For the purposes of this commentary, only civil rights and civil liberties issues relating to state constitutions are considered. More specifically, the discussion that follows concerns questions pertaining to states' bills of rights. An equally and perhaps more important side of state constitutional law concerns the structure of state government, home rule, taxing and spending limitations, and so forth. Attention to these topics has also long been neglected, thus preventing any real and broad reform movements at the state and local levels of government. For a single illustration of the importance of these issues, consider the relatively recent debate in Oregon concerning "home rule." *See, e.g.*, City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 576 P.2d 1204 (1978), *reaff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978).

scores of law review authors representing no fewer than twenty-eight states have followed suit.[4] With increasing regularity, state appellate court decisions are drawing upon his article, perhaps because of some felt need to "legitimize" independent resort to state constitutions.

This rediscovery of state constitutions is certainly a good omen for a nation conceived in federalism—particularly so since, as Justice Brennan has also observed, "it is the state courts at all levels, not the federal courts, that finally determine the overwhelming number of the vital issues of life, liberty and property that trouble countless human beings of this Nation every year."[5] This new interest in state constitutions was not spawned, however, by any enthusiasm in the system of government ordained under the state charter. Rather, state law too often drew attention simply because it could be used as a utilitarian device for perpetuating the constitutional expansionism wrought by the Warren Court.[6] Unfortunately, too many courts and commentators have brushed aside many of the core considerations that underlie constitutionalism at the state level—this in their scurry to foil philosophically unaccommodating federal precedents.

The primary offenders here are those who view the state charter solely in instrumentalist terms related to some particular social goal. For them, the state bill of rights is little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions. State supreme courts ranging from Massachusetts to California, in cases varying from capital punishment[7] to land use,[8] have sometimes employed their state

4. *See* SHEPARD'S LAW REVIEW CITATIONS (1979 & Mar. 1981 Supp); note 9 *infra*.

5. Brennan, *Introduction: Chief Justice Hughes and Justice Mountain*, 10 SETON HALL L. REV. xii (1979). Consider also the following statement: "The spotlight is often focused upon the decisions of the United States Supreme Court. *Too often, I think, that focus tends to divert attention from the vital role of the state courts in the administration of justice.* Actually the composite work of the courts of the 50 states has greater significance in measuring how well America attains the ideal of equal justice under law for all. It is important to stress that the Supreme Court of the United States has power to review only those decisions of state courts that rest on federal law. I suppose the state courts of all levels must annually hand down literally millions of decisions that do not rest on federal law, yet determine vital issues of life, liberty, and property of countless human beings of the nation. Indeed, the number of state court decisions resting on federal law that have been granted review by the United States Supreme Court has never reached 100 during any of my 18 terms. *The overwhelming number of final and vital decisions upon which depend life, liberty, and property thus are decisions of the state courts.*" Brennan, *Justice Nathan L. Jacobs—Tributes From His Colleagues*, 28 RUTGERS L. REV. 209, 210 (1974) (emphasis added).

6. *See, e.g.*, Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 766 (1972).

7. *See, e.g.*, District Attorney v. Watson, 80 Mass. 2231, 411 N.E.2d 1274 (1980).

8. *See, e.g.*, Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) (holding city zoning

constitutions in a selective and simply reactionary manner in order to obtain a desired objective. The legal literature is increasingly inundated with writings urging the bar to make similar use of state charters.[9]

The idea that state charters should be employed on a principled or doctrinal basis is, for the most part, foreign to many courts and commentators presently advocating "independent" reliance on state constitutions. Most recently, the editors of the *Yale Law Journal* have seen fit to publish an essay essentially applauding this reactionary "tradition." In this commentary, I have taken the liberty of scrutinizing certain arguments contained in that essay because they represent, in large measure, much of the "thinking" currently fashionable in far too many legal circles. This commentary hopes to alert those concerned with state constitutionalism to several of the theoretical and practical reasons for moving away from a reactionary or instrumentalist approach for reliance on state constitutions.

I. Federal Law: The Motivating Factor for Reliance on State Law

Mr. Steven Kamp, in his essay entitled *Private Abridgment of Speech and State Constitutions*,[10] calls attention to the importance and indispensable character of state constitutions as founts of individual rights, particularly in the context of freedom of expression. Some three decades ago, now Dean Monrad Paulsen, addressing the same general topic, voiced a similar concern: "State constitutions furnish extensive

ordinance which had the effect of including substantial part of plaintiffs' land in a conservation district violative of "taking" provision of state constitution); Life of the Land v. Land Use Comm'n, 623 P.2d 431 (Hawaii 1981); Robinson Township v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1980) (*per se* exclusion of mobile homes held to lack "reasonable basis"). Not all of these decisions can be labeled "reactionary."

9. For a sampling of these writings, see Note, *Commonwealth v. Richman: A State's Extension of Procedural Rights Beyond Supreme Court Requirements*, 13 DUQ. L. REV. 577 (1975); Note, *Of Laboratories and Liberties: State Court Protection and Civil Rights*, 10 GA. L. REV. 533 (1976); Note, Robins v. Pruneyard Shopping Center: *Federalism and State Protection of Free Speech*, 10 GOLDEN GATE U. L. REV. 805 (1980); Comment, Pruneyard Shopping Center v. Robins, 9 HOFSTRA L. REV. 289 (1980); Note, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596 (1979); Comment, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals*, 9 SW.U.L. REV. 1157 (1977); Note, *Expanding Criminal Procedure Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909 (1976); Comment, *Freedom of Expression: State Constitution Broadens Rights on Privately Owned Property Beyond Boundaries of Federal Constitution*, 20 WASHBURN L.J. 453 (1981). A more recent expression of this view appears in Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413 (1981).

10. 90 YALE L.J. 165 (1980) [hereinafter cited as Kamp].

and sometimes unequal material which can help in the protection of human liberties . . . ."[11] Today, no less than in 1951, there remains a need to understand the significance and role of the independent nature of state constitutional decision making.

