

June 2012

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### Recommended Citation

Titone, Vito J. (1987) "State Constitutional Interpretation: The Search for an Anchor in a Rough Sea," *St. John's Law Review*: Vol. 61 : No. 3 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol61/iss3/4>

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# STATE CONSTITUTIONAL INTERPRETATION: THE SEARCH FOR AN ANCHOR IN A ROUGH SEA

VITO J. TITONE\*

Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.<sup>1</sup>

That it is the responsibility of the judiciary to act as the final arbiter in deciphering the meaning and ambit of the federal Constitution was settled in *Marbury v. Madison*.<sup>2</sup> Similarly, the highest court of each state is the last word on the meaning of its own state constitution.<sup>3</sup> The decisions of the state high courts regarding state constitutional questions guide the legal relationships of millions of people. When the California Supreme Court interprets the California constitution, over twenty million people are affected.<sup>4</sup> Likewise, the rulings of the New York Court of Appeals affect almost eighteen million people.<sup>5</sup> Acutely aware of the impact and finality of their decisions, state court judges—like their federal counterparts—continually debate methodology and philosophy in search of the one correct approach to construing state constitutions.

The two hundred-year-old debate over methodology has generally divided jurists and scholars into one of two intellectually

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<sup>1</sup> 8 WRITINGS OF THOMAS JEFFERSON 247 (P.L. Ford ed. 1898-1899).

<sup>2</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (“[i]t is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>3</sup> See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). See also Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 732 (1982) [hereinafter Galie, *The Other Supreme Courts*].

<sup>4</sup> See Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 986 (1979). The Deukmejian & Thompson article was, in part, the inspiration for the title of this Article.

<sup>5</sup> THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, 1985-86 NEW YORK STATE STATISTICAL YEARBOOK 5 (12th ed.).

armed camps: the interpretivists and the noninterpretivists.<sup>6</sup> The interpretivist school, expressed in the writings of Thomas Jefferson, Alexander Hamilton, Chief Justice John Marshall, and Justices Joseph Story and Hugo Black, advocates strict limits on the judiciary's role. Interpretivists argue that constitutional decision-making must be based upon the original intent of the Constitution's Framers to ensure that the will of the people is not usurped. The intentions of the Framers must be the paramount guiding principle because it was those intentions that persuaded the representatives of the people to adopt the federal Constitution.<sup>7</sup> In the interpretivist view, the courts' responsibility is limited to assuring that the will of the people, as reflected in the normative values expressed within the four corners of the Constitution, is implemented.<sup>8</sup> Only by confining itself to this limited role, proponents of this school of thought assert, can the judiciary be certain that it is inhabiting its proper place in the scheme of American government.

Opposing the interpretivists are those advocating noninterpretivism or judicial activism,<sup>9</sup> represented most notably by jurists such as the late Chief Justice Earl Warren and present Justices William Brennan and Thurgood Marshall. Noninterpretivists argue that constitutional issues should be resolved by reference to the "spirit" of the Constitution rather than the divined intent of the Framers.<sup>10</sup> They stress that the Framers were aristocrats and landowners living over two hundred years ago in a society vastly different from our own. They further point out that when our federal Constitution was adopted two centuries ago by the citizens of

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<sup>6</sup> See generally J. ELY, *DEMOCRACY AND DISTRUST* 1, 1 n.1 (1980); Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 1-2 (1986) [hereinafter Berger, *The Activist Flight*].

<sup>7</sup> See E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 409 (1934); Berger, *The Activist Flight*, *supra* note 6, at 4.

<sup>8</sup> See Berger, *The Activist Flight*, *supra* note 6, at 5 n.32. ("the most contemporarily important theory of the Constitution's authority . . . is the authority of moral reasoning" (quoting Simon, *The Authority of the Constitution and Its Meaning: A Practice to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 646 (1985))).

<sup>9</sup> See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 204-24 (1980) (examination of concepts and methods of textual analysis and constitutional intent) [hereinafter Brest, *The Misconceived Quest*].

<sup>10</sup> See Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 329 & n.237 (1986). Raoul Berger, a leading commentator, stresses that judicial activists insist on an interpretation of the Constitution "in light of what is 'good and just'" in relation to the needs of modern society. See *id.*

a pre-industrial nation consisting of thirteen colonies, our modern problems could not possibly have been comprehended or foreseen. Finally, these judicial activists argue that history seldom furnishes conclusive guidance on the original meaning and intent of the Constitution's provisions. For these reasons, they eschew rigid reliance on linguistic and historical analysis, preferring instead a "living Constitution," interpreted and reinterpreted according to the tenor of the times.<sup>11</sup>

As an Associate Judge of the New York Court of Appeals, my concern here is the proper methodology for state, rather than federal, constitutional interpretation. In this regard, the arguments concerning the federal Constitution cannot be ignored; not only because they are highly instructive, but also because they compromise the bulk of methodological thought to date. Nevertheless, as state constitutions have unique characteristics, the arguments addressing federal constitutional analysis must be considered in a somewhat different light.

State court judges are well accustomed to the principles that govern the formation of the common law and the interpretation of legislative enactments. When dealing with the common law, appellate jurists are constantly functioning as policy-makers, weighing the unquestionable value of stare decisis against the wisdom of departing from precedent in response to a shifting social, economic, political and legal climate.<sup>12</sup> The court's role is obviously quite different when it is called upon to interpret and apply legislation. In those cases, the court must defer to the legislature's policy-making

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<sup>11</sup> Noninterpretivists employ the term "living Constitution" to connote a judicial method divorced from the original intent of the Constitution's Framers. See *infra* note 14 and accompanying text. "Living Constitution" can also refer to "the application of the framers' value judgments and institutional arrangements to new or changed *factual* circumstances." Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709-10 (1975).

<sup>12</sup> See, e.g., *In re Eckart*, 39 N.Y.2d 493, 498-99, 348 N.E.2d 905, 908, 384 N.Y.S.2d 429, 431-32 (1976); *People v. Hobson*, 39 N.Y.2d 479, 487, 348 N.E.2d 894, 900, 384 N.Y.S.2d 419, 424 (1976). The creation of a new tort remedy is an example. In extending manufacturers' liability for injuries to remote "users" arising from product defects, the New York Court of Appeals rejected the prior common law requirements of "privity of contract" in light of significant changes in the economic and social climate of manufacturing. The Court of Appeals stated that "[t]he dynamic growth of the law in this area has been a testimonial to the adaptability of our judicial system and its resilient capacity to respond to new developments, both of economics and of manufacturing and marketing techniques." *Codling v. Paglia*, 32 N.Y.2d 330, 339, 298 N.E.2d 622, 626, 345 N.Y.S.2d 461, 466 (1973); see also *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972) (policy and fairness demand apportionment of liability among tortfeasors).

prerogatives, relying principally on that branch's intentions as reflected in the language and history of the disputed enactment.<sup>13</sup>

Noninterpretivists would contend that courts should look to the principles of common law formation rather than statutory construction as models for interpreting the Constitution, since the policy-making role of the former activity better serves modern society in areas such as human rights.<sup>14</sup> Interpretivists, of course, would advocate precisely the opposite view. It is my contention that while the noninterpretivist school may have much to commend it in the resolution of federal constitutional questions,<sup>15</sup> the interpretivists' position is generally superior when questions of state constitutional construction are involved. This viewpoint is based both on my experience with the New York Constitution and my perception of the unique nature of state constitutions.

### I. THE GROWING IMPORTANCE OF STATE CONSTITUTIONS

The nation's founding fathers "recognized the primacy of the states in protecting individual rights."<sup>16</sup> State courts have long been recognized as laboratories for "social and economic experiments"<sup>17</sup> and "guardians of our liberties."<sup>18</sup> Nevertheless, until re-

<sup>13</sup> See *infra* note 45 and accompanying text.

<sup>14</sup> See *infra* text accompanying notes 110-32.

<sup>15</sup> See A. COX, *THE WARREN COURT—CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 4-5 (1968). Professor Cox argues that both the interpretivist and noninterpretivist views are valid methods of federal constitutional construction. He states:

The critics charge the [Warren] Court with subordinating law to personal political preferences, and with acting like a legislature or an omnipotent council of not-so-wise men instead of a court.

In my view, constitutional adjudication presents an insoluble dilemma. The extraordinary character of the questions put before the Court means that the Court cannot ignore the political aspects of its task—the public consequences of its decisions—yet the answer to the question "what substantive result is best for the country?" is often inconsistent with the responses obtained by asking "what is the decision according to law?"

*Id.*

<sup>16</sup> See Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 *TEX. L. REV.* 1081, 1082 & nn.9 & 10 (1985).

