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ESSAY

ON THE SIGNIFICANCE OF CONSTITUTIONAL SPIRIT

LOUIS D. BILIONIS*

I. INTRODUCTION: THE EBB AND THE FLOW IN AMERICAN CONSTITUTIONAL LAW

The flow of state constitutional law these days comes at a time when judicial protection of individual liberties under the Federal Constitution is unmistakably ebbing. No one should think the two phenomena are unrelated.

One possible connection between the two, espoused commonly but not exclusively by those who prefer the federal ebb to the state flow, is suggested by what we might fairly label the "cynical" account of the recent rise of state constitutional jurisprudence. Liberal lawyers and state judges weaned on the judicial activism of the free-spirited Warren Court years, the account goes, are taking no pleasure in the decisions of an increasingly conservative United States Supreme Court and lower federal judiciary. Still retaining influence at the state level, these liberal forces are turning to state constitutions to justify the rights-expansive (and, critics would say, democracy-denying) results they desire. As descriptive of lawyers litigating in the constitutional field, the cynical ac-

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1. See, e.g., George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975, 987 (1979) (charging the California Supreme Court with result-oriented adjudication under state constitution); Donald E. Wilkes, Jr., The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L.J. 421, 434 (1974) [hereinafter Wilkes, State Court Evasion] (positing that state courts are "anxious to evade the Supreme Court"); Donald E. Wilkes, Jr., More on the New Federalism in Criminal Procedure, 63 Ky. L.J. 873, 873, 894 (1975) (reiterating evasion thesis, while noting that independent state constitutional adjudication may prevent federalism from becoming "a cliche for judicial conservatism"); see also Ronald K.L. Collins, Foreword: The Once "New Judicial Federalism" & Its Critics, 64 WASH. L. REV. 5, 6-7 (1989) (disputing cynical criticisms of state constitutional resurgence as result-oriented); Robin B. Johansen, Note, The New Federalism: Toward a Principled Interpretation of the State Constitution, 29 STAN. L. REV. 297, 297 & n.7, 299 & n.13, 300 (1977) (suggesting that critics of state constitutional resurgence are themselves result-oriented).
count no doubt has the ring of truth about it. The emerging new order may not prove wholly hostile to all assertions of civil rights, but federal assertions of such claims are surely being discouraged. The strategic advantages to pleading today's civil liberties cases in state court on state constitutional grounds are freely admitted.3

What the cynical account implies about state judges who find meaning and potential in the organic law of their states is, however, difficult to accept. The cynical account may not be totally wrong about what motivates judges to act as they do. Those who go with the flow, as well as those who cast with the ebb, sometimes do so with an enthusiasm that makes one wonder whether the personally attractive and the legally appropriate are being kept distinct.4 The problem with the cynical account is that it leaves untold far too much of the judicial story. To most jurists, the state constitution probably presents an unenviable obligation rather than a hoped-for opportunity. Constitutional texts comprise a part of the state's corpus juris, and the court's constitutional responsibility is to consider them and give them their due effect.

Another account of the rise of state constitutions, which we might label the "structural" account, explains state judicial behavior more sat-

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3. See, e.g., Kevin Cullen, Constitutional Lawyers Shift Focus from Federal to State Courts, NEWS & OBSERVER (Raleigh, N.C.), Jan. 5, 1992, at 8J (noting that constitutional advocates have turned to state courts to carry agenda). Superimposing an adversarial process on a federal system that invites dramatic variations in law and process would seem to make forum-shopping and law-shopping an inevitable and necessary part of zealous, professionally responsible lawyering. Constitutional advocates certainly have not missed this point. Traditionally, they have chosen their forums with an eye toward differences in judicial predilection, institutional capacity, and substantive and procedural opportunity. See Burt Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1106-15 (1977).

4. The California Supreme Court's state constitutional decisions during the late 1970s underwent the sharpest criticism of this sort. See, e.g., Deukmejian & Thompson, supra note 1, at 987; Wilkes, State Court Evasion, supra note 1, at 436.
isfactorily. This view begins with the premise that society relies upon two basic forms of judicial action in its quest to realize fundamental values and cultivate a healthy political life: federal judicial interpretation and enforcement of the United States Constitution, and state court interpretation and enforcement of state constitutions. Each is a distinct force which helps shape our national constitutional environment. Each force, however, is also dependent upon, limited by, and to some extent the product of, that very same environment. Federal and state constitutions thus are interdependent features of a greater American constitutional structure—the web of social institutions and practices the American people employ, sometimes unwittingly, to articulate and effectuate their highest ideals.

Under the structural account, the federal ebb and the state flow in American constitutional law are two manifestations of a single phenomenon: a major realignment of the national constitutional order. The primary responsibility for defining and enforcing civil liberties is shifting from the federal courts and the Federal Constitution to the state judiciaries and their state constitutions. According to the United States Supreme Court justices who have been instrumental in bringing about this shift, the transformation is necessitated by structural constitutional considerations implicit in "Our Federalism" and should not be taken as indicative of any substantive agenda. What appears as federal antipathy toward claims of individual liberty is, as it were, nothing personal, but instead a necessary incident of the transformational process. Without the federal ebb, there would be little impetus for the state flow.

To say that the Supreme Court rejects constitutional claims because of the institutional concerns of "Our Federalism" is not to imply that the Court necessarily intends the state courts to receive with favor the many

5. This proposition is obviously simplified, but at no detriment to the points made in the text. Among other things, a more elaborate description of the judicial role would account for state court adjudication of the Federal Constitution, see, e.g., Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035, 1046-54 (1977) (discussing how habeas corpus facilitates state-federal dialogue and contributes to the development of federal constitutional doctrine), and the function of common-law powers in the judicial enforcement of constitutional norms. See, e.g., Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 2-26 (1975) (detailing sub-constitutional nature of certain judicially created rules designed to protect or implement constitutional values).


claims which are being diverted to them through this constitutional realignment. As a practical matter, such a contention would be hard to square with the evident inclinations of the justices who today make up the Court's majority. As a theoretical matter, such a contention is simply unnecessary. From the structural point of view, it is not important that the states reach particular answers, but only that they recognize their responsibility for the questions.