My quarrel with Mr. Kamp's essay is not with the desirability of independent reliance on state charters. There is more at issue here—that is, Mr. Kamp's apparent motivation for this reliance is, as it stands, somewhat suspect. Specifically, he exhorts independent interpretation of state constitutional guarantees protecting "public forum and canvassing rights from private abridgment"[12] because of his displeasure with the fact that the "Supreme Court has held that the First Amendment has no role to play in this area."[13] Accordingly, Mr. Kamp advocates employment of state constitutional guarantees *primarily* as a reactionary device to avoid, and thereby insulate state court decisions from, the mandate of "unpopular" Supreme Court decisions. Phrased another way, he is probing for "alternative method[s]"[14] in order to secure an objective not presently available as a matter of federal constitutional law.[15] It is *this* quest that leads him to suggest "independent" reliance on state constitutions.

But let us assume, if only for the sake of discussion, that tomorrow the spirit should move the justices to resurrect the reasoning employed in Justice Marshall's majority opinion in *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[16] Let us further assume that such a decision

11. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951). This article is far too often overlooked, especially in contemporary writings discussing the "new trend" in employing state constitutions. *See, e.g.*, Kamp, *supra* note 10, at 178 n.64. Another valuable but forgotten article discussing the importance of state constitutional guarantees, including their respective freedom of expression provisions, is that of Professor Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969). For a worthwhile discussion of state constitutional guarantees relating to freedom of speech, see Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318 (1968), *cited in* Kamp, *supra* note 10, at 178 n.64.

12. Kamp, *supra* note 10, at 165.

13. *Id.* at 172.

14. *Id. Compare* Kamp, *supra* note 10, at 172 *with* note 38 *infra*.

15. It is precisely this reactionary approach to state constitutional decision making that thwarts the formation of any truly independent doctrinal developments at the state level. There may, however, be instances where, conceivably, a state court ought to be able to *apply federal* law in order to obtain a result different from that arrived at by a reviewing federal court. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 479-89 (1981) (Stevens, J., dissenting). Justice Mosk of the California Supreme Court has most recently commented: "I don't think the purpose [for invoking the state constitution] is necessarily to just disagree with the United States Supreme Court. I don't think that is a valid justification." Collins & Welsh, *An Interview with Stanley Mosk*, W.L.J., Mar./Apr. 1981, at 8, col. 3. *But see* note 24 *infra*.

16. 391 U.S. 308 (1968) (state trespass law could not be invoked to ban peaceful union

had all the earmarks of an opinion destined to sustain the test of time, and that all indications were that the Court would generously interpret this precedent. Would reliance on the independent guarantees of the various state constitutions then be of any less consequence? If the desired objective may be secured at the federal level, then why resort to state law? Unfortunately, Mr. Kamp leaves these questions essentially unanswered.

Mr. Kamp makes only the naked assertion that "principles of federalism"[17] "dictate that the states enter and protect persons against private abridgment."[18] There is certainly something to be said for such an argument; however, Mr. Kamp does not set out exactly what that "something" is. This omission cannot remain, I submit, without undermining the very foundations of an independent state constitutional jurisprudence. Upon examination, the federalism doctrine reveals considerations of a different order and well beyond any reactionary model of "independent" interpretation. When measured against these and other considerations, Mr. Kamp's variation of independent interpretation clearly misses the mark.

II. Federalism: Three Reasons for Rejecting a Reactionary Approach

For the limited purposes of this commentary, federalism considerations may be described generally by reference to at least three rudimentary accounts. First, as seen from the state perspective, federalism entails the notion that proper respect be accorded to state institutions performing those separate functions associated with the concept of sovereignty.[19] The state charter represents something of a manifesto of that sovereignty. This understanding of federalism clashes with Mr. Kamp's unstated, but implicit, premise that the state constitution takes on meaning only when employed to *respond* to certain interpretations of the Federal Constitution. It is incongruous to speak of "independent" state constitutional protections when the latter depend for their existence on what formulae are advanced by the federal judiciary. Stated otherwise, it is impossible for the corpus of law announced under the state constitution ever to be truly independent and consistent if resort to it is basically haphazard or assessed in instrumentalist

picketing of a shopping center supermarket in its adjacent parking lot). *Logan Valley* was expressly overruled in Hudgens v. NLRB, 424 U.S. 507, 518 (1976).

17. Kamp, *supra* note 10, at 182.

18. *Id.* at 177.

19. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

terms.[20] If one were to turn simply to those decisions clearly grounded in the state constitution—altogether ignoring parallel federal constitutional precedents—what body of decisional law would there be that interpreted state provisions? Although reactionary or selective approaches to state constitutional decision making may secure a particular desired result or may be tactically wise,[21] these approaches do little, if anything, to advance one concern of federalism—giving proper respect to state institutions performing what are clearly separate and sovereign state functions.[22]

Mr. Kamp's instrumentalist model is also difficult to reconcile with that account of federalism which addresses the issue of whether or not a state can deny a federally protected right without first determining if under state law, including the state constitution, that right is secured. Eleven years ago, one commentator explained this argument as follows:

> The federal source of all "due process" and "equal protection" attacks on state regulation is the fourteenth amendment's command that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Whether this command has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.[23]

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20. *See* Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, 8 PUBLIUS 55 (1978).

21. *See* Linde, *First Things First: Rediscovering The States' Bills of Rights*, 9 U. BALT. L. REV. 379, 387-88 (1980) [hereinafter cited as *First Things First*]; Collins & Welsh, *California Constitution Turns Into a Political Toy*, L.A. Times, July 17, 1980, pt. II, at 7, col. 1; Collins & Welsh, *Picking and Choosing a Constitution*, W.L.J., Mar./Apr. 1980, at 13, col. 1. *See generally* notes 40 & 47 *infra*.

22. That is, "if a state court undertakes to evolve an independent jurisprudence under the state constitution, it must give as much attention and respect to the different constitutional sources, and to striving for some continuity and consistency in their use, as we ask of the United States Supreme Court justices . . . . *This will not be accomplished by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result . . . .*" Linde, *Without "Due Process": Unconstitutional Law In Oregon*, 49 OR. L. REV. 125, 146 (1970) (emphasis added).