<sup>17</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"). Justice Brandeis had in mind experimentation by state legislatures, but his conclusion is equally applicable to state courts. See Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 *TEX. L. REV.* 1141, 1141-42 (1985); see also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 *VA. L. REV.* 873, 940 (1976).

cently, federal constitutional law has seemed to overshadow state constitutionalism. Over the past fifty years, however, the confluence of such diverse factors as the New Deal, population growth, and the increasing urbanization of our society has created a growing demand for government's participation in a myriad of new areas. This demand has been felt at the state, as well as the federal, level. Indeed, state legislators increasingly have turned their attentions to such problems as the preservation of privacy interests, the protection of human rights, aid to the needy and the promotion of commerce.<sup>19</sup>

As state governments have grown, their constitutions have been continuously amended to protect the integrity of longstanding state policies from the vicissitudes of future legislatures that may not be sympathetic to the normative values the present body politic would like to consider settled. A further impetus underlying this trend has been a heightened sense of "the inadequacy of state constitutions,"<sup>20</sup> which emerged in the 1960's, in part as a result of the social upheaval of the times and Supreme Court decisions such as *Baker v. Carr*.<sup>21</sup> This reapportionment case forced many states to re-examine their method of elective representation and to reconsider the adequacy of their "state governmental organization and structure."<sup>22</sup> Finally, economic and social growth, coupled with citizens' increased interest in government, has resulted in a renewed focus on the use of state courts to vindicate individual rights and, as a natural corollary, an expansion of state constitutional litigation. The political climate of the 1960's, as well as emerging social problems such as street crime, contributed substantially to this trend.<sup>23</sup>

Although the nation's political climate has shifted since the

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<sup>19</sup> Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

<sup>19</sup> See generally E. CORNWELL, J. GOODMAN & W. SWANSON, *THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 1-4* (1975) (discussing increasing legislative trend of dealing with "material" problems on state level); Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV. 1, 6-9 (1984) (historical analysis of Missouri constitutional efforts to address diverse material problems). With the current trend toward contracting the federal government's participation in the people's social and economic lives, the state's involvement has increased geometrically.

<sup>20</sup> E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 3.

<sup>21</sup> 369 U.S. 186 (1962) (1901 Tennessee apportionment statute declared unconstitutional because it diluted voting power in certain counties).

<sup>22</sup> See A. COX, *supra* note 15, at 114-34 (discussing *Baker v. Carr* and its progeny).

<sup>23</sup> See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 3.

1960's, the trend toward reliance on state constitutions has continued to grow.<sup>24</sup> Indeed, the "call to invigorate state constitutions is growing louder and more frequent,"<sup>25</sup> as both commentators and judges advocate increased reliance on state constitutions and the development of coherent bodies of state constitutional law.<sup>26</sup>

I would be less than candid if I failed to acknowledge that the transition from the Warren Court to the Burger-Rehnquist Courts, with the attendant shift in the Supreme Court's philosophy, is perhaps the single most important factor behind the heightened attention to state constitutions. As Justice Brennan has contended, federal solicitude in the areas of personal freedom, liberty and other "guarantees" arising under the Bill of Rights has diminished since the years of the Warren Court.<sup>27</sup> This change in philosophy

<sup>24</sup> See Brennan, *supra* note 18, at 495; Deukmejian & Thompson, *supra* note 4, at 1009; Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 202 (1983).

In the area of criminal law, for example, state courts have a strong vested interest in deciding cases under state constitutional principles. Justice Abrahamson of the Wisconsin Supreme Court has said:

Criminal law is an area of traditional concern for state judges. It is an area of law in which state judges have special experience and expertise. The very bulk of the criminal cases in the state trial court may justify a state's attempt to formulate rules to achieve stability of state law, relatively free of the changes wrought by the United States Supreme Court, and to achieve uniformity within the state judicial system. Because of the state supreme courts' supervisory power over trial courts and procedural rules, it may be easier to develop independence in criminal procedural law than in other areas of constitutional law.

Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1150 (1985).

<sup>25</sup> Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 PUGET SOUND L. REV. 283, 283 (1985).

<sup>26</sup> Brennan, *supra* note 18, at 503; Galie, *The Other Supreme Courts*, *supra* note 3, at 792-93. In *Massachusetts v. Upton*, 466 U.S. 727 (1984), for example, Justice Stevens' concurrence chastised the state high court for failing to look to an "adequate and independent" ground rather than turning immediately to the federal Constitution. Justice Stevens stated:

The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of either parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the Court in fact is fully met by state law.

*Id.* at 736 (Stevens, J., concurring) (quoting *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123, 126 (1981)). Justice Stevens further stated:

It is also important that state judges do not unnecessarily invite this Court to undertake review of state-court judgments. I believe the Supreme Judicial Court of Massachusetts unwisely and unnecessarily invited just such review in this case. Its judgment in this regard reflects a misconception of our constitutional heritage and the respective jurisdictions of state and federal courts.

*Id.* at 737 (Stevens, J., concurring).

<sup>27</sup> Brennan, *supra* note 18, at 490-91; see Wilkes, *The New Federalism in Criminal*

has given litigants and civil libertarians a powerful incentive to bring their grievances to our state courts and present their claims in terms of state constitutional issues. Additionally, it has motivated the highest courts of some states to take an active role in extending to state citizens greater protections than the federal Constitution has been deemed to afford.<sup>28</sup> The result has been an emerging perception that state courts are a more hospitable forum than are their federal counterparts for those who seek expanded protection of human rights and civil liberties.<sup>29</sup> Interestingly, this perception represents a dramatic turnabout from that which prevailed during the Warren Court years, when the federal courts were seen as the bulwark standing between citizens and state governmental incursions on their liberties.<sup>30</sup>

A subtler, but equally important, factor in the increased use of state constitutions has been the greater familiarity with constitutional adjudication that state courts gradually acquired as a by-product of the Warren Court's expansive use of the fourteenth amendment to bring state government within the Bill of Rights' prohibitions.<sup>31</sup> It is useful to recall, for example, that the exclusion-

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*Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421, 450 (1973-74).

<sup>28</sup> See, e.g., *PruneYard Shopping Center v. Robins*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980) (state constitutional provision extending greater free speech rights than federal Constitution held not violative of first and fourteenth amendments); *People v. Adams*, 53 N.Y.2d 241, 250, 423 N.E.2d 379, 383, 440 N.Y.S.2d 902, 906 (1981); *Cooper v. Morin*, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193-94, 424 N.Y.S.2d 168, 174 (1979); see also *Deukmejian & Thompson*, *supra* note 4, at 976; *Galie, The Other Supreme Courts*, *supra* note 3, at 732; *Galie, State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157, 158 (1979).

<sup>29</sup> See *Linde, First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980) (collection of recent articles on increasing use of independent state grounds). It is elementary that states may afford their citizens greater protection than the federal Constitution requires. See *Cooper v. California*, 386 U.S. 58, 62 (1967) (state may require stricter standards for search and seizure than the federal Constitution requires); *Abrahamson*, *supra* note 24, at 1141-42 (states free to grant more protection under state constitution); *Brennan*, *supra* note 18, at 491-503.

<sup>30</sup> See *supra* note 27 and accompanying text.

<sup>31</sup> Early in the republic's history, the Supreme Court determined that the Bill of Rights was not itself applicable to the states. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). The Court subsequently suggested, however, that some, but not all, of the rights guaranteed by the Bill of Rights might bind the states under the fourteenth amendment's requirement that all state citizens be afforded due process of law. See *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); *Twining v. New Jersey*, 211 U.S. 78, 86 (1908). The Warren Court used this doctrine, known as "selective incorporation," quite liberally, so that by 1970 most of the basic protections provided by the first ten amendments were held binding on the states as well as the federal government. See *infra* notes 32-37 and accompanying text.



ary rule, which was developed to promote the fourth amendment's goals, was not held applicable to the states until 1961.<sup>32</sup> Likewise, it was not until the 1960's that the state courts were required to apply the double jeopardy prohibition of the fifth amendment,<sup>33</sup> the fifth amendment privilege against self-incrimination,<sup>34</sup> the sixth amendment right to jury trial in criminal cases,<sup>35</sup> the sixth amendment right of confrontation<sup>36</sup> and the indigent's right to assigned counsel at trial.<sup>37</sup> In short, the Warren Court's efforts to expand individual rights resulted in making the state courts full partners in applying federal constitutional principles. Although state courts had always engaged in some constitutional adjudication, that area of law became part of the state courts' daily fare in the 1960's as a result of both the expansion of constitutional rights and the courts' increased responsibility for enforcing those rights. The habits of mind and familiarity with constitutional analysis developed in the state courts during this period unquestionably has contributed to their current willingness to explore novel theories under their own state constitutions.