As state judges assume with increasing frequency their responsibility to make independent constitutional judgments, they discover material distinctions between state constitutional adjudication and federal constitutional adjudication that will not merely justify but in fact will compel different answers than would be reached under the Federal Constitution. For present purposes, the distinctions may be grouped into three general categories.

First, the legal texts germane to state constitutional jurisprudence often are markedly different from those that would be relevant at the federal level. State constitutions are rich with provisions that either have no counterpart in the federal document or speak with an emphasis or clarity that similar federal terms lack. Many state constitutions, for instance, contain explicit stipulations that the government must provide and maintain an efficient system of public education. Such provisions have enabled a number of state courts to demand the reform of inequitable school financing schemes, something the United States Supreme Court has been unwilling to require under the Fourteenth Amendment.

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8. Those who find it impossible to credit the Court's disclaimers that no substantive agenda is being pursued do not suggest that the hidden agenda is one to expand individual rights. See, e.g., Herman Schwartz, Trends in the Rehnquist Court, 22 U. Tol. L. Rev. 559, 567-74 (1991) (pointing out the Court's willingness to set aside structural concerns relating to federalism and finality in litigation when necessary to achieve anti-affirmative action objectives). But even if one accepts the Court's sincerity, it does not follow that no substantive motivations are at play. The decision to undertake a program which has obvious and immediate substantive consequences cannot be made without at least an inner ordering of substantive values. E.g., Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1063-64 (1980).

9. E.g., KY. CONST. § 183 (mandating that legislature "provide for an efficient system of common schools throughout the state"); MONT. CONST. art. X, § 1(1) (providing that "[e]quality of educational opportunity is guaranteed to each person of the state"); N.J. CONST. art. VIII, § 4, para. 1 (obligating legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State"); TEX. CONST. art. VII, § 1 (requiring legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools").

In North Carolina, some of the most prominent lines of state constitutional authority stem from distinctive textual features of the state's Declaration of Rights. The language of section 1, providing that all persons are endowed with an "inalienable right" to "the enjoyment of the fruits of their own labor," forms the basis of a vibrant jurisprudence protective of individual economic liberty—a *Lochner*-like economic due process with text to back it up. The plain prohibition against the exclusion of school financing system under state constitution); Helena Elem. Sch. Dist. No. 1 v. State, 236 Mont. 44, 54-55, 769 P.2d 684, 690 (1989) (same); Abbott v. Burke, 119 N.J. 287, 384-85, 575 A.2d 359, 408 (1990) (same).

The North Carolina Constitution contains several provisions which speak to a fundamental right to public education. Article I, § 15, for example, provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. Article IX, § 1 states that "schools, libraries, and the means of education shall forever be encouraged." Id. art. IX, § 1. And under Article IX, § 2(1), "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." Id. art. IX, § 2(1). It has been held, however, that these provisions do not prohibit educational inequities between public schools in poorer counties and those in counties with higher tax bases. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 289, 357 S.E.2d 432, 436, disc. rev. denied, 320 N.C. 790, 361 S.E.2d 71 (1987).


12. *Lochner* v. New York, 198 U.S. 45, 64 (1905). *Lochner* and its progeny held that the general guarantee of due process implied a substantive prohibition against legislative and regulatory measures that substantially interfere with the right of individuals to enter freely into contract. The doctrine was repudiated in 1937 with the decision in West Coast Hotel v. Parish, 300 U.S. 379, 390-400 (1937). See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to -7 (2d ed. 1988) (discussing the rise and fall of substantive due process associated with *Lochner*).


of any person from jury service "on account of sex, race, color, religion, or national origin" found in section twenty-six is generating a significant body of law recognizing a special judicial duty to ensure the integrity of court procedures against charges of unlawful discrimination. Other distinctive provisions await the attention of the courts and litigants.

Second, the constitutionally significant facts may be different at the state and federal levels. Even when the state and Federal Constitutions contain the same language and employ the same methodology to govern the interpretation and application of that language, the ultimate constitutional decision often will turn upon a factual assessment of how society feels about certain matters or how society functions under various condi-


16. Two prominent examples are N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.") and N.C. CONST. art. I, § 27 ("nor cruel or unusual punishments inflicted"). Justice Harry C. Martin has left the bench and bar with suggestions on the direction which adjudication of these provisions might take. See Medley v. North Carolina Dep't of Correction, 330 N.C. 837, 846, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring) (suggested that state ban against "cruel or unusual punishments" is more protective than the federal Eighth Amendment prohibition of "cruel and unusual punishments;" state provision's use of the disjunctive rather than the conjunctive argues for broader scope); Lee v. Mowett Sales Co., 316 N.C. 489, 495, 342 S.E.2d 882, 887 (1986) (Martin, J., dissenting) (arguing that parent-child immunity should be abrogated because § 18 "mandates that children should have a remedy against their negligent parents").
tions. Resolution of a search and seizure issue, for example, may turn on whether a claimed expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" 18 or a cruel and unusual punishment challenge upon whether a sentencing practice offends society's "evolving standards of decency." 19 In each instance it could matter greatly which society you are talking about: a privacy claim lacking the national consensus necessary to trigger federal constitutional protection might still enjoy local support strong enough to dictate state constitutional protection; 20 a sentencing practice might abridge the moral consensus that has evolved at the state but not the national level. 21 Similarly, perceived practical difficulties with a federal constitutional rule as it has operated around the nation might lead to its modification or abandonment, whereas the same rule might merit retention as a state constitutional proposition for want of demonstrated problems locally. 22 Indeed, whenever a constitutional methodology admits a need to accommodate institutional considerations, the possibility for different yet equally correct state and federal results exists. The institutional concerns that weigh in the federal constitutional balance rarely if ever equate precisely with those of a state court adjudicating a constitution that will be enforced only within the state's borders. 23