23. *Id.* at 133. Continuing, Linde further explained: "The point is obvious when a conclusion such as 'Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of Oregon constitution article I' is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the

This account of federalism recognizes something of a jurisdictional barrier which requires state courts to examine first state law and then, if constitutionally necessary, proceed to Fourteenth Amendment considerations.[24]

The third account pertains to what Justice Stanley Mosk of the California Supreme Court labels as "the ability of the states to innovate and to create new bodies of law, and to experiment."[25] This argument recognizes the importance of experimentation at the state level in order to best obtain the particular objectives outlined in the state charter, or in order to rely upon a preferred jurisprudence for applying the law of the state. In interpreting their own charters, state courts need not only *apply* differently those federal standards incorporated into their constitutions, but more importantly, may announce their own *original* stan-

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state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it." *Id.* Similar statements may be found in *First Things First*, *supra* note 21, at 383-84; Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 250 (1972); Kipling, *A Talk With Justice Linde*, W.L.J., Mar./Apr. 1980, at 1, col. 1; Linde, Book Review, 52 OR. L. REV. 325, 339 (1973). *See also* Oregon v. Hass, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting) ("[U]nless it is quite clear that the state court has resolved all applicable state-law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand," the Supreme Court should decline to reverse the state court's ruling in favor of the rights claimant). *Compare* Linde, *supra*, *with* Bice, *supra* note 6, at 753-54: "[S]tate court refusals to reach federal issues, either at trial or on appeal, are the most likely manifestation of discriminatory purpose . . . ." and *with* Kelman, *supra* note 9, at 428-31 (premising his arguments on a "broader rights" view of state constitutions).

24. This is a well-settled rule of law in Oregon. *See*, *e.g.*, State v. Clark, 291 Or. 201, 630 P.2d 810 (1981); Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981); State v. Scharf, 288 Or. 451, 454-55, 605 P.2d 690, 691 (1980); State v. Spada, 286 Or. 305, 309, 594 P.2d 815, 817 (1979); State v. Smyth, 286 Or. 293, 297, 593 P.2d 1166, 1168 (1979). At least a handful of state supreme courts, however, have overlooked this argument and have employed a different approach. *See*, *e.g.*, State v. Simpson, 95 Wash. 2d 170, 192, 622 P.2d 1199, 1212-13 (1980) (Utter, C.J., concurring); Williams v. Zobel, 619 P.2d 448, 454 (Alaska 1980) *argued*, 50 U.S.L.W. 3272 (U.S. Oct. 7, 1981); People v. Holcomb, 395 Mich. 326, 330 n.2, 235 N.W.2d 343, 344 n.2 (1975). *See also* Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U.L. REV. 887, 889 (1980) (Justice Wilkins of the Supreme Judicial Court of Massachusetts discussing instances in which it is "superfluous to determine state constitutional principles"); Collins & Welsh, *supra* note 15. "[T]o a certain extent we have to see what the minimum is first, and then we look to our state constitution and our state statutes to see if greater protection is provided under state law, in which case we give the greater protection." *Id.* at 8, cols. 3-4. *But cf.* People v. Pettingill, 21 Cal. 3d 231, 248, 578 P.2d 108, 118, 145 Cal. Rptr. 861, 871 (1978) (per Mosk, J.)(" '[O]ur first referent is to California law' ").

25. Collins & Welsh, Portions of Unpublished Interview with Justice Stanley Mosk (San Francisco, Calif., Jan. 24, 1981). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1136-39 (1978).

dards.[26] Thus, state courts whose constitutions so permit have the opportunity to consider anew a jurisprudence of freedom of speech,[27] or they may want to think through the wisdom of employing the "rationality" analysis presently in vogue in the federal courts.[28] In the criminal procedure context, state judges, by relying on their state constitutions, could reformulate the law of confessions or rearticulate the constitutional premises underlying the exclusionary rule.[29] The possibilities are almost endless. State courts and commentators, however, with their eyes set on the workings of the Supreme Court,[30] have nevertheless made little progress toward this end.

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26. Justice Charles Douglas of the New Hampshire Supreme Court has spoken to this general point: "State judges turn out decisions that increasingly mirror the federal cases. Their state bills of rights have atrophied in the process of keeping up with the latest five-to-four decision out of Washington. Intellectual challenge declines because it is easier for most law clerks and judges to look first to the federal cases." Douglas, *supra* note 25, at 1137.

Even so, there is some evidence that state courts are beginning to realize the point made in the text. *See, e.g.*, State v. Clark, 291 Or. 201, 630 P.2d 810 (1981) (sketching out the contours of the state privileges or immunities clause); Williams v. Zobel, 619 P.2d 448 (Alaska 1980), *argued*, 50 U.S.L.W. 3272 (U.S. Oct. 7, 1981) ("two-tier" equal protection analysis abandoned in favor of employing an "intermediate" approach); Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978) (Mosk, J., separately concurring) (abandoning "two-tier" equal protection analysis and instead employing an "intermediate" approach); Haynes v. Burks, 290 Or. 75, 619 P.2d 632 (1980)(rejecting "balancing" formula employed in Barker v. Wingo, 407 U.S. 514 (1972)). *See generally* People v. Pettingill, 21 Cal. 3d 231, 253-54, 578 P.2d 108, 122, 145 Cal. Rptr. 861, 875 (1978) (Clark, J., dissenting).

27. *See, e.g.*, Linde, *"Clear & Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN L. REV. 1163, 1174-83 (1970); Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980). Here one must, of course, be particularly mindful of the different wording of the state freedom of expression provisions. *See* Welsh & Collins, *Taking State Constitutions Seriously*, THE CENTER MAGAZINE, Sept./Oct. 1981, at 6 (comparing various freedom of expression provisions).

28. *See, e.g.*, Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Michelman, *Politics and Values or What's Really Wrong With Rationality Review*, 13 CREIGHTON L. REV. 487 (1979); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). *See also* Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980).

29. *See, e.g.*, Y. KAMISAR, POLICE INTERROGATION & CONFESSIONS 41-76 (1980); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CALIF. L. REV. 1 (1978); Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). There is also the matter of the differing nature of a state court's supervisory powers. *See, e.g.*, Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 907 (1976).

