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Thomas B. Miller

West Virginia Supreme Court of Appeals

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THE NEW FEDERALISM IN WEST VIRGINIA

THOMAS B. MILLER*

I. INTRODUCTION

Much has been written recently about the New Federalism, a term used to describe the increasing tendency by state courts to decide issues under their own constitutions rather than under the federal constitution. In this, the bicentennial year of the United States Constitution, it seems particularly appropriate to briefly review some of the reasons behind this trend, its theoretical bases, and how far it has progressed in West Virginia.

Courts have generally recognized that many issues arise under specific provisions of state constitutions for which there is no federal counterpart. These issues lie peculiarly within the province of state

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* B.A. 1950, University of Virginia; LL.B. 1956, West Virginia University College of Law; Justice, West Virginia Supreme Court of Appeals. The author gratefully acknowledges the assistance of his law clerk, James B. Stoneking, in the preparation of this essay.


2 E.g., Board of Educ. v. Slack, 327 S.E.2d 416 (W. Va. 1985) (W. VA. CONST. art. X, § 8—bonded indebtedness of counties); White v. Manchin, 318 S.E.2d 470 (W. Va. 1984) (W. VA. CONST. art. VI, § 12—state senators must be residents of county and senatorial district); Atchinson v. Erwin, 302 S.E.2d 78 (W. Va. 1983) (W. VA. CONST. art. VI, § 39—local laws not to be passed in enumerated cases); O'Conor v. Margolin, 296 S.E.2d 892 (W. Va. 1982) (W. VA. CONST. art. VI, § 30—legislative act to embrace only one object); Lane v. West Virginia State Bd. of Law Examiners, 295 S.E.2d 670 (W. Va. 1982) (W. VA. CONST. art. VIII, § 1—judicial power in supreme court enables it to regulate and control the practice of law); Killen v. Logan County Comm'n, 295 S.E.2d 689 (W. Va. 1982) (W. VA. CONST. art. X, § 1—taxation of real and personal property at "true and actual value").
courts and are not in the main arena of contention. More troublesome problems arise, however, where state courts are called upon to interpret language in their constitutions which is the same or similar to language appearing in the United States Constitution. The main area of engagement centers on the Bill of Rights. Despite the similarity in language and the existence of United States Supreme Court precedents, state courts have often charted their own course by reading their state constitutional provisions more broadly than analogous federal provisions. It is this practice which writers call the New Federalism.

What appears to form the heart of the New Federalism debate is the belief that in recent years the United States Supreme Court has eroded many of the individual rights previously recognized and developed by the Warren Court. Much of the impetus for developing a state constitutional jurisprudence can be traced to a law review article written in 1977 by Justice William Brennan. After decrying the Burger Court’s conservative trends in the area of civil liberties, Brennan found consolation in our system’s “double source of protection” for individual rights. He called upon states to “breathe new life” into diminished constitutional guarantees by relying upon their own constitutions. Encouragement has also come from dissenters in the high court’s more conservative decisions, who have taken pains to remind state courts that they may extend greater protection under state constitutional provisions.

This essay will attempt to highlight the theoretical roots of the New Federalism. It will also examine some of the practical limi-

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3 As Professor Williams points out in his article, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195 (1985), other areas are implicated such as equal protection principles.
4 The phrase “New Federalism” is usually credited to Professor Wilkes and was first used by him in his 1974 law review article, supra note 1.
6 Brennan, supra note 5, at 503.
tations which confront state courts in breaking with federal precedents, and the methodology which has been employed in so doing. Finally, it will review and analyze cases in West Virginia which have recognized distinctive state constitutional principles.

II. Theory

"Federalism" expresses the unique feature of the American system of government whereby two sovereigns coexist, each supreme within its own sphere. It contemplates not only distinct governing authorities, but also distinct bodies of law. From a broad perspective, then, it seems only natural that the legal protections guaranteed at the national and state levels should differ. With fifty separate states, each independently governed and having its own history and traditions, some disharmony seems inevitable. A handful of commentators would press the point even further. They suggest that state independence should be encouraged and that disharmony—even on constitutional issues—is a sign of the system's health and vitality.