17. See, e.g., Kenneth C. Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952-59 (1955) (discussing function of so-called "legislative facts" in judicial decisionmaking).
23. Federalism concerns loom particularly large in the typical federal equation. The United States Supreme Court is ever mindful that its rulings apply throughout the land, and accordingly they must be sensitive to the disparities in local needs and local conditions from
Third, the constitutional spirit which pervades adjudication may be different at the state and federal levels. A court must make innumerable judgments in the course of expounding a constitution; the spirit with which it approaches constitutional texts, constitutional traditions, and the institutional implications of constitutional adjudication will leave a mark on those judgments, on the structure of the enterprise as a whole, and on the jurisprudence that is ultimately produced. In any jurisdiction, certain views regarding the proprieties and possibilities of judicial review will have more currency than others, and they will dictate a prevailing spirit that animates constitutional adjudication and informs judicial judgment. No inherent reason requires that a state’s hopes and fears about constitutional adjudication must correspond to those that happen to move a majority of the United States Supreme Court. To the contrary, under the federalism that is driving America’s constitutional transformation, state-by-state differences signal that the system is functioning as it should. For federalism’s potential to be fulfilled, each state should be free to follow its own instincts and bring to its constitutional analysis that spirit which best fits its history, its traditions, and its needs.

The significance of constitutional spirit for today’s constitutional jurisprudence deserves considerably more attention than a single article—and certainly an essay of this nature—can extend. A short excursion into some of its dimensions, however, is both possible and profitable.

II. CONSTITUTIONAL SPIRIT AND THE NECESSITY FOR “A FREQUENT RECURRENCE TO FUNDAMENTAL PRINCIPLES”

Article I, section 35 of the North Carolina Constitution provides a fitting point of departure for this brief exploration of constitutional spirit. The penultimate provision of the state’s Declaration of Rights, this intriguing clause states that a “frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.” This language has been a part of North Carolina’s written fundamental law since the beginning. The North Carolinians who met in Congress at Halifax in 1776, probably borrowing from the recently adopted Pennsylvania and Virginia constitutions, thought enough of its message to state to state and respectful of the need for and the virtues of diversity. For a classic statement of the point, see New State Ice Co. v. Liebmann, 285 U.S. 262, 280-311 (1932) (Brandeis, J., dissenting).

25. Section XIV of the Pennsylvania Constitution, completed on September 28, 1776 (six weeks before the framers of North Carolina’s Constitution convened at Halifax), stated:
That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to pre-
include the provision in the state's original constitution. Over the years, the clause has been carried forth essentially intact.

The central concept embodied in section 35 has appealed to constitutional drafters elsewhere. Eleven other states and at least one Native American community currently have constitutional provisions proclaiming the importance of a "frequent recurrence to fundamental principles," although in each instance the clause in question contains qualifications or embellishments not found in North Carolina's version. While some variations in wording may be set aside as fairly minor, three particular

serve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard of them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state.

PA. CONST. of 1776, A Declaration of Rights of the Inhabitants of the State of Pennsylvania, § XIV. When Pennsylvania adopted a new constitution in 1790, the provision was omitted.

26. Section 15 of the Virginia Constitution's Bill of Rights, adopted on June 12, 1776 (five months before the Halifax Congress convened), stated "[t]hat 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." VA. CONST. of 1776, Virginia Bill of Rights, § 15. The provision now appears at VA. CONST. art. 1, § 15.

27. N.C. CONST. of 1776, Declaration of Rights, § XXI. The Halifax Provincial Congress convened on November 12, 1776, ratified the Declaration of Rights on December 17, 1776, and ratified the remainder of the state's constitution on the following day. 10 COLONIAL RECORDS OF NORTH CAROLINA 913, 973-74 (William L. Saunders ed., Raleigh, N.C., J. Daniels, 1890). One scholar has noted the influence of other state constitutions, including those of Pennsylvania and Maryland, on the framers of the North Carolina Constitution of 1776. See John V. Orth, "Fundamental Principles" in North Carolina Constitutional History, 69 N.C. L. REV. 1357, 1358 (1990).

William Hooper, one of North Carolina's delegates to the Continental Congress in Philadelphia, also impressed upon those who convened at Halifax the importance of a frequent recurrence to fundamental principles. In a letter to the delegates at Halifax which stressed popular sovereignty and the separation of powers, Hooper wrote that "it is necessary that recurrence should often be had to original principles to prevent those evils which in a course of years must creep in and vitiate every human institution and by insensible gradations at length steal upon the Understanding as part of the original system." 10 COLONIAL RECORDS OF NORTH CAROLINA, supra, at 862, 867.

28. In 1776, the provision read: "That a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. CONST. of 1776, Declaration of Rights, § XXI. In the Constitution of 1868, the word "that" was deleted and the provision was renumbered to appear as § 29. N.C. CONST. of 1868, art. I, § 29. In 1971, renumbering placed the provision where it is now found as § 35. N.C. CONST. art. I, § 35.

29. See ARIZ. CONST. art. 2, § 1; ILL. CONST. art. 1, § 23; MASS. CONST. pt. 1, art. XVIII; N.H. CONST. pt. 1, art. 38; S.D. CONST. art. VI, § 27; UTAH CONST. art. 1, § 27; VT. CONST. ch. I, art. 18; VA. CONST. art. 1, § 15; WASH. CONST. art. 1, § 32; W. VA. CONST. art. 3, § 20; WIS. CONST. art. 1, § 22; GILA RIVER INDIAN COMMUNITY CONST. art. IV.