30. Another point to consider is exactly how much guidance the United States Supreme Court presently gives the states in the area of constitutional law. *See* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981). Professor A.E. Dick Howard noted: "They're making decisions on a pragmatic, case-by-case basis, so we're likely to see this crazy quilt pattern of rulings continue." Gest, *Supreme Court Steps Back From Activism*, U.S. NEWS & WORLD REP., July 13, 1981, at 52. *See also* O'Connor, *Trends in the Relationship Between the Federal & State Courts From the Perspective of a State Judge*, 22 WM. & MARY L. REV. 801, 804 (1981). So understood, it would be desirable for "in-

Seen against this backdrop, it matters little, if at all, whether *Logan Valley* is the established federal law, so long as the states do not diminish federally protected rights. What does matter, in terms of federalism, is that independent interpretation at the state level be associated with fundamental jurisprudential concerns which transcend mere reactionary motivations.

III. A Few Additional Reasons for Rejecting a Reactionary Approach

Mr. Kamp additionally overlooks other important considerations in his rush to circumvent federal law in the hope of "protecti[ng] . . . public forum and canvassing rights from private abridgment."[31] In his analysis of the decision in *Pruneyard Shopping Center v. Robins*,[32] Mr. Kamp takes fundamentally the same approach as did the California Supreme Court.[33] Both claims are, from a state constitutional vantage point, one-sided. Recall that the United States Supreme Court, like the California Supreme Court, considered only the federal constitutional property and speech rights of the shopping center owners. In his hurry to invoke state constitutional "protections" providing access to shopping centers, Mr. Kamp skips over the possibility that the relief sought by the shopping center owners may indeed *still* be available to them as a matter of state law. What about article I, section 1 of the California Constitution, which lists among the "inalienable rights" those associated with "protecting property"? Or what about clauses which on their face or by interpretation may prohibit access to privately owned shopping centers or require that "just compensation" be paid for such access?[34] These are considerations of state constitutional law that Mr.

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dependent-minded state courts [to] engage in zero-based state interpretation," contrary to what Professor Kelman suggests. *See* Kelman, *supra* note 9, at 429.

31. Kamp, *supra* note 10, at 165.

32. 447 U.S. 74 (1980).

33. Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 41, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). *See* Welsh & Collins, Pruneyard—*Looking at the New Federalism*, W.L.J., Jul./Aug. 1980, at 13, col. 1.

34. Consider, for example, article I, section 15 of the Illinois Constitution, which provides: "Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." ILL. CONST. art. I, § 15. *See also* LA. CONST. art. I, § 4 (*see* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 10-20 (1974)); MINN. CONST. art. I, § 13; MO. CONST. art. 1, § 26; VA. CONST. art. I, § 11 (*see* I HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 210-29 (1974)). For an interesting judicial examination of such provisions, see Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981) (holding city zoning ordinance which had the effect of including substantial part of plain-

Kamp does not pause to explore. A reactionary or result-oriented view of independent interpretation at the state level necessarily puts aside such considerations. Independent interpretation, as a matter of constitutional principle, must be a two-way street.

Mr. Kamp correctly points out that "[m]ost courts have simply assumed that the state guarantee was to be construed *in pari materia* with the first Amendment."[35] Ironically, this occurs in many state appellate courts despite the differences in both history[36] and text[37] between the

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tiffs' land in a conservation district violative of "taking" provision of state constitution); Metropolitan Atlanta Rapid Transit Auth. v. Trussell, 247 Ga. 148, 273 S.E.2d 859 (1981) ("damage" clause of state constitution gives injured citizen a constitutional cause of action against a public authority for injury to his property interests regardless of whether there is also a "taking"). Ironically, the California Supreme Court has yet to pass on this issue, even though it was presented to it in the *Pruneyard* briefs. *See* CAL. CONST., art. I, §§ 1, 19. *But cf.* State v. Schmid, 84 N.J. 535, 423 A.2d 615, 629 (1980), *juris. postponed*, 101 S.Ct. 2312 (1981) (allowing distribution of political literature on private campus under free speech clause of state charter and also finding no violation of federal or state property rights).

35. Kamp, *supra* note 10, at 178 n.64, 181.

36. In this regard, Mr. Kamp makes the following statement: "Moreover, the language and history of the state constitutional guarantees of free speech and related rights of expression indicate that they provide protection for public forum and canvassing rights against private abridgment." *Id.* at 178-79.

On this point, one will look in vain to find any historical discussions of state constitutions beyond Mr. Kamp's passing footnote references to the California and Michigan constitutions. *See id.* at 179 n.70. Yet the significance of historical information as an aid in construing state constitutions cannot at this time be understated. Relatively little has been done in this area. For some general source materials, see W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS (1980); 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 72-172 (1927); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 100-09 (1973); H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826, at 113-20 (1939); A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (1975); A. HOWARD, THE ROAD FROM RUNNYMEDE 203-15 (1968); A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 106-17 (1935); 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 179-379 (1971); W. SWINDLER, SOURCES & DOCUMENTS OF UNITED STATES CONSTITUTIONS (1977) (10 vols.); Black, *The Formation of the First State Constitutions*, 7 CONST. REV. 22 (1923); David, *Our California Constitutions: Retrospections in This Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697 (1976); Dubauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323 (1958); Graham, *The Early State Constitutions*, 9 CONST. REV. 222 (1925); Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816 (1968); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972). Equally, if not more helpful sources for discerning historical intent are the records and proceedings of the debates of the constitutional conventions of the respective states. *See also* A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1798 (1924).

37. On this point, Mr. Kamp correctly points out that "[t]he free speech guarantees in [most of the] state constitutions create an affirmative right of free speech, unlike the mere limitation on state action found in the First Amendment." Kamp, *supra* note 10, at 179 (footnote omitted). One wishes that Mr. Kamp had further expounded on the implications

federal and state charters[38]—differences to which Mr. Kamp gives ei-

of this point so far as it concerns the "system of freedom of expression" at the state level. *Id.* at 178.

There are many avenues open for exploration when it comes to textual and structural interpretations of state charters. *See, e.g.*, Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979), in which the Oregon Supreme Court was called upon to decide whether or not the state constitution permitted an award of punitive damages for defamation. Speaking for an undivided court, Justice Lent stated: "Article I, § 8 of the Oregon Constitution provides: 'No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.' Unlike the First Amendment to the Constitution of the United States, it does not mention separately the 'freedom of the press' and so does not provide support for any distinction between private individuals and members of the media.