Other considerations, however, counsel against this trend. Perhaps with the exception of Louisiana, the states in our nation share a common legal heritage. It cannot be seriously contended that any state's plan of organization, constitution, and common law were developed in a vacuum. Quite to the contrary, new states drew heavily upon the law of the national government and their sister states, often by simply adopting what had been done or said beforehand. Today, when a state court is called upon to interpret a provision in its bill of rights, that provision will typically have deep roots

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8 This is perhaps best captured by two constitutional provisions. The supremacy clause in art. VI, § 2 provides that the "Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." However, the national government was envisioned as a government of limited powers. Those powers which were not surrendered to the national government were retained by the states. This principle finds expression in the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."


which may actually antedate the formation of the republic.¹¹ This common historical thread would, in logic at least, dictate a uniform interpretation.

Some degree of uniformity is also supported by the longstanding process of "nationalizing" the protections guaranteed under the federal Bill of Rights. Starting in the early twentieth century, constitutional protections formerly applicable only to the national government were made binding upon the states as "liberty" interests, protected against state encroachments by the Fourteenth Amendment. This process has helped to foster the view that basic civil liberties are, and rightly should be, national in their scope.

Given this need for uniformity, the question arises to what extent a state court should defer to the decisions of our nation's highest court. Under the Supremacy Clause, decisions of the United States Supreme Court provide a minimum level of protection, a "floor" if you will, with respect to constitutional liberties. They do not, however, mandate a "ceiling," and states are permitted if they so choose to give greater protection under their own law.¹² From the point of view of federal constitutional theory, then, there is no impediment to the development of a state-based constitutional law. Yet, the question remains: Should states defer to decisions of the United States Supreme Court for the sake of achieving uniformity?

For several closely related reasons, I believe that state courts cannot simply blind themselves to decisions of the Supreme Court. Though most of these reasons will be discussed below, I mention two here by way of emphasis. First, perhaps the greatest impediment to state courts in the area of constitutional bill of rights is the lack of a state jurisprudence upon which to rely. For years, the states

¹¹ This point was argued by Justice Richardson in his dissent in People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976). In Disbrow, the California court declined to follow federal precedent holding that statements taken in violation of Miranda could be used to impeach a defendant who took the stand. Justice Richardson noted that the privilege against self-incrimination, upon which Miranda was based, was a common law privilege which had existed well before being codified in either the state or federal constitutions. This history, "blithely ignore[d]" by the majority, demanded a uniform interpretation. 16 Cal. 3d at 119-20, 545 P.2d at 284, 127 Cal. Rptr. at 372.

have been willing to cast a deferential eye toward Supreme Court rulings, and it seems unjustifiable to now ignore helpful federal precedent. Second, a respect for decisions of the Supreme Court flows from its preeminent status as the highest court in the land under the federal Constitution. Thus, both the paucity of state-based constitutional law and the very nature of our federal system suggest that state courts should place reliance upon Supreme Court decisions.

III. **SOME PRACTICAL CONSIDERATIONS**

Many practical concerns also caution against too great a reliance upon state constitutions in extending civil liberties protection. Three such concerns were voiced by Justice Utter of the Washington Supreme Court in a recent article: "First, [state courts] must justify departing from precedents laid down by the United States Supreme Court . . . . Second, they must decide when and how to approach a state constitutional problem . . . . Finally, they must decide how to analyze state constitutional provisions with few or no [state] supreme court precedents for guidance."

Other equally important considerations come readily to mind. A state supreme court rarely enjoys the prestige of the United States Supreme Court, particularly when it embarks on a more expansive reading of its own constitutional bill of rights. For this reason, the task of justifying a departure from settled law only becomes more exacerbated. Furthermore, it is much easier for a state legislature to react to "overrule" a state supreme court decision than it is for Congress to do so through the cumbersome amendment process.