30. The constitutions of Arizona, Utah, Washington, and the Gila River Indian Community of Arizona, for instance, consider a frequent recurrence to fundamental principles "essential to the security of individual rights and the perpetuity of free government," ARIZ. CONST.
distinctions merit noting. First, some states have "expanded" provisions, clauses which supplement the "frequent recurrence to fundamental principles" formulation with a catalogue of additional social qualities—justice, moderation, temperance, virtue, frugality, and industry being typical—to which firm adherence also is demanded. Second, a few states with expanded provisions also explicitly recognize a "right" of the people to expect strict observance of fundamental principles and social qualities from their legislative and judicial officials. Third, some states include language detailing the virtues expected of private citizens in their political affairs, and perhaps their social affairs as well.

The differences in the provisions can be meaningful, but we may pass over them in this Cook's tour to focus upon the concept which forms their core and which North Carolina's section 35 sets out with unadorned clarity—the necessity for a "frequent recurrence to fundamental principles." It has been said that these words on their face naturally suggest "not so much a specific legally-enforceable duty as a constitutional attitude," and that in fact is how the words have figured

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art. 2, § 1; Utah Const. art. 1, § 27; Wash. Const. art. 1, § 32; Gila River Indian Community Const. art. IV, whereas in North Carolina it is "absolutely necessary to secure the blessings of liberty," N.C. Const. art. I, § 35.


32. Mass. Const. pt. 1, art. XVIII ("[T]hey have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the Commonwealth."); N.H. Const. pt. 1, art. 38 ("[T]hey have a right to require of their law-givers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of government."); Vt. Const. ch. I, art. 18 ("[T]he people . . . have a right, in a legal way, to exact a due and constant regard to them, from their legislators and magistrates, in making and executing such laws as are necessary for the good government of the State."). Explicit textual declaration of such a right does not mean that courts will make the right judicially enforceable. See State v. Elbert, 125 N.H. 1, 15, 480 A.2d 854, 862 (1984) (Souter, J.) (suggesting that New Hampshire's provision is merely advisory or admonishing).

33. Ill. Const. art. 1, § 23 ("The blessings [of liberty] cannot endure unless the people recognize their corresponding individual obligations and responsibilities."); Mass. Const. pt. 1, art. XVIII ("The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives . . . ."); N.H. Const. pt. 1, art. 38 ("[T]he people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives . . . ."); Vt. Const. ch. I, art. 18 ("[T]he people ought, therefore to pay particular attention to these points, in the choice of officers and representatives . . . ."); Va. Const. art. 1, § 15 (calling for "the recognition by all citizens that they have duties as well as rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed"). Cf. Corum v. University of North Carolina, 330 N.C. 761, 787-88, 413 S.E.2d 276, 292-93 (1991) (relying on N.C. Const. art. I, § 35, which contains no references to private citizens, to support position that Declaration of Rights only creates rights against state officials acting in their official capacity).

34. Peter R. Teachout, Against the Stream: An Introduction to the Vermont Law Review
in the practice of state constitutional adjudication over the years. State justices have employed the principle of "frequent recurrence" in a number of judicial opinions, but not as a direct source of substantive legal doctrine. The principle has operated instead in the interstices of constitutional analysis, where judges make pivotal choices about the reach of individual constitutional rights and about the proper role of the judiciary in enforcing those rights in a democratic society. In these analytical lacunae, rights-bestowing texts and precedents lose their power to dictate results, that elusive quality of judgment bears directly on decisionmaking, and, accordingly, a jurist's sense of constitutional spirit has its most pronounced impact.

Judges turn to diverse corners for a sense of the constitutional spirit that can appropriately inform their exercise of judgment. For some, the needed guidance comes from the popular theorizings of the academy or even, it has been suggested, from the memory of lessons imparted at the judge's childhood "dinner table forum." Others find inspiration in a clause like section 35—which, unlike the sources just mentioned, has the founders' authorship, the people's ratification, and textual respectability unequivocally commending it. One might add to that list of credentials consistent judicial interpretation, for the "frequent recurrence to fundamental principles" language has met with a uniformity in reading that is perhaps surprising given its breadth.

Courts agree that the phrase aims primarily to engender an unwavering reverence for individual rights. The clause stands as a "solemn warning" from the constitutional framers, who wished their descendants...

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35. Professor Lawrence Sager refers to it as the strategic space between constitutional norms and the constitutional rules which a court promulgates to effectuate those norms—analytical space where institutional considerations that argue for restraint may influence the formulation of the rule. Lawrence G. Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 TEX. L. REV. 959, 961-73 (1985) [hereinafter Sager, Strategic Space]; see also Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1213-28 (1978) [hereinafter Sager, Fair Measure] (developing thesis that institutional considerations prompt courts to define constitutional rules narrowly, thereby underenforcing constitutional norms).


never to forget that past generations struggled dearly to secure the individual rights adumbrated in the state constitution. During his tenure on North Carolina's high court, Justice Sam J. Ervin, Jr. expressed vividly this state's perspective on the matter:

"During the past 172 years, the organic law of this State has contained the solemn warning that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." When the representatives of the people of North Carolina assembled in Congress at Halifax on November 12, 1776, for the express purpose of framing a Constitution, they possessed an acute awareness of the long and bitter struggle of the English speaking race for some substantial measure of dignity and freedom for the individual. They loved liberty and loathed tyranny, and were convinced that government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented. In consequence, they inserted in the basic law a declaration of rights designed chiefly to protect the individual from the State. When it rewrote the fundamental law, the Convention of 1868 retained these provisions and incorporated them and certain other guaranties of personal liberty in the First Article of the present State Constitution, which like its counterpart in the Constitution of 1776 is designated a "Declaration of Rights.""