"Defamatory statements, of course, have throughout the history of this state been recognized as an abuse of the right of free expression for which a person is to be held responsible under the provisions of Article I, § 8. However, when we consider the ways in which a person may be held responsible in a civil action for defamatory speech or writing, we must also consider the provisions of Article I, § 10, which guarantees every person a remedy 'by *due course of law* for injury done him in his . . . reputation.' Construing together these two provisions of Article I, both of which have a direct bearing on defamation cases, we hold that in a common-law civil action for damages, the defendant who has abused the right of free expression by defamatory statements may be held responsible only to the extent of permitting the injured party to recover for the resulting injury to reputation—that is, to recover compensatory damages." 286 Or. at 117-18, 593 P.2d at 788 (emphasis added). "Due course of law" is not to be confused with provisions such as "due *process* of law" that are contained in the Federal Constitution. *See, e.g.*, State v. Stroup, 290 Or. 185, 200, 620 P.2d 1359, 1368 (1980); Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 145-46 (1970).

38. Textual differences are again alerting some state judges to the need to invoke constitutional considerations different from those to which the Federal Constitution gives rise. *See, e.g.*, Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981) (applying "unnecessary rigor" provision of state constitution to treatment of prisoners); State v. Blocker, 291 Or. 255, 630 P.2d 824 (1981); State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) (statute prohibiting possession of a "billy" held contrary to state constitutional right of "the people . . . to bear arms for the defense of themselves"); State *ex rel* Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980) ("justice shall be administered openly" provision of state constitution held to permit access of newspaper reporters to juvenile court hearing); State v. Greene, 285 Or. 337, 347, 591 P.2d 1362, 1367 (1979) (Linde, J., concurring) (arguing that under the state constitution, "a search or seizure is supposed to be authorized and governed by law before a question arises whether that law authorized something that the constitution forbids"); Davidson v. Rogers, 281 Or. 219, 222, 574 P.2d 624, 625 (1978) (Linde, J., concurring) (discussing state constitutional provision allowing for a "remedy by due course of law for injury done [one] in his person, property, or reputation"); Hansen v. Owens, 619 P.2d 315 (Utah 1980) (compelled handwriting sample held to be violative of state constitutional provision prohibiting the state from compelling a person "to *give* evidence against himself"); State v. Simpson, 95 Wash. 2d 170, 622 P.2d 1199 (1980) (privacy provision in state charter held to require "automatic standing principle" in search and seizure context); Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 68, 615 P.2d 440, 449 (1980) (Dolliver, J., dissenting) (public right of access to pretrial hearing); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (W. Va. 1980) ("Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public . . . ." state constitutional provision, when read in light of "courts of this State shall be open" state constitutional clause, held to

ther no serious attention or only rhetorical reference. What about courts which adopt Mr. Kamp's view but do so by relying on *both* federal and state grounds[39] in order to obtain an "independently" grounded decision vis-à-vis an analysis of *federal* precedents?[40] Here the issue is how and when such federal precedents are incorporated into the state constitutional law without doing violence to the notion of truly independent state constitutional decision making.[41] Consider in this respect *Jacoby v. State Bar*,[42] a case concerning the validity of a proscription against certain types of attorney advertising. While the California Supreme Court declared that the state constitutional "provision is 'more definitive and inclusive than the First Amendment,' "[43] it added that "although for convenience we frequently refer throughout this opinion to the First Amendment, we base our decision equally on the terms of the state Constitution."[44] Thereafter, the court in *Jacoby* proceeded to "analyze petitioners' contentions in terms of general First Amendment law."[45] Does that mean that all of the federal cases primarily relied upon or discussed were thereby incorporated into the law under the state constitution? If not, what is the decisional basis[46] of the

guarantee public and press access to pretrial hearings). *Accord*, State v. Tourtillott, 289 Or. 835, 845, 618 P.2d 423, 435 (1980) (Linde, J., dissenting) (wildlife preserve "checkpoint" stops). *See also* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6-10, 20-25, 35-40, 62-65 (1974); Force, *supra* note 11, at 141-42. Consistent with the position advanced in this commentary, decisions like the above-mentioned ones take on meaning at the state level, in terms of formulating a corpus of law, *only* when resort to the state constitution is the rule and not an "alternative method" (Kamp, *supra* note 10, at 172) for skirting federal law.

39. Consider Bice, *supra* note 6, at 756-58.

40. Too frequently, state courts, in invoking state and federal guarantees, "fail to distinguish between them and they have [therefore] become almost interchangeable. By deciding cases on the basis of federal constitutional provisions raised in the pleadings, and by failing to discuss possible differences between state and federal safeguards, state courts have contributed to the diminishing importance of state constitutional protection for civil liberties." Note, *Freedom of Expression Under State Constitutions*, *supra* note 11, at 326-27 (footnote omitted). For an example of one variation of this, see People v. Level, 103 Cal. App. 3d 899, 162 Cal. Rptr. 682, *judgment vacated & remanded*, 449 U.S. 945 (1980), *rev'd* 117 Cal. App. 3d 462, 172 Cal. Rptr. 904 (1981). *See also* People v. Plantefaber, 410 Mich. 594, 302 N.W.2d 557 (1981) (mere footnote reference to state charter followed by exclusive discussion of federal law); note 47 *infra*.

41. *See First Things First*, *supra* note 21, at 394.

42. 19 Cal. 3d 359, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977).

43. 19 Cal. 3d at 363 n.2, 562 P.2d at 1329 n.2, 138 Cal. Rptr. at 80 n.2 (quoting Wilson v. Superior Court, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975)).

44. *Id.*

45. 19 Cal. 3d at 368, 562 P.2d at 1332, 138 Cal. Rptr. at 83.

46. This is not to say that judicial holdings must always be grounded in decisional law, but only that the holding be grounded in law. *See* Sterling v. Cupp, 290 Or. 611, 613 n.1, 625 P.2d 123, 126 n.1 (1981). Somehow, far too many attorneys assume that the absence of

court's holding insofar as the state constitution is concerned? Must a state court, particularly in light of *Delaware v. Prouse*,[47] be explicit in declaring that it is employing federal law for illustrative purposes only and does not intend to adopt the federal standards part and parcel?