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14 The Florida Supreme Court's expansive interpretation of its constitutional search and seizure provision in Grubbs v. State, 373 So. 2d 905 (Fla. 1979), and State v. Dodd, 419 So. 2d 333 (Fla. 1982), is thought to have triggered an amendment requiring it to "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const. art. I § 12 (1885, amended 1968). The Maryland Supreme Court in Johnson v. State, 282 Md. 314, 384 A.2d 709 (1978), implemented its "prompt presentment" rule (requiring persons arrested to be taken promptly to a magistrate) and held that the failure to do so would render a prior confession invalid. Subsequently, the Maryland legislature enacted a statute to overrule *Johnson*, Act of May 19, 1981, Ch. 577, 1981 Md. Laws 2326. See generally D. Wilkes, Jr., *The New
As a consequence, rejecting federal precedents may not only promote tensions with the other branches of state government, but may actually encourage them to thwart court action. Substantial departures may also draw the ire of the public through the electoral process or public referendum.15

Another consideration which may give a state court pause in pursuing its own constitutional analysis is the lack of any authoritative approach by other state courts.16 Without more guidance on the analytical approach to be used, and a greater confidence in state courts to faithfully apply it, reliance on independent state authority becomes transparently result-oriented.

It should also be noted that state courts are often seriously disadvantaged in attempting to review the history of their own constitutional law. Records of state constitutional debates may be fragmentary or totally nonexistent.17 Thus, not only the original intention of the drafters, but even the sources upon which they relied,

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Similarly, when the West Virginia court held in Killen v. Logan County Comm'n, 295 S.E.2d 689 (W. Va. 1982), that under article X, § 1(b) of the West Virginia Constitution, real property had to be assessed at true and actual value, the legislature responded by proposing the "Property Tax Limitation and Homestead Exemption Amendment of 1982." W. VA. CONST. art. X, § 1(b) (1872, amended 1982). This amendment was adopted November 2, 1982, and fixed assessments at 60 percent of true and actual value, with the right to establish a higher percentage if approved by two-thirds of the members of each house of the legislature.

15 Perhaps the most extreme example of popular reaction was the passage in June, 1982 of Proposition 8, also known as the California Victims' Bill of Rights. It amended the California Constitution to provide that "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding[.]" CAL. CONST. art. I, § 28(d) (1879, amended 1982). The obvious impact of the amendment is to prohibit the state supreme court from fashioning any state-law based exclusionary rule, subject only to the limitations of the Fourth Amendment.

16 In State v. Wyer, 320 S.E.2d 92 (W. Va. 1984), we had the first occasion to determine if a Miranda warning was sufficient to waive the Sixth Amendment right to counsel. We surveyed the divergent conclusions of other state and federal decisions, noting that the United States Supreme Court had not decided the issue. It subsequently decided the issue in Michigan v. Jackson, 475 U.S. 625 (1986), which created a higher standard than the one set in Wyer. This points to another peril of embarking on a state constitutional basis when the Supreme Court has made no definitive judgment. If the state decision offers insufficient protection, it has no precedential value. See State v. Barrow, No. 16370 (W. Va. July 7, 1987) overruling Wyer.

17 Despite three volumes of debate on our 1863 Constitution, there is no debate reported on article III, which forms the core of our state bill of rights.
are often lost to history.\textsuperscript{18} Similar problems arise even today. Legislative records are often silent on the meaning to be ascribed to state constitutional amendments. Perhaps the only resources available to the courts is the literature prepared by interest groups supporting or opposing a given amendment at the general election. A court should rightly hesitate to interpret a state constitution armed only with the words of the provision in question and obviously one-sided political rhetoric.

Finally, it seems prudent to suggest that where the vast majority of a state's constitutional cases in the area of criminal procedure have rested on United States Supreme Court precedent, it is hardly rational to begin to decide them anew on state constitutional grounds.