Judges have interpreted this admonition from our forebears as implying an obligation as well: the living must fight spiritedly to preserve what their ancestors fought so heroically to obtain. It is thus that Justice Harry C. Martin, writing recently for the North Carolina Supreme Court


39. Ballance, 229 N.C. at 768, 51 S.E.2d at 733-34 (citations omitted).
in the celebrated *Corum* case,\(^40\) could observe with fidelity to precedent that "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property."\(^41\) At least since *State v. Harris*,\(^42\) a 1940 decision that Justice Martin cited in *Corum*, North Carolina's constitutional rhetoric has insisted that individual rights must be read broadly and enforced vigorously by the courts.\(^43\) Only in that way may we prevent a gradual erosion of our rights and maintain the tradition of the Declaration of Rights reflected in section 35. Other jurisdictions similarly have regarded generosity in interpreting and enforcing individual rights as a logical corollary of the textual call for "frequent recurrence," although not necessarily making the point with the emphasis displayed in the North Carolina cases.\(^44\)


\(^{42}\) 216 N.C. 746, 6 S.E.2d 854 (1940). In *Harris*, the court set aside legislation which required the licensing of all dry cleaners, touching off the modern state constitutional doctrine of economic due process. *Id.* at 765, 6 S.E.2d at 866; *see supra* note 13.

\(^{43}\) *Harris*, 216 N.C. at 762-65, 6 S.E.2d at 865-66. Several North Carolina opinions since *Harris* explicitly or implicitly have summoned forth the precept that individual rights are to be interpreted broadly. *See*, e.g., *Kiser v. Kiser*, 325 N.C. 502, 510, 385 S.E.2d 487, 491 (1989) (positing that the "great ordinances" of the state constitution merit liberal interpretation, in contrast to provisions of a structural nature); *Jackson v. Bumgardner*, 318 N.C. 172, 187-88, 347 S.E.2d 743, 752 (1986) (Martin, J., concurring in part and dissenting in part) (citing § 35 and positing fundamental right of married couples to plan their families and, accordingly, to receive damages for breach of contract to provide effective contraception); *In re Crutchfield*, 289 N.C. 597, 608, 223 S.E.2d 822, 828 (1975) (Lake, J., dissenting) (citing § 35 and positing broader due process rights for judge charged with misconduct); *Allred v. Graves*, 261 N.C. 31, 38, 134 S.E.2d 186, 192 (1964) (citing *Harris* squarely for proposition); *State v. Bridges*, 231 N.C. 163, 166, 56 S.E.2d 397, 399 (1949) (Ervin, J., dissenting) (citing § 35 and arguing for broader protection at trial for criminal defendant); *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) ("These fundamental guaranties are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty.").

\(^{44}\) When state courts invoke the "frequent recurrence" principle, they almost invariably do so to support a charitable interpretation of constitutional rights or a vigorous judicial review of government action impacting adversely upon individual interests. *See*, e.g., *Priestly v. State*, 19 Ariz. 371, 374, 171 P. 137, 138 (1918) (interpreting principle as cautioning against "frittering a right away in exposition"); *Commissioners of Union Drainage Dist. No. 1 v. Smith*, 233 Ill. 417, 425, 84 N.E. 376, 378 (1908) (citing principle in course of invalidating legislation which denies individual judicial determination by an impartial tribunal); *Wice v. Chicago & N.W. Ry.*, 193 Ill. 351, 358, 61 N.E. 1084, 1087 (1901) (citing principle for proposition that "[f]undamental principles secured by fundamental laws of the state cannot be departed from with safety, especially those affecting personal liberty"); *In re J.P.*, 648 P.2d 1364,
Judicial review which proceeds from a premise so protective of individual rights will not comport with everyone's idea of democracy, since it can lead to judicial invalidation of the choices made by the people's representatives, the legislature, in the name of the people themselves. But as a revealing passage from *Harris* explains, it is compatible with the kind of democracy envisioned by many state constitutions, North Carolina's included:

The admonition of the Constitution requiring frequent recurrence to fundamental principles is politically sound. Only in this way may we avoid a break with tradition that preserves the spirit, and often the letter of the law.

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1372 (Utah 1982) (citing principle in course of articulating unenumerated fundamental right in family relationships); Cady v. Lang, 95 Vt. 287, 293, 115 A. 140, 142 (1921) (citing principle in support of broad interpretation of statutes designed to implement fundamental right to fair trial by impartial judge); Ackerman v. Port of Seattle, 55 Wash. 2d 400, 407, 348 P.2d 664, 668 (1960) (citing principle to support liberal interpretation of individual rights that reacts flexibly to changes in technology; holding that low airplane flights constitute taking of property); State *ex rel.* McFerran v. Justice Court of Evangeline Starr, 32 Wash. 2d 544, 548, 202 P.2d 927, 929 (1949) (relying upon principle in holding that judicial officer possesses inherent power to order change of venue needed to ensure that individual receives fair trial before impartial tribunal); State v. Strasburg, 60 Wash. 106, 112-13, 110 P. 1020, 1021 (1910) (relying upon principle to invalidate legislation abrogating insanity defense); Graf v. Frame, 177 W. Va. 282, 286-90, 352 S.E.2d 31, 35-39 (1986) (relying upon principle in support of issuance of mandamus to prohibit state officer from acting when conflict of interest exists); Cooper v. Gwinn, 171 W. Va. 245, 248, 298 S.E.2d 781, 784 (1981) (citing principle in support of conclusion that inmates have right to rehabilitation and are entitled to writ of mandamus to enforce the right).