An instrumentalist approach to decision making does not provide the necessary decisional framework in which to determine questions of consistency and uniformity. Similarly, it provides no decisional platform upon which to develop a jurisprudence adaptable to the law of the state. Instead, a reactionary approach uses the state charter in a piecemeal fashion, whenever the occasion may arise—in the minds of the judges—for purposes of philosophical disagreement or in order to insu-

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decisional law is tantamount to the absence of law—this notwithstanding the command of a rule, regulation, city charter provision or ordinance, statute, or state constitutional provision. Hence, attorneys quite regularly feel compelled to draw upon federal decisional law when state appellate courts have not rendered opinions interpreting the state constitution. Of course, decisional law is at best but one guide.

47. 440 U.S. 648 (1979). Speaking for the Court, Justice White declared: "Because the Delaware Supreme Court held that the stop at issue not only violated the Federal Constitution but was also impermissible under Art. I, § 6, of the Delaware Constitution, it is urged that the judgment below was based on an independent and adequate state ground and that we therefore have no jurisdiction in this case. At least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification as to the ground upon which the judgment rested. Based on our reading of the opinion, however, we are satisfied that even if the state Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the state Constitution and that we have jurisdiction of this case.

"As we understand the opinion below, Art I, § 6, of the Delaware Constitution will automatically be interpreted at least as broadly as the Fourth Amendment; that is, every police practice authoritatively determined to be contrary to the Fourth and Fourteenth Amendments will, without further analysis, be held to be contrary to Art I, § 6. This approach, which is consistent with previous opinions of the Delaware Supreme Court, was followed in this case. *The court analyzed the various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the state Constitution was therefore also infringed.* This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the state Constitution might have provided an independent and adequate state ground. The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments. If the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law.' " 440 U.S. at 651-53 (footnotes and citations omitted) (emphasis added). This pronouncement is certainly a signal to the states that mere citation to the state charter may not be sufficient to establish an independent state constitutional basis for the state decision. *See generally* Collins & Welsh, *supra* note 15, at 8, col. 3. Worse yet are mere references to "state cases" as a basis for reliance on the state constitution. *See, e.g.*, People v. Level, 103 Cal. App. 3d 899, 162 Cal. Rptr. 682, *judgment vacated and remanded*, 449 U.S. 945 (1980), *rev'd*, 117 Cal. App. 3d 462, 172 Cal. Rptr. 904 (1981). *See also* note 40 *supra*.

late a controversial decision from Supreme Court review. Seen in this light, the sovereign law of the state constitution becomes little more than a plaything. Couched differently, "freedom of expression" clauses like those in the previous charters are not instrumental in developing a jurisprudence of freedom of expression as a matter of state law, but rather these and other clauses are understood as being instrumental in securing a particular *political* objective in a particular controversy—in Mr. Kamp's case, that of "public forum and canvassing rights." When this occurs, the state constitution ceases to be the *legal* touchstone. The conceptual link between the clauses and the constitution is thus severed. In that regard, Mr. Kamp and those who subscribe to his position would do well to consider the following: "[W]hat is instrumental cannot endure in the absence of that to which it is instrumental."[48]

Reactionary use of the state constitution perpetuates another evil. It invites state judges to take their *first* constitutional cue from what the United States Supreme Court says about the Federal Constitution, despite the fact that it is the *state* constitution they are being called upon to interpret. This is a surprising phenomenon since in areas of private law such as torts, landlord-tenant or contracts, state courts often consider the decisional law of other states. After the emergence of the Warren Court, this no longer holds true in the area of constitutional law. Thus, "while state courts routinely assume their charge to declare individual rights against other individuals or private entities, the curious fact is that they seldom and hesitantly assume the same responsibility for individual rights against public authority."[49] In developing truly independent bodies of state constitutional law, state courts may well be better served[50] by devoting more attention to considering what their sister courts have done in interpreting perhaps identical provisions in their charters—this after examining questions of constitutional text,

48. H. JAFFA, THE CONDITIONS OF FREEDOM 227 (1975).

49. *First Things First*, *supra* note 21, at 380. *See* Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 177 (1981).

50. Political scientists G. Alan Tarr and Mary Cornelia Porter have discussed in this regard what they label as "patterns of reciprocal influence," which they describe as follows:

"*Vertical Federalism*: State supreme court participation in the vertical process of federalism is demonstrated by their development of Federal constitutional law in five distinguishable, but not altogether unrelated, ways:

"First, since state courts as well as federal courts are obliged to enforce the U.S. Constitution, and since such a miniscule percentage of the constitutional rulings of state supreme courts are reviewed by the highest Federal tribunal, state supreme courts make both a qualitatively and quantitatively impressive contribution to the corpus of Federal constitutional law.

"Second, state high courts rather directly influence the fashioning of Federal constitu-

structure and history.[51]

The underlying premise of the immediately preceding remarks suggests another fallacy in the instrumentalist brand of logic advanced in Mr. Kamp's essay. The argument restates the oft-quoted maxim that provides that states are free under their own law to extend "greater [constitutional] protection"[52] whenever they perceive the need. In a sense, the oft-quoted maxim is wrong, if only because it is unduly simplistic. It is erroneous because states may certainly extend an *equal* measure of constitutional protection under their state charters, though they may do so for different reasons. More importantly, there is no constitutional impediment preventing state courts from granting a lesser degree of protection under state law, *provided* only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court. In other words, the logic of principled interpretation at the state level, being other than reactionary oriented, demands that any given argument be tested on its own merits independently of what level of constitutional protection could result. In some instances, it may well be that the logical scope of a state constitutional premise does not extend so far as to afford an equivalent or greater measure of protection than that allotted under the Bill of Rights.

A few examples may help clarify the point. Assume that a given state has in its charter a bill of rights similar to the federal one. Thoughtful state judges so situated might find themselves hard pressed to accept the "right of privacy" arguments advanced in *Griswold v. Con-*

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tional law by lighting the way for the U.S. Supreme Court. Indeed, the Supreme Court may postpone tackling certain issues until it has a body of cases upon which to draw. . . .

"Less directly, state justices formulate or—more accurately—engender constitutional law through their responses to U.S. Supreme Court rulings. . . .