IV. METHODOLOGY

Several approaches have been suggested as a means of justifying state constitutional primacy. Indeed, the term "primacy" represents one such methodology, which holds a state court should begin its analysis with its own constitution, coupled with its history and structure, to evolve a meaning. It is generally agreed that Justice Linde of the Oregon Supreme Court has been the most penetrating spokesman for this model.\textsuperscript{19}

Another available approach is termed the "interstitial" model. As its name suggests, this model requires a state court to acknowledge any applicable United States Supreme Court decisions as a floor. The court then must determine whether a higher protection should be afforded under its state constitution. This approach enables a state court to utilize federal precedents, which it ordinarily would not do under the primacy model.

In effect, the interstitial model allows the state court to build on a foundation of federal precedent and then to expand protection

\textsuperscript{18} There is no authoritative publication with regard to the 1872 Constitution.

if desired on state constitutional grounds.\textsuperscript{20} A state court operating under the interstitial model may elect not to give the federal law any precedential weight.\textsuperscript{21} Justice Handler of the New Jersey Supreme Court has developed a list of factors to which a state court may resort in determining whether its state constitution warrants a departure from the federal norm.\textsuperscript{22} It is, of course, understood that the state may not settle its law below the federal norm.

A third recognized approach to analyzing state constitutional issues is known as the "dual sovereignty" model. It proceeds by analyzing both federal and state constitutional provisions and allowing the state court to elect to follow the federal precedent rather than to give elevated protection under its state constitution. On the other hand, the state court may rely upon separate and independent grounds to achieve a higher protection under its own constitution.\textsuperscript{23}

It should be pointed out that both the interstitial and the dual sovereignty models carry with them a potential for application of the principle expressed in \textit{Michigan v. Long},\textsuperscript{24} namely, that the Supreme Court will review state court decisions unless there is a "plain statement" that the decision was grounded on state law:

\begin{quote}
[W]hen...a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only
\end{quote}


\textsuperscript{21} Utter, \textit{supra} note 20, at 1029.

\textsuperscript{22} Justice Handler, in his concurring opinion in State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982), provided a list of seven reference points available to judges in determining whether additional protection is provided under state constitutional law. These include: (1) textual language, (2) legislative history, (3) preexisting state law, (4) structural differences, (5) matters of particular state interest or local concern, (6) state traditions, and (7) public attitudes.

\textsuperscript{23} Utter, \textit{supra} note 20, at 1029-30.

Thus, it is clear that a state court which discusses federal precedents in its analysis, but decides the issue on its own state constitution, must expressly state that federal law is used only for guidance and is not controlling.

V. WEST VIRGINIA AND THE NEW FEDERALISM

On several occasions, the West Virginia Supreme Court of Appeals has utilized state constitutional provisions to create higher rights than those afforded under the federal Constitution. The remainder of this essay will review recent West Virginia cases which have expanded protections beyond those recognized under federal constitutional law. In particular, it will examine the nature and extent of the deviation from federal precedent and the legal rationale offered by the court.

Perhaps the most noteworthy state-law based decision in recent years was Pauley v. Kelly, where it was held that article XII, section 1 of the West Virginia Constitution, providing for “a thorough and efficient system of free schools,” made education a fundamental right subject to equal protection principles. Under the court’s analysis in Pauley, an educational funding system based upon discriminatory classifications would be subject to strict scrutiny and sustained only upon a showing of a compelling state interest. This was the same position taken by the New Jersey Supreme Court in 1973 under its “thorough and efficient” clause in Robinson v. Cahill. The United States Supreme Court has declined to find education to be a fundamental right for purposes of equal protection analysis.

The state supreme court has also concluded that article III, section 5 of the West Virginia Constitution, which contains a prohibition against “cruel and unusual punishment,” incorporates a proportionality principle. This holding was based in part on the

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25 Id. at 1040-41.
wording of the state constitutional guarantee, which states that "[p]enalties shall be proportioned" to the offense.\textsuperscript{29} In 1980, proportionality analysis was all but excluded under the eighth amendment by the Supreme Court in Rummel v. Estelle.\textsuperscript{30} In Wanstreet v. Bordenkircher,\textsuperscript{31} decided one year after Rummel, the West Virginia court rejected the federal approach. It traced a line of state cases and concluded that a heightened concern for the proportionality of sentences existed by reason of our different constitutional language.\textsuperscript{32}