As might be predicted, the frequent recurrence principle has been popular with judges who write separately in dissent or in concurrence to note that they would have preferred a broader interpretation of individual rights. *See* Carpenter v. Moore, 51 Wash. 2d 795, 800-01, 322 P.2d 125, 129 (1958) (Finley, J., concurring in part and dissenting in part) (arguing for plaintiff's right to recover damages for pain and suffering); City of Bremerton v. Smith, 31 Wash. 2d 788, 800, 199 P.2d 95, 101 (1948) (Simpson, J., dissenting) (arguing for broader protection against search and seizure); *Public Util. Dist. No. 1 v. Washington Water Power Co.*, 20 Wash. 2d 384, 407, 147 P.2d 923, 934 (1944) (Simpson, C.J., dissenting) (arguing for broader protection against interested jurors); *State v. McCollum*, 17 Wash. 2d 83, 96, 136 P.2d 165, 170 (1943) (Millard, J., dissenting) (arguing for broader protection against search and seizure); *S & W Fine Foods, Inc. v. Retail Delivery Drivers Union, Local No. 353*, 11 Wash. 2d 262, 278, 118 P.2d 962, 969 (1941) (Robinson, C.J., concurring) (arguing that rights of laborers should be protected; would affirm injunction against labor picketing); *State v. Broadnax*, 25 Wash. App. 704, 722, 612 P.2d 391, 399 (1980) (Ringold, J., dissenting) (arguing for broader protection against search and seizure); *Delp v. Itmann Coal Co.*, 176 W. Va. 252, 256-57, 342 S.E.2d 219, 223-24 (1986) (McGraw, J., dissenting) (believing that directed verdict was erroneous, and that fundamental right to jury trial was thus abridged); *Jacobs v. Major*, 139 Wis. 2d 492, 541, 407 N.W.2d 832, 852-53 (1987) (Abrahamson, J., concurring in part and dissenting in part) (arguing for constitutional protection of political speech reasonably exercised in a non-governmental "public forum"); *State v. Hanson*, 136 Wis. 2d 195, 221, 401 N.W.2d 771, 781 (1987) (Abrahamson, J., dissenting) (arguing for suppression of confession obtained from defendant who is uninformed by police that his attorney is seeking to consult him).
We violate no precedent by referring to the important function these guaranties of personal liberty perform in determining the form and character of our government. They are not accidental or unrelated. They fall into the pattern of democracy upon which our institutions are founded. In no other part of the fundamental law is so well caught and held the aspiration for this sort of freedom. If those whose duty it is to uphold tradition falter in the task, these guaranties may be defeated temporarily, or permanently lost through obsolescence. But it is idle to hope that the superstructure will survive its foundation stones.\textsuperscript{45}

The textual demand for “frequent recurrence to fundamental principles” is thus an expression of the spirit of the state constitution which contains it, worthy of the serious attention of every judge who hopes to imbue her judgment with a true sense of that spirit. As they endeavor to capture that spirit, today’s judges may benefit from the record left by their predecessors. Judges of earlier eras harkened to the principle of “frequent recurrence” for insight, and found within it a discrete and cogent vision of individual rights and the role which judges should play in their interpretation and enforcement. As the \textit{Harris} court perceived, the rights enshrined in the state constitution need not be regarded as anomalies deemed necessary to check against the potential occasional excesses of a generally satisfactory preexisting democratic political system. In keeping with the spirit of the framers, those rights may better be viewed as the “foundation stones” upon which the political “superstructure” is built.\textsuperscript{46} A court intent on doing full justice to the foundational stature of state constitutional rights has less reason to fear, and indeed has many more reasons to find attractive, a presumption of generous interpretation and unfailing enforcement of individual rights. Today, as ever, “it is idle to hope that the superstructure will survive its foundation stones.”\textsuperscript{47}

\section*{III. Constitutional Spirit and Skepticism for the Fashionable}

Of course, too much can be made of the explicit constitutional mandate for “frequent recurrence to fundamental principles.” A clause so spacious can be irresistibly attractive to the vagabonds of constitutional law—those various theories which, while differing in degree of extravag-
gence, all seem to search for, rather than proceed from, a text to call home. All who would lay claim to provisions like section 35 must exercise restraint and good sense, lest (witness the fate of the Ninth Amendment) these clauses pass into the purgatory reserved for principles that the courts do not trust themselves to handle responsibly.

Any attempt to saddle the “frequent recurrence” principle with a weight greater than its language and judicial interpretation readily can bear deserves to be met with a raised eyebrow. By the same token, however, demurral is also in order whenever the “frequent recurrence” principle receives less than its fair due. Therein may lie the real power of the ancient admonition for state constitutional jurisprudence’s immediate future. For even if the solemn warning of our forebears is heeded only modestly, it counsels courts to apply a healthy dose of skepticism to any measure which threatens to erode individual rights. That may be just

48. It would be a shame to pass up this chance to recall John Hart Ely’s quip:

The Ninth Amendment, which applies to the federal government, provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Occasionally, a commentator will express a willingness to read it for what it seems to say, but this has been, and remains, a distinctly minority impulse. In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh. (“What are you planning to rely on to support that argument, Lester, the Ninth Amendment?”) The joke is somewhat elusive. It’s true that read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that thought can get pretty scary.


49. Four commentators recently have pointed to the “frequent recurrence” principle to fortify a thesis. Each seems to have cited the principle with a modicum of temerity, using it to accentuate propositions supported primarily by other principles. See Philip P. Houle, Eminent Domain, Police Power, and Business Regulation: Economic Liberty and the Constitution, 92 W. VA. L. REV. 51, 122 (1989) (citing N.C. CONST. art. I, § 35 to accent importance of judicial review, and arguing for greater constitutional protection of economic liberty, consistent with earlier constitutional tradition); David M. Skover, The Washington Constitutional “State Action” Doctrine: A Fundamental Right to State Action, 8 U. PUGET SOUND L. REV. 221, 276-77 (1985) (citing WASH. CONST. art. I, § 32 in support of proposition that government is established to maintain individual liberty, and arguing for affirmative state action to protect constitutional liberty against private infringement); Teachout, supra note 34, at 46-47 (citing “moderation” language of VT. CONST. ch. I, art. 18, in support of plea for caution in judicial review; the provision admonishes government agencies, including the courts, to proceed with regard for “the values of balance, proportion, and restraint”); Sanford E. Pitler, Note, The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 WASH. L. REV. 459, 509 n.259, 522 n.325 (1986) (citing WASH. CONST. art. I, § 32 to underscore the importance of liberal interpretation of enumerated rights to guard against their gradual depreciation, and arguing for a protective state constitutional exclusionary rule).
enough to save state constitutional law from the seductive entreaties facing it in the years ahead.