"Finally, by making their own uses of Supreme Court decisions, state supreme courts serve as repositories of constitutional law. . . .

"*Horizontal Federalism*: [I]nteractions among the American states are an equally important component of the federal relationships and contribute to policy development throughout the states. . . .

"State supreme courts' relatively rapid adoption of similar policies pertaining to school finance and automobile guest statutes . . . indicates that interstate influences are vital in the development of public and private law." Tarr & Porter, *State Supreme Court Policymaking and Federalism*, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (Porter & Tarr eds. 1981).

51. It would be helpful indeed if the editors of the *American Political Science Review* resumed their past practice of having noted scholars author a yearly summary of developments in state constitutional law. *See, e.g.*, Grant, *State Constitutional Law in 1935-36*, 30 AM. POL. SCI. REV. 692 (1936).

52. Kamp, *supra* note 10, at 174.

necticut[53] and its progeny,[54] or they may be unpersuaded by the arguments relied upon by a majority of the Court in *Richmond Newspapers, Inc. v. Virginia*[55] for constitutionally allowing access to the courts.[56] Considerations of text, logic, history and consistency may prompt these judges to reject these federally protected "rights," but only as questions of state law. These federal "rights" would not suffer in that the same state judges would then have to yield to the dictates of federal law and acknowledge the claims presented. Accordingly, the constitutional premises upon which the state law is grounded would not be sacrificed merely because federal decisional law pointed in another direction.

Throughout this commentary I have been critical of the notion of turning to state constitutions simply as, using Mr. Kamp's words, "alternative method[s]"[57] for obtaining a given objective. In actuality, this approach produces a handful of state constitutional decisions that are no more than aberrations, linked neither in logic nor in precedent to any sustaining corpus of state law. What this means, if anything, at the educational level is that students are instructed to "*see also*" the decision of state *X* which may have rejected, for example, the holding of *Hudgens v. NLRB*.[58] So understood, the reactionary approach is perpetuated—this at the expense of undermining the jurisprudential significance of state constitutional law. Education in the sovereign law of the state concerning the independent rights and liberties of its inhabitants deserves more than such cursory attention. As Professor William Swindler put it, state constitutional law must cease to be a "chronically neglected subject."[59]

Among the fifty states, there is today an unhealthy kind of attention given to the decisions rendered by the United States Supreme

53. 381 U.S. 479 (1965).

54. *See* Carey v. Population Serv. Int'l, 431 U.S. 679 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

55. 448 U.S. 555 (1980).

56. For a discussion of the court access provisions found in a number of state charters, see Welsh & Collins, *Taking State Constitutions Seriously*, THE CENTER MAGAZINE, Sept./Oct. 1981, at 6.

57. Kamp, *supra* note 10, at 172.

58. 424 U.S. 507 (1976). Consider in this respect the following complaint by Justice Douglas of the New Hampshire Supreme Court: "The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from 'federally' oriented law schools. The lack of treatises or textbooks developing the rich diversity of state constitutional law developments could be viewed as an attempt to 'nationalize' the law and denigrate the state bench." Douglas, *supra* note 25, at 1147 (footnote omitted & emphasis in original).

59. Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166 (1967).

Court. In part, that attention has itself engendered the move towards a reactionary "jurisprudence." So prevalent is this attitude that some state judges, in response to the reactionary motivations of their colleagues, deem it necessary to formulate "criteria"[60] to justify independent resort to their *own* constitutions.[61] Of still greater concern is the resulting effect that a reactionary approach produces in the political arena, where the possibility of amending the state charter looms ever large. Where resort to the state constitution is a selective, issue-by-issue process, it will come as little surprise when the public manifests its outrage, backed by its amendment muscle,[62] at novel state constitu-

60. *See, e.g.*, State v. Simpson, 95 Wash. 2d 170, 200-02, 622 P.2d 1199, 1217 (1980) (Horowitz, J., dissenting). The attorney general of California has, perhaps disingenuously, advocated similar "criteria." Deukmejian & Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 987-96 (1979). *But see* Collins & Welsh, *California Constitution Turns into a Political Toy*, *supra* note 21, noting: "Deukmejian, writing recently in the Hastings Constitutional Law Quarterly, took note of the court's independence from both Washington and Sacramento, a situation that he traced to 'result-oriented' decision-making in criminal justice cases. But politics, rather than legal principle, is behind Deukmejian's insistence that the court establish a 'principled basis for repudiating federal precedent' before considering reliance on the state Constitution. He himself does not abide by that policy in his own office. For example, in his novel Los Angeles school violence lawsuit, Deukmejian is quick to invoke state constitutional law. The suit is replete with claims that many observers believe are unlikely to be sustained under federal law. Like the state Supreme Court justices he criticizes, Deukmejian is willing to acknowledge the independent status of California's Constitution only when it suits him." *Id.* at 7, col. 1.

Other "criteria" for resort to one body of law or another are sometimes employed. Consider Justice Mosk's explanation of why the California Supreme Court relied upon federal law—despite briefing on the state law—in the noted *Bakke* case: "That was done deliberately. We discussed state issues and we could have insulated our opinion from federal review by relying on state grounds, but upon reflection we believed that the issue was of national significance and, therefore, calculatingly prepared the opinion with a view to its being considered by the U.S. Supreme Court. If they had denied certiorari, they would have given us a clear message. Since they took it over, they reached their conclusion; our opinion was written deliberately for that purpose. Normally, we would have used the state constitution, but we deliberately chose not to because we had before us an issue of national import, affecting parties and institutions beyond the borders of our state." Collins & Welsh, *supra* note 15, at 10, col. 2.

61. In critical response to the widespread hesitation of state judges to make independent use of their charters, one state supreme court justice has said: "I urge my brother state judges to use initiative in looking up provisions of the respective state constitutions, construing and applying them to the facts at hand and only then turning to the federal cases. To do so will get our product back on the market and lessen our role as mere distributors of the federal product. It is easier for law clerks, academics and judges to palm off the federal product as if it were a monopoly market with direction from corporate headquarters in Washington. By dusting off our state constitutions, judges can be 'activists' in the best sense of the word and breathe life into the fifty documents. If we let them atrophy in our respective states, we will not only have failed to live up to our oaths to defend those constitutions but will have helped to destroy federalism as well." Douglas, *supra* note 25, at 1150.