Similarly, the West Virginia court held in syllabus point 1 of State ex rel. Harper v. Zegeer\textsuperscript{33} that "[r]eal punishment of chronic alcoholics for public intoxication violates our State constitutional prohibition against cruel and unusual punishment."\textsuperscript{34} It was candidly acknowledged by the Harper court that its holding was at odds with a closely divided decision by the United States Supreme Court over a decade before in Powell v. Texas.\textsuperscript{35} However, Harper emphasized that Justice White, the swing vote in the Powell majority, had stated in a separate opinion that if the record were better developed he would agree that cruel and unusual punishment principles were implicated.

Language in our article III, section 14 which states "[t]rials of crimes, and misdemeanors . . . shall be by a jury of twelve men," led the West Virginia court to conclude that it provides greater protection for a jury trial than the sixth amendment. In Hendershot v. Hendershot,\textsuperscript{36} decided in 1980, the court held that this provision prohibited a sentence of imprisonment for criminal contempt with-
out a jury trial. Extensive historical precedents were marshalled in *Hendershot* including the very early case of *State v. Cottrill*, in which the court held that the same constitutional provision mandated a jury trial in all misdemeanor cases.

The court in *Hendershot* recognized that *Bloom v. Illinois*, a 1968 United States Supreme Court case which permitted incarceration up to six months for criminal contempt, dictated a different result. As *Hendershot* explained, *Bloom*'s holding was based on the conclusion of two prior cases, *Duncan v. Louisiana* and *Cheff v. Schnackenberg*, that "historically the right to a jury trial in a criminal case did not include 'petty' offenses. This term was defined in *Cheff* to be an offense for which the punishment does not exceed a six-month confinement." However, the specific reference in the West Virginia constitution to "misdemeanors" foreclosed the "petty" offense concept. Also helpful in buttressing *Hendershot*'s analysis were legislative enactments, dating from the formation of the state, which guaranteed the right to a jury trial in misdemeanor cases where the defendant was to be imprisoned. Subsequently, in *Champ v. McGhee*, the court, relying on *Hendershot*, held in the single syllabus: "Under art. 3, § 14 of the West Virginia *Constitution*, the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration."

West Virginia has likewise departed from the United States Supreme Court’s conclusion that neither double jeopardy nor due process principles forecloses the imposition of an increased criminal sentence in the event of a retrial after appeal or of an appeal de novo. *State v. Eden*, decided in 1979, involved an appeal from a magistrate court. The principle was extended to municipal court appeals five years later in *State v. Bonham*.

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41 *Hendershot*, 164 W. Va. at 193, 263 S.E.2d at 92.
Two concerns were the motivating factors in both of these decisions. First, a chilling effect is placed on the right to appeal where the possibility exists of an enhanced sentence if the appeal proves successful. Second, where the appeal is from a magistrate or municipal court, the procedure is not really an appeal but rather a trial de novo. Consequently, regardless of how egregious the error was in the underlying trial, it cannot be corrected on the "appeal." The defendant is simply compelled to undergo a second trial faced with the possibility of receiving an increased sentence. These matters were of compelling concern and the court said in Bonham, they were not addressed satisfactorily by the high court's decision, thus justifying a departure.46

The right of access to criminal trials by the public and press was recognized under article III, section 1447 and section 1748 of the West Virginia Constitution in State ex rel. Herald Mail Co. v. Hamilton 49 in 1980. This decision followed Gannet Co. v. De Pasqualle, 50 handed down one year before, in which the United States Supreme Court held that the press and public had no right under the sixth amendment's jury trial provisions to be present in the courtroom during a criminal trial. Unlike the sixth amendment, the criminal trial guarantees under the West Virginia Constitution provide specifically that all courts of the state "shall be open." In Herald Mail, the West Virginia court discussed at some length the history of the "open courts" provision as it had evolved from the English common law into early charters and state constitutions, and concluded: "The uniform interpretation of the mandate that the courts 'shall be open' . . . is that this language confers an independent right on the public