Many of those who delight in the substantive outcomes associated with the ebb of federal constitutional law are not likely to watch idly as their victories wash away in a flow of state constitutional law. They doubtless will heighten their efforts to have state courts follow the federal suit; to that end they will strive to import into state constitutional jurisprudence the conservative constitutional strategies currently popular in federal judicial circles. For any number of reasons—including the theoretical or ideological appeal of the methodology in question, the ingrained sense of federal superiority in all matters constitutional, the idea that uniformity is a virtue, or (dare it be admitted) the judicial reluctance to be cast as a liberal maverick before the state electorate—the temptation to acquiesce can be strong.

The state judge who draws strength from the spirit of a provision like North Carolina's section 35, however, cannot help but be sensitive to one feature of some of the more fashionable federal strategies which makes them easier to resist from a state constitutional standpoint. The salient shortcoming of these federal strategies when applied in a state constitutional context is not that they serve the agenda of political conservatives—although they do—but that they are founded on a premise that is antithetical to the philosophy of "frequent recurrence." Whereas a clause like section 35 advises that judgments in the interstices of constitutional analysis should be resolved in favor of broader definition and protection of individual rights, currently prevalent federal methodologies often reflect the contrary view that it is better to err on the side of understating the reach of an individual right and underenforcing the right's potential.50

The inclination toward understatement and underenforcement is evident in the United States Supreme Court's dealings with the rights of the criminally accused. To their credit, the justices have been reasonably charitable toward Bill of Rights guarantees when doing so serves the fundamental due process objective of securing an accurate resolution of the factual dispute between the government and a defendant (an uncontroversial goal shared by law-and-order proponents and civil libertarians alike).51 But criminal procedure rights often have other dimensions.

50. The dynamics of judicial understatement and underenforcement of constitutional principles are cogently explored and aptly illustrated in Professor Lawrence Sager's work. See Sager, Fair Measure, supra note 35, at 1213-28; Sager, Strategic Space, supra note 35, at 961-73.

51. See, e.g., White v. Illinois, 112 S. Ct. 736, 743 (1992) (reaffirming, by 7-2 vote, that unreliable hearsay evidence is objectionable on Confrontation Clause grounds); Cage v. Louisi-
Some, like the Sixth Amendment rights to counsel and to a speedy trial, promote values in addition to accuracy, while others, such as the Fourth Amendment's exclusionary rule and the Fifth Amendment's privilege against self-incrimination, rest primarily, if not entirely, upon considerations independent of the quest for truth. The Court's conservative majority has shown little solicitude for the non-accuracy residuum of criminal procedure rights, adopting three basic strategies for reducing and confining that residuum. Non-accuracy values are dismissed through interpretation, depreciated through doctrinal structuring designed to permit accuracy concerns to control, and isolated so that


56. This strategy has been particularly prevalent in the right to counsel area, where the Court has dismissed dignitary values associated with the right almost out of hand. See Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that claim of ineffective assistance of counsel generally requires demonstration of prejudice to the outcome of the trial); Jones v. Barnes, 463 U.S. 745, 754 (1983) (holding no constitutional violation when counsel refuses to raise colorable claim on appeal that client insisted counsel advance so long as counsel's strategic decision is reasonable); Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (holding that Sixth Amendment does not guarantee a "meaningful relationship" between attorney and client).

57. The piece de resistance of the depreciation strategy is the harmless error doctrine, which conditions the use of appellate review as a means of vindicating a constitutional right upon a showing that accuracy values merit it. Emblematic of the doctrine's triumph is Arizona v. Fulminante, 111 S. Ct. 1246 (1991), which renounced the constitutional gospel that admission of a coerced confession could never be harmless error. Id. at 1266.

The depreciation strategy also is evident in the Court's speedy trial jurisprudence. See Barker v. Wingo, 407 U.S. 514, 530 (1972) (applying balancing test in which accuracy concerns predominate); H. Richard Uviller, Barker v. Wingo: Speedy Trial Gets a Fast Shuffle, 72
the costs and benefits of every effort to vindicate them may be carefully scrutinized. The jurisprudence that results from these approaches consistently tilts in favor of understatatement and underenforcement of individual rights.

The same bias heavily infects the methodology Justice Scalia unveiled in *Michael H. v. Gerald D.* for determining whether a claimed liberty interest merits substantive protection under the Fourteenth Amendment. A responsible inquiry, Justice Scalia rightly acknowledged, requires consideration of relevant societal traditions. But which traditions are relevant to the inquiry? In a footnote "destined to take its place among constitutional history's most provocative asides," Justice Scalia posited that the Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Whatever else may be said of this mode of historical analysis, there can be no doubt that it systematically understates the liberty protected by the Fourteenth Amendment. While the most specific

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60. *Id.* at 122-24.


62. *Michael H.*, 491 U.S. at 127 n.6 (plurality opinion).