62. Consider, for example, the constitutional havoc presently occurring in California as

tional decisions.[63] It is time to lay to rest the notion that state constitutions are, in the political scheme of things, nothing but convenient escape hatches. This holds true even in the sensitive area of freedom of expression. For the reasons outlined above,[64] state courts should look first to their own laws, and in that regard downplay their concern about "the ebb and flow of opinions on the Potomac."[65]

Conclusion

If state constitutional law is ever to attain its deserved place in American jurisprudence, resort to the various and varying state charters must become something more than a mere "shell game."[66] This is no less the case when it comes to questions of protecting "public forum and canvassing rights from private abridgment."[67] The *process*

certain political forces seek to push through a state constitutional amendment that would curtail independent use of the state charter. *Compare* Van de Kamp, *Shutting an Overused Trap Door*, L.A. Times, July 5, 1981, pt. IV, at 5, col. 1 *with* Smith, *Are the State Courts Anti-Police?*, L.A. Times, May 31, 1981, pt. IV, at 5, col. 1. So politicized has use of the state charter in California become that a state trial judge and a state government attorney have gone on record as being hesitant to use the state constitution when, in their opinion, there is a possibility that the public may respond by passing a contrary state constitutional amendment. *See* Welsh & Collins, *Taking State Constitutions Seriously*, THE CENTER MAGAZINE, Sept./Oct. 1981, at 6 (remarks in response to authors' paper). But what of the initiative and referenda rights secured to the people of that state in article IV, section 22(a) of the California Constitution? So far as the amendment process is concerned, only at the state level can it be said that there is a real and effective *democratic* check on the powers of the judicial and legislative branches. (*Compare* the vastly more difficult process for amending the Federal Constitution as set forth in article V *with* that of the California Constitution.) *See* Comment, *Judicial Review of Initiative Constitutional Amendments*, 14 U.C.D. L. REV. 461 (1980). An instrumentalist approach, ever mindful of securing a particular political goal, may sometimes look to federal decisional law to uphold a given claim if reliance on state law may result in the electorate's passing a contrary constitutional amendment. From this vantage point, an instrumentalist approach is certainly antidemocratic.

63. Upon reflection, one may pause before applauding a few of the more recent "independent" decisions of the Supreme Judicial Court of Massachusetts. Has this court proceeded with too much haste in turning to its state charter, perhaps by using the Massachusetts Constitution in a reactionary fashion? Consider in this regard Moe v. Secretary of Admin. & Fin., 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387 (1981) (abortion funding); District Attorney v. Watson, 80 Mass. 2331, 411 N.E.2d 1274 (1980) (death penalty).

64. *See* text accompanying notes 23 & 24 *supra*.

65. Collins & Welsh, *supra* note 15, at 8, col. 3.

66. *See* People v. Pettingill, 21 Cal. 3d 231, 253-54, 578 P.2d 108, 122, 145 Cal. Rptr. 861, 875 (1978) (Clark, J., dissenting).

67. Regrettably, Mr. Kamp's data concerning developments in shopping center construction, location and function are dated. *See* Kamp, *supra* note 10, at 168-69 nn.13-22, data otherwise available at the time when Hudgens v. NLRB, 424 U.S. 507 (1976), was decided. *Cf.* Friedman, *No, All Shopping Centers Are Not Alike*, LOS ANGELES, Nov. 1979, at 242, *cited in* Kamp, *supra* note 10, at 168 n.18.

For a worthwhile discussion of some important social problems relating to new forms of

whereby the state constitution is employed can be as important as the result obtained in any constitutional struggle. That being the conceptual touchstone, Mr. Kamp does well when he speaks of future independently based decisions that "will move the system of freedom of expression into a new period of federalism in which state constitutional guarantees of free speech play a role complementary to that of the First Amendment."[68] This hoped-for outcome presumes that state constitutions will themselves be accorded independent importance.[69]

home ownership and land use, see Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981).

68. Kamp, *supra* note 10, at 188. "What is most needed is *concentrated independent thought* on free expression problems. *By turning their attention away from federal doctrines and by engaging in independent analysis*, state courts, through the interpretation of state constitutions, could perform a valuable service in this area." Note, *Freedom of Expression*, *supra* note 11, at 335 (emphasis added). This is well illustrated by a recent decision of the Oregon Supreme Court, Hall v. May Dep't Stores, 292 Or. 131, 637 P.2d 126 (1981) (punitive damages for defamation of plaintiff's person held prohibited by state constitution). If read carefully, the *Hall* opinion has free speech implications far beyond the immediate context in which the case presents itself. But that is a topic for a future article.

69. Given the current enthusiasm with federal *decisional* law—do lawyers still consult the text of the Federal Constitution?—it is little wonder that both the state bench and bar should be unfamiliar with their own charters. And when the constitutional text is consulted, it is readily assumed in far too many cases that federal and state provisions are either identically worded or of identical force. Consider in this respect the situation of a North Carolina trial judge: "A Superior Court judge issued a written apology Wednesday to the Times-News of Burlington for forbidding it to publish information obtained from the personnel file of a suspended elementary school principal.

"Judge D. March McLelland said that after studying the state constitution, which says the press "shall never be restrained," he decided he had made a mistake in issuing a restraining order, and wanted to apologize.

"McLelland said he had assumed that the North Carolina Constitution contained a provision on press freedom similar to the First Amendment . . . .

"The judge said, "Had [the state constitutional] provision been called to my attention or had I looked it up when application for the order was made, it would not have been issued. Had it been called to my attention or had I looked it up after issuance, it would have been dissolved immediately." Charleston Daily Mail, May 21, 1981, pt. I, at p. 15A, col. 1. (I am indebted to Professor Robert F. Williams of Rutgers-Camden Law School for calling this news item to my attention.) The state trial judge's plight is a common one. That is, in the majority of cases lawyers simply do not brief the law mandated by the state charter. When this happens, it would be a salutary practice for judges, including state appellate judges, to request supplemental briefing on the state law. *See* Welsh & Collins, *supra* note 27.