In summary, the urgings of the federal judiciary, the current proclivity of litigants to use state courts, the federal retrenchment in the human rights area and the willingness of state courts to engage in state constitutional analysis have all contributed to the current trend toward expansive state constitutional adjudication. This trend makes it imperative for state court judges, particularly those at the appellate level, to formulate a valid and systematic approach to state constitutional interpretation. Attention to methodology is an obligation we owe to the people of the states, who rely on us to assure that the law which governs their lives reflects fundamental contemporary norms.

The importance of careful analysis in state constitutional ad-

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<sup>32</sup> The exclusionary rule was first recognized in *Weeks v. United States*, 232 U.S. 383 (1914). In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme Court held that the state courts need not apply the rule in their criminal prosecutions. *Wolf* was finally overruled by the Warren Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>33</sup> See *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>34</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964); see also *Griffin v. California*, 380 U.S. 609 (1965) (prohibiting comment on defendant's failure to testify in state courts).

<sup>35</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>36</sup> *Pointer v. Texas*, 380 U.S. 400 (1965); see also *Washington v. Texas*, 388 U.S. 14 (1967) (applying right to compulsory process to state prosecutions).

<sup>37</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

judication cannot be overemphasized. Cases decided solely on state constitutional grounds are absolutely shielded from federal review, provided they meet the minimum standards required by the federal Constitution.<sup>38</sup> Moreover, judicial decisions under the state's constitution are immune from intervention by the state legislature.<sup>39</sup> Such decisions may be modified or overturned only through the constitutional amendment process, which is inevitably time consuming and complicated.<sup>40</sup> Thus, an ill-considered decision or one that is inconsistent with the widely held normative values of the state's populace may nonetheless continue to influence legal relationships indefinitely. And, even if changed by constitutional amendment, the ruling will still affect those whose lives it touches in the interim. While the occasional mistake is a price we pay for the advantages of an independent judiciary, the special need for caution in the area of state constitutional adjudication lends particular urgency to our efforts to develop a coherent methodology that will produce reasonably consistent and predictable results.

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<sup>38</sup> See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (Court "will not undertake to review" state court decision which relies on federal precedent solely for guidance); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (Supreme Court can reverse only those state judgments that "incorrectly adjudge federal rights"); *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (state court's views on state constitutional law binds federal court); *Brown v. State*, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983); *Abrahamson*, *supra* note 24, at 1156; *Brennan*, *supra* note 18, at 501 ("the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States"). See also *Cooper v. California*, 386 U.S. 58 (1967); *Bellanca v. State Liquor Auth.*, 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981) (freedom of expression guarantee in state constitution of no lesser vitality than of federal Constitution); *Abrahamson*, *supra* note 24, at 1157 n.53 (citing cases holding that states are free to set own standards for constitutional safeguards); *Galie*, *The Other Supreme Courts*, *supra* note 3, at 732 (state court interpretations of state constitutions not reviewable by Supreme Court).

<sup>39</sup> See *Maltz*, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985). As Professor Maltz states: "When a judge finds that a statute is unconstitutional, he is freed from the most powerful constraint on his decision—the possibility that the legislature will overrule his decision." *Id.* at 1000 (footnote omitted). See also *Deukmejian & Thompson*, *supra* note 4, at 1006 n.3 (noting that such insulation from meaningful oversight carries a serious potential that "a state supreme court may not explain its decision at all"). Because of the importance of state constitutional decisions, courts should probably be hesitant to decide cases on constitutional grounds when alternative nonconstitutional grounds exist.

<sup>40</sup> Some state constitutions provide for amendment by voter initiative. See, e.g., CAL. CONST. art. IV, § 24. See also *Erlor & Vincent*, *The California Supreme Court and the Death Penalty*, 2 BENCHMARK 143, 143 (1986) (discussing Briggs Initiative where people of California "saw fit to strengthen the [existing] death penalty," upheld in *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980)). Others allow only for legislatively initiated amendments approved by the voters. See, e.g., N.Y. CONST. art. XIX, §§ 1-3 (legislatively proposed amendments, constitutional conventions and amendments simultaneously submitted by convention and legislature).

## II. SCHOOLS OF INTERPRETIVE THOUGHT

There exists in the marketplace of legal thought a plethora of scholarly commentary on constitutional interpretation, oriented primarily toward the federal Constitution but also having much instructive value for interpretation at the state level. With all of this erudite material available, it would be foolish and redundant for me to undertake a thorough review of the various schools of thought. Nonetheless, for the sake of clarity, I feel it necessary at least to give an overview of the major interpretive positions as a foundation for the ensuing discussion of my own views on state constitutional adjudication. Parenthetically, I would note that the debate among proponents of the two primary viewpoints—interpretivism and noninterpretivism—has become quite heated, with each side taking an adamant and perhaps somewhat extreme position. In my view, the result has been counterproductive, in that it has led the discussion down increasingly rarified academic paths. Nonetheless, since most of the other schools of thought are but hybrids of the two most prominent schools, I will focus on the latter even though there may be some risk of oversimplification.<sup>41</sup>

### A. *The Interpretivist School*

[I]ntellectual honesty demands that the "original understanding" be honored across the board—unless we are prepared to accept

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<sup>41</sup> While the methodology currently centers around the viewpoints of interpretivists and noninterpretivists, scholars have recognized other minor schools of constitutional interpretation include the following: "Strict textualism" (also called literalism), which requires rigid adherence to the Constitution's language. This method is rarely used because it produces too strident and narrow a range of decision-making and is inadequate for resolving many important questions because much of the Constitution's language is open-ended and because many of its words are ambiguous or vague. See Brest, *The Misconceived Quest*, *supra* note 9, at 205-09. "Moderate intentionalism" is more pragmatic. It recognizes that "[t]he text of the constitution is authoritative, but many of its provisions are . . . inherently open-textured." *Id.* This school believes that while "[t]he original understanding is also important, . . . judges [should be] more concerned with the adopters' general purposes than with their intentions in a very precise sense." *Id.*

"Structural interpretation" was a popular interpretive methodology around 1800. This school emphasizes not the actual intent of the Framers, but the more political consideration of what powers the states could have conferred on the federal government without destroying the essentials of state autonomy. Proponents look to what the states intended when they ratified the federal Constitution as well as the structural relationship between government institutions. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22-32 (1969).

judicial revision where it satisfies *our* predilections, as is the current fashion.<sup>42</sup>

Interpretivist review is deeply rooted in our judicial heritage, and it is certainly a well established and accepted mode of constitutional construction.<sup>43</sup> Under the interpretivist or original intent approach, analysis always begins with the written document and the intention of those responsible for the provision to be applied. Significantly, the search for underlying intention is of primary importance, more paramount, perhaps, than the language actually embodied in the text.<sup>44</sup>

### 1. Interpretivist Emphasis on Political Legitimacy

The judiciary serves a vital function in our tripartite governmental structure. It ensures that the political branches of government do not overstep their constitutional bounds and provides the governed with a forum for peaceful dispute resolution.<sup>45</sup> This role is both constitutionally mandated<sup>46</sup> and pragmatically necessary to ensure that the actions of government will be perceived as legitimate.<sup>47</sup>

The judiciary's own claim to legitimacy, however, is perhaps the most problematic. First, its position and power are derived from the Constitution, the very document it is charged with con-

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<sup>42</sup> R. BERGER, *GOVERNMENT BY JUDICIARY* 411 (1977).

<sup>43</sup> See J. ELY, *supra* note 6, at 35. Raoul Berger argues that because interpretivist review is so well-rooted in the American judicial tradition, the noninterpretivist "who would challenge th[at] view . . . carries a very heavy burden of proof." Berger, *The Activist Flight*, *supra* note 6, at 5.

<sup>44</sup> Compare Kernochan, *Statutory Interpretation: An Outline of Method*, 3 *DALHOUSIE L.J.* 333 (1976) (general review of interpretation methodology) and Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 *HOFSTRA L. REV.* 1125 (1983) (general overview of judicial use of legislative history) with Bennett, *Objectivity in Constitutional Law*, 132 *U. PA. L. REV.* 445, 460-68 (1984) (authoritativeness of intention in constitutional interpretation). Proponents of interpretivist review at the state level also emphasize Framers' intent. See, e.g., Maltz, *supra* note 39, at 995-96. See also *infra* notes 54-71 and accompanying text. See generally C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 17-41 (1986) (traditional theory of interpretation uses Framers' intent).

<sup>45</sup> See Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 696 (1976). "When [the other] branches overstep the authority given them by the Constitution, . . . the Court must prefer the Constitution to the government acts." *Id.*

<sup>46</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Although not expressly mentioned in the Constitution, judicial review of the other branches' action is generally viewed as essential to our system of checks and balances.