63. Justice Scalia's mode of analysis gained only Chief Justice Rehnquist's concurrence. Justices O'Connor and Kennedy pointedly disavowed it. *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (noting methodology's inconsistency with precedent and its tendency to foreclose flexibility needed to deal with the unanticipated). Justice Brennan savaged it. *Id.* at 136-47, 156-57 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting) (criticizing methodology as unsupported by precedent, as a mask for subjective judgments, and as conflating existence of liberty interest and issue of countervailing governmental interests). Commentary has amplified the criticism. See, e.g., Tribe & Dorf, *supra* note 61, at 1086 (essaying various criticisms).
tradition favored by Scalia surely helps identify the range of individual rights within the amendment's ambit, it is scarcely the exclusive historical indicium of constitutional significance. More generalized traditions can also illuminate the inquiry, revealing dimensions of the concept of liberty that a more specific tradition might obscure. By confining judges to only the most specific traditions, Scalia's methodology seeks to reduce the risk of erroneously subjective overstatements of the rights embraced by the Fourteenth Amendment. But in its pursuit of that objective, the methodology places those same rights at greater risk of erroneous understatement by closing the judicial mind to constitutionally relevant considerations.

Whether these and other conservative methodologies make for good federal constitutional jurisprudence need not detain us here. The important point is their unsuitability for the adjudication of state constitutional questions. For one thing, the calculus that makes the methodologies seem appealing to some people at the federal level depends upon structural considerations that operate with less force at the state level. The erroneous overstatement of a state constitutional right is not nearly so troublesome as a similar mistake under the Federal Constitution might be because the former is bound to be less costly and more easily rectified than the latter. In a state like North Carolina, however, an additional and more fundamental reason exists for questioning such methodologies. The state's constitutional framers foresaw that we might be tempted to weaken our ardor for individual rights in the face of the perceived exigencies of our day. They warned us to be vigilant and admonished us to

64. As Justice O'Connor pointed out in her concurring opinion in Michael H., the Court profited from its consideration of more general traditions in cases like Loving v. Virginia, 388 U.S. 1, 12 (1967), and Turner v. Safley, 482 U.S. 78, 94 (1987). Michael H., 491 U.S. at 132 (O'Connor, J., concurring in part).

65. Overstatement of a federal constitutional right constrains the national political majority and the political majorities of every state, and to the extent that it threatens to disrupt social practices, it does so nationwide. Any harm done by the overstatement of a state constitutional right, by contrast, is confined for the most part to the state in question.

Interpretive errors theoretically may be corrected by constitutional amendment, but the procedure is considerably more cumbersome at the federal level than it is at the state level. E.g., compare U.S. Const. art. V (amendment requires ratification by three-fourths of the states) with N.C. Const. art. XIII, § 4 (amendment by legislative initiative, taking three-fifths majority, and electoral ratification by simple majority). "It is said that the Amending Clause of the [Federal] Constitution has been employed to reverse the work of the Court only twice, perhaps three times; and it has never been used to take away or diminish the Court's power." BICKEL, supra note 36, at 21. Judicial overruling of an unsatisfactory precedent is clearly the preferred method of correction. It would seem that claims of stare decisis are at least as pronounced in theory at the federal level as at the state level—though perhaps no more pronounced, see Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) ("Stare decisis is not an inexorable command," but a principle of judicial policy).
resist when they mandated that our "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." If nothing else, allegiance to the text and its spirit should make us wary of compromising calculuses.

IV. Conclusion

Needless to say, there is much more to the spirit of a state constitution than the zeal for individual rights manifested by a "frequent recurrence to fundamental principles" clause. An exhaustive study would take into account the separation of powers and popular sovereignty—principles that surely ranked as fundamental in the minds of state constitutional framers and which thus require constant attention and unfailing respect in our constitutional affairs today. Considerable attention also would have to be paid to other textual provisions which express important insights about the nature and spirit of the document as a whole.

66. Laurence Tribe and Michael Dorf have argued in similar fashion that the Ninth Amendment operates as a textual rule of construction that is antithetical to the restrictive historical method advanced by Justice Scalia in Michael H. Tribe & Dorf, supra note 61, at 1100-01 ("Ninth Amendment . . . affirmatively acts as a presumption in favor of generalizing at higher levels of abstraction"). Whatever the force of the argument under the Ninth Amendment, the case seems easier to make under a provision which unequivocally mandates a "frequent recurrence to fundamental principles."


68. See, e.g., N.C. CONST. art. I, § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."). See generally Orth, supra note 27, at 1360-61, 1363-64 (discussing popular sovereignty under North Carolina Constitution).

69. Fashioning a jurisprudence of judicial review that gives separation of powers and popular sovereignty principles their fair measure at the same time that it safeguards individual liberties against erosion is challenging, but not impossible. As the Supreme Court of North Carolina recognized in State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940), once individual rights are conceptualized as structural components of the democratic system—"foundation stones" upon which the political "superstructure" is built—they can be reconciled with other principles that underlie the political order. Id. at 763, 6 S.E.2d at 866. See supra text following note 44.

70. The North Carolina Constitution, for instance, contains an equivalent of the Ninth Amendment. N.C. CONSt. art. I, § 36 ("The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people."). This provision could lend support to the rule of generous interpretation of individual rights derived from the "frequent recurrence" clause. See supra note 66. Like the Ninth Amendment, § 36 also provides an alluring textual basis for rooting an unenumerated fundamental right. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). But see supra note 48 and accompanying text (not-
Work in that direction surely is to be encouraged. Yet the simple lesson of this brief examination into constitutional spirit is nonetheless sound and powerful. Judges who expound a state constitution must do so with devotion to its spirit—not the spirit of the Federal Constitution, and not the spirit that underlies the currently popular constitutional theory. In many states, North Carolina among them, keeping faith with the constitutional spirit means interpreting individual rights liberally and enforcing them unflinchingly.

ing reticence of courts to rely upon Ninth Amendment). The case for a body of unenumerated fundamental rights is strengthened substantially by the very first provision of the Declaration of Rights, which declares that all persons "are endowed by their Creator with certain inalienable rights"—"among" them (but not exclusively, it would seem, given the use of the word "among") "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. CONST. art. I, § 1.