46 Bonham, 317 S.E.2d at 503-04.
47 In State ex rel. Herald Mail Co. v. Hamilton, 165 W. Va. 103, 107, 267 S.E.2d 544, 547 n.2 (1980), the following language was quoted from article III, section 14: " 'Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay . . .' (Emphasis in original).
48 In Herald Mail, 165 W. Va. at 103, 107, 267 S.E.2d at 547 n.2, (1980), the following language was quoted from article III, section 17: " 'The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.' "
49 Herald Mail, 165 W. Va. 103, 267 S.E.2d 544.
to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding." Thus, the clause providing for "open courts" conferred a right in addition to those provided under the more narrow language of the sixth amendment.

Finally, two other related areas should be mentioned. In Dobbs v. Wallace and Louk v. Haynes, the court concluded without any extended discussion that counsel was required at parole and probation revocation hearings, contrary to the more limited case-by-case federal standard set in Gagnon v. Scarpelli.

In Ray v. McCoy, it was held that the provisions of article III, section 5 of our constitution, requiring that "[n]o person shall be transported out of, or forced to leave the State for any offence committed within the same" operated to prevent "a prisoner convicted under West Virginia law from involuntarily serving any portion of a state sentence beyond the West Virginia borders." The United States Supreme Court, in the 1983 case of Olim v. Wakinekona, concluded that the due process clause of the fourteenth amendment did not foreclose such a transfer from one state to another without a hearing. It is apparent that our more express constitutional language accounts for the distinction between Ray and Olim.

These cases should not be read to imply a willingness by the West Virginia court to simply abandon federal precedent in favor of a state-based analysis. Nearly ten years ago, in State v. Adams, the court held that the admission in a criminal trial of a defendant's refusal to submit to a breathalyzer was a violation of the privilege against self-incrimination under both the United States and West Virginia constitutions. This holding was made in the absence of any controlling authority from the United States Supreme Court. Some

51 Herald Mail, 165 W. Va. at 110, 267 S.E.2d at 548.
56 Id. at 92.

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five years later, the high court held in *South Dakota v. Neville*\(^9\) that the admission of such refusal evidence was not a violation of the fifth amendment. In light of *Neville* and subsequent state cases which formed a clear majority rule against *Adams*, this issue was reexamined in *State v. Cozart*;\(^\text{60}\) and *Adams* was overruled.

### VI. Conclusion

This review of West Virginia cases lends itself to several observations. Undoubtedly, the court has recognized the basic concepts inherent in the New Federalism. This has been accomplished in two major areas. First, the court has shown an awareness of areas of traditional state concern and has been willing to extend broader protection. Thus, for example, the "thorough and efficient" clause in our constitution was held to embody a heightened concern for education and educational funding which warranted strict scrutiny under equal protection analysis. Second, where the state constitution uses wording which provides protections over and above federal guarantees, the court has shown a willingness to implement it by developing its own state-law jurisprudence. The express provision of a proportionality principle in article III, section 5 of the West Virginia Constitution has led the court to consider whether a given criminal sentence is disproportionate. Similarly, the "open courts" language in our counterpart to the sixth amendment was held to confer rights on persons other than the criminal defendant, despite federal law to the contrary.

These cases demonstrate a willingness to establish an independent state constitutional basis where the constitutional language suggests an enhanced right. The *Cozart* decision in 1986 overruling *Adams*, however, stands as a reminder of the court's unwillingness to maintain a higher standard when it is contrary to later Supreme Court precedent and that adopted by the majority of other states.

What does this bode for the future? I believe that our state constitutional jurisprudence will continue to grow. This is partic-

\(^\text{60}\) State v. Cozart, 352 S.E.2d 152 (W. Va. 1986).
ularly so in matters of strong state or local interest. Its growth, however, will be limited to some extent by the fact that the court has not fully embraced the New Federalism to any marked degree. Thus, only where our constitution has distinctive language can it be expected that a substantial variance with federal precedent will occur.