<sup>47</sup> See Berger, *The Activist Flight*, *supra* note 6, at 24.

struing and applying.<sup>48</sup> Second, its members are most often appointed rather than elected and usually serve far longer terms than members of the executive and legislative branches. Finally, since judges are ordinarily not subject to recall or removal except in cases of misconduct,<sup>49</sup> they are generally not accountable to the people in the same direct way that elected legislators or executive officers are.<sup>50</sup> Thus, the judiciary is, fundamentally, an anti-majoritarian institution—a characteristic that makes it particularly susceptible to questions about the legitimacy of its decisions.

At the heart of the interpretivist approach to constitutional construction is its sensitivity to this institutional problem of ensuring the judiciary's legitimacy in the face of its peculiar anti-majoritarian role in a democratic society.<sup>51</sup> The interpretivists begin with the premise that a constitution, adopted by the People's representatives, embodies the will of the People—the ultimate source of governmental authority.<sup>52</sup> They then follow this premise to its logical conclusion: that judges must apply the Constitution in

<sup>48</sup> U.S. CONST. art. III, § 1; see Berger, *The Activist Flight*, *supra* note 6, at 7.

<sup>49</sup> See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 5-6 (1980). "Federal judges not only are appointed rather than elected but they are removable only by an exceedingly intricate and extra-majoritarian process of impeachment and protected absolutely against any diminution of compensation." *Id.* at 5.

For examples of election requirements and terms for judges, see CAL. CONST. art. VI, § 16 (mandating confirmation even in uncontested elections of state high court judges and directing that such judges shall be re-elected every 12 years); N.Y. CONST. art. VI, § 6 (14 year elective term for supreme court justices); WASH. CONST. art. IV, § 3 (term of Washington Supreme Court judge is 6 years).

<sup>50</sup> Of course, the judiciary is indirectly accountable, in that its non-constitutional rulings are subject to change by the political branches. See J. CHOPER, *supra* note 49, at 5-6. Further, judges, who are generally appointed by *popularly elected* executives and confirmed by *popularly elected* legislatures, cannot realistically be viewed as totally divorced from the popular will. See Shaman, *The Constitution, the Supreme Court and Creativity*, 9 *HASTINGS CONST. L.Q.* 257, 274-76 (1982).

<sup>51</sup> See J. ELY, *supra* note 6, at 5-8; see also Bishin, *Judicial Review in Democratic Theory*, 50 *S. CAL. L. REV.* 1099, 1137 (1977) ("[j]udicial review helps American government make tolerable accommodations between personal and group rule and therefore seems sufficiently in line with the purposes of the 'American democracy' to qualify as one of the acceptable devices for achieving them").

<sup>52</sup> See Rehnquist, *supra* note 45, at 696. Chief Justice Rehnquist, in this article, stated that "[t]he people are the ultimate source of authority . . . They have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually." *Id.*; see also Brest, *The Misconceived Quest*, *supra* note 9, at 204 ("Constitution manifests the will of the sovereign citizens of the United States"); Hachey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 *MARQ. L. REV.* 485, 485 (1979) ("[t]he voters . . . rejected the first [state] constitution [and] . . . in 1848 [they] ratified a constitution which reflected the wisdom of their delegates, the needs of the future state for generations to come, and Wisconsin's perception of Jacksonian Democracy").

accordance with the meaning of the written words themselves and the intentions of those who framed the words thereby "leav[ing] the People's destiny in their own hands"<sup>53</sup>—a methodology that "better fits our usual conceptions of what law is and the way it works."<sup>54</sup>

It is a basic tenet of the interpretivist school that the judiciary is excluded from policy-making.<sup>55</sup> This tenet is a natural corollary of the principle that the Constitution, itself a product of the People's will, entrusts the policy-making functions of government to the legislative and executive branches.<sup>56</sup> When a court ignores the language or intent of a provision, it is, in a sense, slighting the will of the People and upsetting the delicate equilibrium that exists in our system between the majoritarian and non-majoritarian elements.<sup>57</sup> The interpretivist concern is to avoid decision-making that subordinates the popular will of the People to the personal inclinations of judges. In that regard, it is consistent with our fundamental notions of democracy.<sup>58</sup> As one commentator has noted, "[a]dherence to the text and original understanding arguably constrains the discretion of decisionmakers and assures that the Constitution will be interpreted consistently over time."<sup>59</sup>

Those views have repeatedly been voiced at the federal level, and the historic voices speak well for themselves. In *Rhode Island v. Massachusetts*,<sup>60</sup> for example, the Court stated that constitutional construction "must necessarily depend on the words of the

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<sup>53</sup> Berger, *The Activist Flight*, *supra* note 6, at 14.

<sup>54</sup> J. ELY, *supra* note 6, at 3.

<sup>55</sup> See R. BERGER, *supra* note 42, at 417; Berger, *The Activist Flight*, *supra* note 6, at 9 ("[a] central value is the presupposition that judges were excluded from making law, and any theory of judicial interpretation that embraces the lawmaking function does violence to that design"). *But see* Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 1 (1986) (judicial legislation deeply established).

<sup>56</sup> See, e.g., N.Y. CONST. art. III, § 1 ("[t]he legislative power of this state shall be vested in the senate and assembly."); see also J. ELY, *supra* note 6, at 5. See generally F. GREEN, *CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860* 52-60 (1930) (discussion of independent state action in drafting constitutions).

<sup>57</sup> See generally J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 31-38 (1984) (judicial review and democratic government); C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 3-11 (1986) (history of judicial review and judicial legislation); Bishin, *supra* note 51, at 1101 (judicial review consistent with American democratic theory).

<sup>58</sup> In the interpretivists' view, the People have a right to expect that judicial review in this area will be consistent "with the intent of the drafter." Maltz, *supra* note 39, at 1001.

<sup>59</sup> Brest, *The Misconceived Quest*, *supra* note 9, at 204.

<sup>60</sup> 37 U.S. (12 Pet.) 657 (1838).

constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states."<sup>61</sup>

In *Oregon v. Mitchell*,<sup>62</sup> decided by the Supreme Court 132 years later, Justice Harlan stated: "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."<sup>63</sup>

The most basic of the judicial functions—review of legislation for its consistency with constitutional mandate—is itself derived from this theory. As Alexander Hamilton wrote in *The Federalist No. 78*:

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.<sup>64</sup>

Indeed, mindful of the problem of legitimizing the judiciary's veto power over legislative decision-making, Hamilton stressed that "the power of the people is superior to both" that of the legislature and that of the judiciary, so that when "the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."<sup>65</sup>

As to judicial legislating, Hamilton's view was unambiguous. He clearly asserted that courts may not "substitute their own pleasure to the constitutional intentions of the legislature."<sup>66</sup> Although the courts were to be the guardians of the people's will against "legislative encroachments" and judicial independence was

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<sup>61</sup> *Id.* at 721.

<sup>62</sup> 400 U.S. 112 (1970).

<sup>63</sup> *Id.* at 203 (Harlan, J., dissenting).

<sup>64</sup> THE FEDERALIST No. 78, at 492 (A. Hamilton) (B.F. Wright ed. 1961).

<sup>65</sup> *Id.* at 492.

<sup>66</sup> *See id.* at 493.

considered a vital part of the governmental scheme,<sup>67</sup> it was for the people, and not the courts, "to alter or abolish the established Constitution, whenever they [found] it inconsistent with their happiness."<sup>68</sup> In Hamilton's view, the Justices of the Supreme Court were given the necessary independence and freedom from direct accountability by their lifetime appointments, and, in exchange, were obliged to decide constitutional cases by applying an objective standard based upon the will of the people, as reflected by the intent of the Framers.<sup>69</sup>

The Hamiltonian position sounds very much like an exposition of the interpretivist faith:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk . . . .<sup>70</sup>

The fear expressed by Hamilton, and shared by modern interpretivists, is that the Court would become another legislative body because it had the power, if it chose, to "constru[e] the laws according to the *spirit* of the Constitution" and to mold its decisions "into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body."<sup>71</sup> Like today's interpretivists, Hamilton's response to this potential judicial evil was to argue that the national courts were not empowered "to construe the laws according to the spirit of the Constitution" and did not, in fact, have "any greater latitude . . . than may be claimed by the courts of every State."<sup>72</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 494.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 496.

<sup>71</sup> THE FEDERALIST No. 81, at 506 (A. Hamilton) (B.F. Wright ed. 1961).

<sup>72</sup> *Id.* Hamilton also believed that, unlike legislators, the qualifications which made men fit to be judges would ensure that they would also not abuse their positions. *See id.* at 507-10. The threat of impeachment, Hamilton believed, would act as an additional protection against abuses of power. *See id.* at 509. Impeachment, however, has rarely been an effective remedy for judicial abuse of power because of the difficulty in defining what impeachable abuse means and in attaining the necessary super-majority. *See J. CHOPER, supra* note 49, at



## 2. The Role of the Judge

As Professor Ely states in his discussion on interpretivism, judicial review runs counter to our notion that we are a government of the people with elected representatives to make our laws.<sup>73</sup>

When a court invalidates an act of the political branches on constitutional grounds . . . it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process . . . [A] body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.<sup>74</sup>

As Hamilton recognized, we are at least partially dependent upon the integrity and honor of our jurists to avoid exercising their power to the fullest extent and, most importantly, to avoid the temptation to make policy.<sup>75</sup> Constitutional issues should be decided on the basis of objective criteria, rather than the judge's own ideas about right and wrong.<sup>76</sup> For the interpretivists, this guiding principle implies that the words of the constitution and the intent of the Framers must serve as the anchor for judicial decision-making.<sup>77</sup> While jurists obviously cannot completely close their eyes to the social impact of their decisions, the judiciary, ideally, should strive to determine what the Framers intended and "apply fixed and binding norms" to the new factual situations that may arise.<sup>78</sup>

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50, 144, 168.

Professor Berger, after a careful and in-depth study of our constitutional history and the era in which the Constitution was adopted, concludes that the Framers "considered that they had avoided the vague for the specific; the last thing they had in mind was to set judges afloat on a sea of unlimited discretion." Berger, *The Activist Flight*, *supra* note 6, at 22.

<sup>73</sup> See J. ELY, *supra* note 6, at 4-5.

<sup>74</sup> *Id.*

<sup>75</sup> See R. BERGER, *supra* note 42, at 300-04 (judicial role limited to policing constitutional boundaries); see also Berger, *The Activist Flight*, *supra* note 6, at 9 (interpretation does not mean making law). Professor Berger states that "the Framers acted on the principle 'that the power of making ought to be kept distinct from that of expounding the law.'" *Id.* at 9 (quoting E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 43-44 (1963) (emphasis omitted)).

<sup>76</sup> Rehnquist, *supra* note 45, at 695-96 ("judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation, which prides itself on being a self-governing representative democracy").

<sup>77</sup> See Deukmejian & Thompson, *supra* note 4, at 976.

<sup>78</sup> See Grey, *supra* note 11, at 705-06. Judicial review itself is not undemocratic because that function is "deeply rooted in our history and in our shared principles of political legiti-

Use of that method represents adherence to the social contract between the judiciary and the people.<sup>79</sup> As Justice Shirley Abrahamson of the Wisconsin Supreme Court stated: "Judges are not to rule on the basis of the passions of the times. Judges must interpret the law exercising integrity, intellect, and wisdom—even in the face of community hostility."<sup>80</sup>

Whether a judge is appointed or elected, the selection is made primarily on the basis of his or her ability as a jurist, not a policy-maker. Naturally, politics, friendships and partisan expectations play a part in the selection process. When the system is working correctly, however, selection is made primarily on the basis of ability and integrity.<sup>81</sup> More than one United States president has been surprised to discover that his appointed Justice decided constitutional issues contrary to his personal political or moral beliefs. And, that is as it should be.

Despite their special training and carefully honed skills, judges

macy." *Id.* at 705. Further, as Professor Berger points out, "the original intention doctrine is faithful to the essence of communication: it is for the speaker to explain what his words mean." Berger, *The Activist Flight*, *supra* note 6, at 24.

To implement real limits on government the judges must have reference to standards which are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their creation. Recourse to 'the intention of the framers' in judicial review, therefore, can be understood as indispensable to realizing the idea of government limited by law.

Kay, Book Review, 10 CONN. L. REV. 801, 805-06 (1976).

<sup>79</sup> See Schlag, *supra* note 25, at 286. "For the social contract theorists, the legitimacy of government rests upon its origin in the consent of the people to curtail their liberties in exchange for security." *Id.* at 323. See generally J. STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT 113-28 (1978) (consent in liberal democratic theory).

The most helpful aspects of the social contract theory for purposes of the interpretivist theory are either "the notion that the social contract was executed at a particular point in time . . . the time constitutions are adopted or ratified," Schlag, *supra* note 25, at 323; or the idea that the contract is "a continuous historical temporization . . . [which] would then be viewed as the continuous development of the political and social order by the successive consent and contributions of succeeding generations." *Id.* at 324. Interpretivists have some problems with the second of these two views, however, because "[i]t leaves indefinite the limitations on what each generation may contribute to the social contract." *Id.*

<sup>80</sup> Abrahamson, *supra* note 17, at 1155; see B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 88-90 (1921).

<sup>81</sup> THE FEDERALIST No. 78, at 496 (A. Hamilton) (B.F. Wright ed. 1961). As Hamilton envisioned:

[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.

*Id.*

are often ill-equipped to perform the role of legislators.<sup>82</sup> Judges are not representative of a cross-section of American society in the same way that the People's elected representatives may be.<sup>83</sup> Because jurists may differ in experience and temperament from the public at large, decisions they make based upon their own subjective notions of right and wrong—or upon their own passions—may be out of step with the social mores of the surrounding society.<sup>84</sup> Even more importantly, an individual's appointment to the judiciary does not ensure that that individual's personal values are consistent with the protection intended for the non-majoritarian elements of society by the state and federal constitutions.<sup>85</sup> Thus, the closer the judiciary adheres to the Constitution's objective meaning, to the extent that such meaning can be discerned, the more likely it is that the proper balance between the majority's wishes and the rights of the minority will be struck.<sup>86</sup>

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<sup>82</sup> See *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 301-02, 448 N.E.2d 86, 89-90 461 N.Y.S.2d 232, 235-36 (1983). In *Murphy*, the New York Court of Appeals was asked to overturn the common law terminable-at-will doctrine in the employer-employee relationship. The court determined that any deviation from such a long standing rule would require legislative action because "[t]he Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected . . ." *Id.* at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236. See also *Fleishman v. Eli Lilly & Co.*, 62 N.Y.2d 888, 890, 467 N.E.2d 517, 518, 478 N.Y.S.2d 853, 854 (courts should not deviate from long standing rules, even where judicially created, without legislative action), *cert. denied*, 469 U.S. 1192 (1985).

<sup>83</sup> See Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664 (1985).

<sup>84</sup> See Berger, *The Activist Flight*, *supra* note 6, at 14 (citizens are deprived of right to rule themselves when courts overrule state legislatures under guise of constitutional interpretation).

<sup>85</sup> See J. ELY, *supra* note 6, at 44 (no assurance that judges "will be persons who share your values"); Berger, *The Activist Flight*, *supra* note 6, at 13 (justices do not agree about what is just or what is good and bad); Brest, *supra* note 83, at 664-65 (judges often act as "legal elite" whose values differ from society at large). Professor Ely, discussing the federal Constitution, states:

The noninterpretivist would have politically unaccountable judges select and define the values to be placed beyond the majority control, but the interpretivist takes his values from the Constitution, which means, since the Constitution itself was submitted for and received popular ratification, that they ultimately came from the people. Thus the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.

J. ELY, *supra* note 6, at 8.

<sup>86</sup> The political imbalance that results from arbitrary and noninterpretive review was stated by Professor Bishin as follows:

If the courts follow neither the Constitution nor the laws in allocating freedom, the only alternative is their own personal conceptions. But there is nothing which makes their conceptions any more legitimate than those of anyone else. Thus,

Yet another reason given by the interpretivists for close adherence to the Constitution's discernible objective meaning is the goal of providing certainty in the law. If judges feel free to decide cases on no other basis than that the result is "right," there is a very real danger that the law will change each time the personnel of the court changes, when judges with a different sense of right and wrong are added. The result is that precedent would be overruled too frequently and that a new set of values periodically would be read into the document that governs the nation's daily life. Such a result would be highly undesirable in a system that depends upon an enduring constitution to provide fundamental values that guide governmental and individual choice throughout the centuries.<sup>87</sup>

The faith of the interpretivists is best expressed in the injunction of the noted scholar, Raoul Berger, that "[i]f government by judiciary is necessary to preserve the spirit of our democracy, let it be submitted in plain spoken fashion to the people—the ultimate sovereign—for their approval."<sup>88</sup> Since the state and federal constitutions represent the best expression of the people's most fundamental values, the interpretation of these documents is the highest and only appropriate function of the judiciary.

### B. *The Noninterpretivist School of Thought*

For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth.

Constitutions are not ephemeral documents, designed to

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when they invalidate the majority's laws on assertedly constitutional grounds, they are in effect violating one well-known value of democracy—namely, the value of political equality. Their desires are being given greater weight than those of others for no other reason than that they are strategically located to enforce their own views.

Bishin, *supra* note 51, at 1133-34.

<sup>87</sup> See J. ELY, *supra* note 6, at 8 (constitution submitted to and approved by the People demands strict interpretation to preserve value of People checking themselves); Bishin, *supra* note 51, at 1133-34 (judges utilizing personal conceptions on constitutional questions undermines fundamental democratic values of political equality); Rehnquist, *supra* note 45, at 698 (judges attempting to solve societal problems transforms courts from keepers of the covenant to a small group constituting a third legislative branch). See generally R. BERGER, *supra* note 42, at 363-72 (1977) (explaining need for preserving "original" intent).

<sup>88</sup> R. BERGER, *supra* note 42, at 418.

meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.<sup>89</sup>

The premise of noninterpretivist review is that judges should not be constricted by all of the values written into the Constitution by the Framers. As the noted noninterpretivist Professor Alexander M. Bickel has contended, the courts should not be bound by historical intent that has gone stale with time but, instead, should "be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles."<sup>90</sup> Contemporary jurists following this approach would give some weight to the historically intended meaning, treating it as presumptively correct, or at least, important. However, they do not consider themselves absolutely bound by the original intention of the drafters.<sup>91</sup> The guiding light of a noninterpretivist judiciary would be to make constitutional law that is consistent "with democratic theory, conventional morality, or some similarly defined set of values."<sup>92</sup>

Noninterpretivists would argue that the formal process for amending the federal Constitution is an ineffective mechanism for updating that document to meet modern concerns.<sup>93</sup> A study of the federal Constitution supports their argument. The difficulty of obtaining the necessary legislative approvals and state ratifications has led, since the Bill of Rights' adoption, to very little updating of the normative values embodied in the Constitution. Thus, if the

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<sup>89</sup> Brennan, *supra* note 18, at 495.

<sup>90</sup> See Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 41 (1961) (quoting Hart, *The Supreme Court, 1958 Term—Foreward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959)).

<sup>91</sup> See J. ELY, *supra* note 6, at 2-3 (in noninterpretivist review justices apply their own rendition of societal values as exemplified in *Roe v. Wade*, 410 U.S. 113 (1973)); Brest, *The Misconceived Quest*, *supra* note 9, at 205, 228; Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 278 n.2, 312 (1981) (unwritten constitution comprised of value judgments not plausibly attributable to Framers but nevertheless constitutionalized by court).

<sup>92</sup> See Maltz, *supra* note 39, at 1001 (citations omitted). "Unlike the conventions underlying interpretive review . . . none of the theories of noninterpretive review reflect a societal consensus on the appropriate role of the judiciary. As a result, judges must rely on their individual perceptions of justice and fundamental fairness to choose among the various competing approaches to noninterpretive review." *Id.*

<sup>93</sup> See, e.g., Brest, *The Misconceived Quest*, *supra* note 9, at 236 (process of mobilizing popular support on specific issues too cumbersome to facilitate proper constitutional change).

courts were bound strictly by the historical intentions underlying the existing provisions, the result would be the imposition of antiquated values on contemporary society. The better approach, according to noninterpretivists, is for our carefully selected Supreme Court Justices to draw "freely upon such sources as custom, conventional morality, and economic, social, and philosophic theory."<sup>94</sup> Moreover, the task cannot be left to legislators because they are subject to immediate political pressures, while impartial and independent judges are better able to focus on the inherent "fairness of legislation and the legislative process" itself.<sup>95</sup>

Noninterpretivists also make a valid point when they argue that the outmoded norms embodied in our two hundred-year-old federal Constitution never have been truly representative of the American tradition. American mores are eclectic, and there is "no single, predominant American tradition."<sup>96</sup> Those who had the power to vote and ratify the Constitution were politicians, landowners and aristocrats. Excluded from the process were important segments of the American populace such as racial minorities, women, the landless and the poor. Furthermore, the values of the many ethnic groups that have arrived and enriched our cultural and moral heritage in the two hundred years since the Constitution's adoption were not even contemplated, much less accounted for, in the drafting of that document. Thus, according to the noninterpretivists, our modern sensitivity to the needs of a highly pluralistic society also dictates decreased focus on the values of the select group of individuals who drafted and ratified the Constitution and a concomitant heightened emphasis on current cultural norms.

The noninterpretivists, however, do not disregard the need for restraints on the judiciary's power to dictate what is and is not permissible. However, they view as adequate checks on judicial power such devices as impeachment or removal by the electorate in

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<sup>94</sup> See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 374 (1981). The Constitution's amendment process is arduous, requiring a two-thirds vote of both houses of Congress and ratification by three-fourths of the states. Professor Ely acknowledges that a recent constitutional amendment "will represent, if not necessarily a consensus, at least the sentiment of a contemporary majority." J. ELY, *supra* note 6, at 11. However, the provisions that are by far the most frequently considered by the Supreme Court are those that "represent the voice of people who have been dead for a century or two." *Id.* (footnote omitted).

<sup>95</sup> See Maltz, *supra* note 39, at 1002 & n.43.

<sup>96</sup> Perry, *supra* note 91, at 283.

states such as California, where high court judges must be confirmed in popular "retention" elections.<sup>97</sup> Other constraints that noninterpretivists stress include the professional self-discipline and the "disciplining rules" of the legal community that "constrain the interpreter, thus transforming the interpretive process from a subjective to an objective one" and furnishing "standards by which the correctness of the interpretation can be judged."<sup>98</sup> Further, judges are constrained by the need to rely on the willingness of the other branches of government, and of society at large, to recognize their decisions as authoritative and to enforce or obey those decisions.<sup>99</sup> When the Supreme Court mandated the integration of public schools, for example, the force of its decision would have been lost had the executive branch determined that the Court had acted capriciously and chosen not to use the national militia to enforce it.<sup>100</sup> For the noninterpretivists, this subtle pressure, flowing from the judiciary's dependence on other branches, assures that its decisions will not be too far out of step with the cultural values of the surrounding society.

### 1. The Intention of the Framers and Noninterpretivist Review

A major source of disagreement between interpretivists and noninterpretivists centers around the question of whether the Framers and ratifiers actually intended that future generations would be bound by historical intent. Noninterpretivists argue that the question is unanswerable. Professor Michael J. Perry, for example, argues: "Just as there is no plausible textual or historical justification for noninterpretive review, there is likewise no airtight textual or historical justification for most *interpretive* review."<sup>101</sup>

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<sup>97</sup> See CAL. CONST. art. VI, § 16. See also Erler, *Editor's Introduction*, 2 BENCHMARK 109, 114 (1986) (voters determine whether judge should continue beyond first term).

<sup>98</sup> See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982). Raoul Berger, discussing Professor Fiss' contentions, interprets him as arguing that the disciplining rules of our professional grammar and other constraints embedded in the interpretive community serve "as anchors for the Constitution." See Berger, *The Activist Flight*, *supra* note 6, at 21. However, as Professor Berger also points out, Professor Fiss does not provide examples of these disciplining rules. *Id.* Presumably, the habit of a priori reasoning and the principle of stare decisis are two well-rooted judicial conventions that would constrain even noninterpretivist decision-making.

<sup>99</sup> See, e.g., Fiss, *supra* note 98, at 744-62 (judicial authority based on objective character of interpretation).

<sup>100</sup> Cf. A. Cox, *supra* note 15, at 116 (noting that judges merely apply binding law to litigants creating power of legitimacy enforced by other branches).

<sup>101</sup> Perry, *supra* note 91, at 282 (emphasis in original).

Similarly, Professor H. Jefferson Powell states:

The Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language. This expectation is evident in the framers' numerous attempts to refine the wording of the text, either to eliminate vagueness or to allay fears that overprecise language would be taken literally and that the aim of a given provision would thus be defeated. . . . Although the Philadelphia framers certainly wished to embody in the text the most "distinctive form of collecting the mind" of the convention, there is no indication that they expected or intended future interpreters to refer to any extratextual intentions revealed in the convention's secretly conducted debates. The framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation. . . .

The framers were aware that unforeseen situations would arise, and they accepted the inevitability and propriety of construction.<sup>102</sup>

The theme of the noninterpretivist school of thought represented by Professors Perry and Powell is that not only were the Framers and ratifiers powerless to bind future generations to their intentions, but that it is not even clear that they meant to do so. Some Framers and adopters may have intended the contrary, and still others may not have considered the question at all.<sup>103</sup> It is even possible that those responsible for the adoption of the Constitution desired that certain provisions—particularly those that are broad, general and open-ended—"be interpreted with increasing

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<sup>102</sup> Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1985) (footnotes omitted). *But see* Berger, "Original Intention" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) (arguing that Professor Powell's thesis is unsupported by any concrete evidence).

<sup>103</sup> *See* Brest, *The Misconceived Quest*, *supra* note 9, at 215, 220. Professor Brest discusses the inherent difficulties of interpreting the adopters' intentions with regard to future interpretation. *See generally id.* at 216-22. First, one must struggle to discern the constitutional concepts and values from the perspective of the Framers themselves. *See id.* at 218. Then, one must ascertain the adopters' interpretive intent and the intended scope of the individual provision in question. *See id.* Finally, one must attempt to apply them to situations that the adopters did not foresee. *See id.*



breadth as time went on."<sup>104</sup> As noninterpretivist Professor Paul Brest asserts: "It seems peculiar, to say the least, that the legitimacy of a current doctrine should turn on the historian's judgment that it seems 'more likely than not,' or even 'rather likely,' that the adopters intended it some one or two centuries ago."<sup>105</sup> Such a projection of what was in the Framers' and ratifiers' minds is, at best, fantasy.<sup>106</sup>

Another argument the noninterpretivists make concerning the weakness of the interpretivists' position is that interpretivism is an elusive and uncertain process. To understand original intent a judge must project himself into the world in which the Framers operated two hundred years ago, comprehend that world, consider "the intended scope of the provision" in that light and then somehow translate that information into ideas that can be used to resolve the unforeseen and unanticipated problems presented in the contemporary world.<sup>107</sup> A noninterpretivist would argue that this Herculean task is simply beyond the ability of most mortals.

## 2. The Particular Suitability of Noninterpretivist Review for Human Rights Problems

There are many different philosophies among the noninterpretivists. Of the two main schools of thought, one would apply the noninterpretivist perspective to all constitutional adjudication,<sup>108</sup> while the other would confine the use of that perspective to the area of human rights.<sup>109</sup> Commentators of the latter school posit that while interpretivist review is generally a valid methodology, the alternative noninterpretivist approach is both necessary and logically justifiable when applied to the human rights area. These commentators acknowledge that a constitution is a binding "written document, expressing some clear and positive restraints upon

<sup>104</sup> *Id.* at 220.

<sup>105</sup> *Id.* at 222.

<sup>106</sup> *See id.* at 221.

<sup>107</sup> *Id.* at 218-19.

<sup>108</sup> *See id.* at 205 (aims of constitutionalism best served by nonoriginalist adjudication which treats the text and original history as important but not necessarily authoritative); Grey, *supra* note 11, at 706 (pure interpretive model does not accept courts' role as expounder of individual liberty and fair treatment beyond those expressed in Constitution).

<sup>109</sup> Grey, *supra* note 11, at 706. *But see* Perry, *supra* note 91, at 281 (in human rights cases courts "should [not] assume a policymaking role with respect to human rights" because "[t]here is no historical justification for any noninterpretative review") (emphasis in original).

governmental power."<sup>110</sup> They contend, however, that the judiciary has an additional responsibility to expound the "basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law."<sup>111</sup> The broad, open-ended provisions of the Constitution "are seen as sources of legitimacy for judicial development," furnishing the judiciary with a mechanism for an evolving constitutional law that keeps pace with changing national values.<sup>112</sup> While the Constitution provides the foundation to restrain government action "in the name of basic rights," it is sufficiently nonspecific to permit the judiciary to elaborate upon and even alter "the content of those rights over time."<sup>113</sup>

Advocates of this philosophy point to the fact that the Constitution expresses a fundamental distrust for unbridled majority decision-making as reflected in the provisions encouraging the protection of minority rights, individual freedom and the democratic process. This argument is further supported by the procedural provisions governing constitutional amendment, which preclude revision by a simple majority. Thus, noninterpretivists contend that, regardless of their specific intentions, the Framers had a general bias in favor of shielding the minority from the tyranny of the majority and that bias ought to be implemented through an expansive reading of the provisions intended for that purpose.<sup>114</sup>

In addition to regarding their own approach as intellectually sound, the noninterpretivists contend that an expansive reading of the Constitution is necessary to ensure the continued vitality of American democracy. The twin values of individual freedom and enhancement of the democratic process are, according to the noninterpretivists, basic to the unique American way of life. Thus, they must not be made subject to the vicissitudes of contemporary

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<sup>110</sup> Grey, *supra* note 11, at 706.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 709.

<sup>113</sup> *Id.* Professor Grey specifically challenges the view of Justice Black, an interpretivist, who argued that "[t]he amendment process was the framer's chosen and exclusive method of adopting constitutional values to changing times; the judiciary was to enforce the Constitution's substantive commands as the framers meant them." *Id.* Professor Grey lauds, for example, the development of the due process doctrine, arguing that the "flexible requirement of 'fundamentally fair' procedures in criminal and civil proceedings—cannot be reconciled with the interpretive model" but are "developments of the 'living constitution' concept *par excellence*." *Id.* at 711 (footnote omitted).

<sup>114</sup> See Bishin, *supra* note 51, at 1111 (Constitution distrusts simple majorities and prevents them from making amendments).

politics, the legislative process or executive intervention. Noninterpretivists believe that their style of review, which assumes a "living Constitution" implemented by an independent judiciary, best assures that these values will be safeguarded and that the rights of minorities will be protected.<sup>115</sup>

Some commentators, such as Professor Ely, have suggested that noninterpretivist review in the human rights area should be limited further to the application of the open-ended constitutional provisions that are concerned "only with questions of participation, and not with the substantive merits of the political choice under attack."<sup>116</sup> Professor Ely contends that many of the activist Warren Court decisions were justified because they were guardians of "the process by which the laws that govern society are made."<sup>117</sup> The two broad concerns of the Warren Court were "clearing the channels of political change . . . and . . . correcting certain kinds of discrimination against minorities," concepts that "fit together to form a coherent theory of representative government."<sup>118</sup> These values, according to Professor Ely, must be strenuously protected because they are "critical to the functioning of an open and effective democratic process."<sup>119</sup> As Professor Bishin states:

[T]he method of limitation chosen—whether it involves a majoritarian or nonmajoritarian agency—will be consistent with majoritarian precepts if it creates that balance of majoritarian power and constraint which amounts to legitimate majority rule. Judicial review, if limited to the protection of the right to vote and freedom of expression . . . would seem to be as capable of handling that office as any other available candidate.<sup>120</sup>

Thus, in stark contrast to the interpretivists, noninterpretivists perceive the courts to be as capable as legislators in protect-

<sup>115</sup> See Brest, *The Misconceived Quest*, *supra* note 9, at 227; see also J. ELY, *supra* note 6, at 43 (Supreme Court's constitutional function is to define and protect fundamental principles).

<sup>116</sup> J. ELY, *supra* note 6, at 181.

<sup>117</sup> *Id.* at 74.

<sup>118</sup> *Id.* Significantly, one of the most controversial of the Warren Court's decisions, *Roe v. Wade*, 410 U.S. 113 (1973) (striking down state laws prohibiting first trimester abortions), was outside the values that Professor Ely suggests are proper subjects for the noninterpretivist protection.

<sup>119</sup> J. ELY, *supra* note 6, at 105. See also Bishin, *supra* note 51, at 1113 (Warren Court decisions "recognize the majoritarian principle" and its decisions aim at protecting groups and individuals from being deprived of the power of their voices and votes).

<sup>120</sup> Bishin, *supra* note 51, at 1127.

ing individual rights and, in particular, minority rights. The constitutional amendment process is seen as inadequate, in part, because it "usually requires considerable mobilization and intense interest focused on a specific issue."<sup>121</sup> Moreover, constitutional amendment cannot be effected without vigorous commitment of legislators, who may have little practical motive to protect minorities against the majority constituencies that elect them.<sup>122</sup> Indeed, the Civil War Amendments, which were intended to grant blacks only limited rights while retaining a basically segregated social system, present a clear example of "provision[s] . . . drafted by an unrepresentative and self-interested portion of the adopters' society."<sup>123</sup>

It has been argued that the Supreme Court illegitimately assumes the role of protector of human rights by resorting to strained readings of constitutional provisions or selective use of legislative history.<sup>124</sup> It may further be argued that judicial decision-making that is not anchored in any textual, historical or precedential source may serve as much as a mechanism for the ultimate destruction of our liberties than as a vehicle for positive change. The noninterpretivists, however, are not merely naive idealists insensitive to these problems. They are acutely aware that judges are fallible and realize that just as "the Court can serve as an instrument of moral growth, it can also serve as an instrument of moral retardation."<sup>125</sup> But, contemporary noninterpretivists nonetheless argue that:

Few, if any, political institutions or practices work perfectly; the proper test is whether, on balance, they work tolerably well. . . . [I]t is far more likely that the Court will hand down many decisions sustaining morally suspect governmental action. The justices of the Court are, after all, creatures of the . . . larger moral culture of other government officials.<sup>126</sup>

Many noninterpretivists argue that their judicial philosophy must be evaluated on the basis of its performance in modern times. Noninterpretivist judicial action during the Warren Court years, they contend, led to among the most laudable legal developments

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<sup>121</sup> Brest, *The Misconceived Quest*, *supra* note 9, at 236.

<sup>122</sup> *See id.* at 236-37.

<sup>123</sup> *Id.* at 230.

<sup>124</sup> *See Grey, supra* note 11, at 708.

<sup>125</sup> Perry, *supra* note 91, at 312.

<sup>126</sup> *Id.* at 313.

in the field of human rights and the protection of the democratic process.<sup>127</sup> While they concede that older cases such as *Dred Scott*<sup>128</sup> and *Lochner*<sup>129</sup> were embarrassing failures of noninterpretivist review, noninterpretivists assert that such past disgraces are not a sound measurement of the success of a school of thought that also produced *Brown v. Board of Education*<sup>130</sup> and so many other decisions protective of individual liberty.<sup>131</sup>

The noninterpretivist would applaud the remarks of Chief Justice Warren in *Brown v. Board of Education*, when he said in discussing the fourteenth amendment:

[W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>132</sup>

### III. DISTINGUISHING FEATURES OF STATE CONSTITUTIONS

Much of the debate between the interpretivists and the noninterpretivists has been concerned with the proper approach to the federal Constitution. Although many of the arguments apply with equal force to the interpretation and application of state constitutions, the differences between the federal Constitution and its counterparts at the state level require an analysis more narrowly tailored to the latter's unique characteristics.

All constitutions are, of course, written embodiments of the normative values that the people and their representatives deem most fundamental.<sup>133</sup> As such, our federal Constitution is characterized by its brevity and its imposition of clear limitations on the

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<sup>127</sup> See *id.* at 314-15; see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

<sup>128</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>129</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>130</sup> 347 U.S. 483 (1954).

<sup>131</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (state law barring interracial marriage declared unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (zone of privacy created by constitutional guarantees); *McLaughlin v. Florida*, 379 U.S. 184, 184 (1964) (criminal statute prohibiting cohabitation by interracial married couples held unconstitutional).

<sup>132</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 492-93 (1954) (citations omitted).

<sup>133</sup> See, e.g., R. BERGER, *supra* note 42, at 363-64.

powers of government.<sup>134</sup> Our earliest state constitutions were similarly brief and confined to the delineation of basic values.<sup>135</sup> Most of the early state constitutions were approximately five thousand words in length and were "restricted to matters of fundamental importance."<sup>136</sup> The inexorable movement of time, however, brought with it an increase in social complexity. The stagecoach of the 1700's was upstaged by the Industrial Revolution of the 1800's, which has been replaced by the computer and information revolution of the late 1900's. The increasing complexity of society, with its greater demand for education, social welfare programs and other services, has brought with it an expansion of the functions and responsibilities of state government.<sup>137</sup>

The federal Constitution has remained largely unchanged throughout these two centuries of upheaval, adapting to social developments not by amendment but rather by expansive interpretation. The states, however, have responded to our changing world largely by amending their constitutions.<sup>138</sup> This difference in the way in which the state and federal governments respond to social change is reinforced by differences in the nature of their constitutions. While the federal Constitution is generally viewed as a grant of executive, legislative and judicial authority,

[s]tate legislatures in nearly every state are held to be able to do whatever is not forbidden them by the state constitution or the Federal Constitution. Consequently, state constitutions are longer and more detailed than their federal counterpart, thus giving more opportunities for the development of an independent body of law.<sup>139</sup>

In addition to containing basic bills of rights, albeit with slightly different wording in some instances, many state constitutions are now considerably longer than their federal counterpart and include numerous statutory-like provisions that have no federal analogue.<sup>140</sup> In New York, for example, there are constitu-

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<sup>134</sup> See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 4.

<sup>135</sup> See *id.* at 5.

<sup>136</sup> *Id.*

<sup>137</sup> See *id.* at 1, 2.

<sup>138</sup> See *id.* at 2, 3.

<sup>139</sup> Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935 (1976); see *Thomson v. Robb*, 229 Va. 233, 328 S.E.2d 136 (1985).

<sup>140</sup> In 1967, the New York Constitution had some 50,000 words. The Maryland Constitution has approximately 40,000 words and Hawaii's has only 15,000. See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 16. In contrast, our federal Constitution has less

tional provisions addressing tax exemptions<sup>141</sup> and a prohibition against gifts of state money.<sup>142</sup> The typical state constitution confers rights not contemplated in the federal Constitution. Examples of these rights include:

a right to privacy, a right to work, a right to bargain collectively, a right to access to the courts or to government agencies, a right to education, rights of handicapped persons, environmental rights, economic rights of individuals, rights of prisoners, rights of accused and convicted and rights protecting ethnic character.<sup>143</sup>

State constitutions thus often reflect contemporary notions of the amenities that modern civilized life should include, well beyond the basic freedoms guaranteed by the federal Constitution. Such provisions provide specific guidance as to what areas of human endeavor should be singled out for heightened judicial concern.

Among the most important features that distinguish state constitutions from their federal counterpart is the greater ease with which the framers' true intent may be discerned. Unlike the federal Constitution, state constitutions are frequently amended, and in many states a total constitutional revision has occurred over the years.<sup>144</sup> The New York Constitution has been amended one hundred and sixty-eight times, and the current version is only ninety-seven years old.<sup>145</sup> The Hawaiian Constitution, adopted on November 7, 1950, has already been amended over twenty-two times.<sup>146</sup> The Maryland Constitution, which is about one hundred and twenty-four years old, has been amended approximately one hundred and twenty-five times.<sup>147</sup>

In contrast, our two hundred-year-old federal Constitution has only been amended twenty-six times, and one of those amendments merely repealed a previous amendment that was deemed unworkable. The first ten amendments, among the most significant in terms of individual rights, were all adopted in 1791, only a few years after the Constitution itself was ratified. Only nine amend-

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than 7,000 words. See U.S. CONST.

<sup>141</sup> N.Y. CONST. art. XVI, § 1.

<sup>142</sup> *Id.* art. VIII, § 1.

<sup>143</sup> Galie, *The Other Supreme Courts*, *supra* note 3, at 734 (footnotes omitted); see also *id.* at 735, 740 (noting human rights provisions of Montana and California constitutions).

<sup>144</sup> See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 10.

<sup>145</sup> *Id.* at 16.

<sup>146</sup> *Id.* at 16, 17.

<sup>147</sup> *Id.* at 16.

ments were enacted between 1792 and 1920. The amendments adopted since 1921 dealt largely with procedural issues rather than substantive rights of citizens.<sup>148</sup> Thus, it is apparent that state constitutions differ dramatically from their federal counterpart in terms of ease and frequency of amendment and, concomitantly, in their ability to reflect more directly contemporary values and norms.<sup>149</sup>

The sensitivity of many states to the contemporary needs of their citizenry is demonstrated by their actions in the turbulent events of the 1960's, which "produced a new sense of concern about the inadequacy of state constitutions."<sup>150</sup> Realizing that their constitutions needed modification and updating in light of recent Supreme Court decisions<sup>151</sup> and changing social and political conditions,<sup>152</sup> many states had re-examined their constitutional structures in those years.<sup>153</sup> In New York, we now hold a new constitutional convention every twenty years, with the goal of bringing our state's constitution up to date.<sup>154</sup> California, like New York, has a process for assuring that its constitution reflects the current needs of its people. Its provision for amendment by popular initiative permits voters to express their present concerns in constitu-

<sup>148</sup> See generally Galie, *The Other Supreme Courts*, *supra* note 3, at 753-63 (discussing textual differences between federal and state constitutions).

<sup>149</sup> The contention that the state amendment process is responsive to the mandate of the people is borne out in the area of criminal justice. Constitutional amendments have been used in several states "to override state court opinions that extend individual rights . . ." beyond the limits set by the Supreme Court. Abrahamson, *supra* note 24, at 1154 & n.48. Justice Abrahamson points to a number of examples from California, Florida and Massachusetts. *Id.* See, e.g., CAL. CONST. art. I, § 27 (1982 amendment reinstating death penalty and overruling *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972)); FLA. CONST. art. I, § 12 (1982 amendment conforming state search and seizure clause to federal counterpart, the fourth amendment); *cf.* MASS. CONST. pt. 1, art. 26 (1982 amendment permitting death penalty, subsequently declared unconstitutional in *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 163, 470 N.E.2d 116, 124 (1984)); see also Fisher, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 72-76 (1983) (discussing California's ballot propositions to limit state court's power).

<sup>150</sup> E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 3.

<sup>151</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 189 & n.4 (1967) (Tennessee constitutional provision on reapportionment held unconstitutional)

<sup>152</sup> See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 3 (public officials, state and local opinion leaders, and influential private organizations threw their weight behind constitutional reforms).

<sup>153</sup> *Id.* at 20; see also V. O'ROURKE & D. CAMPBELL, *CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE* 113-91 (1943).

<sup>154</sup> N.Y. CONST. art. XIX, § 2.



tional form, and Californians have availed themselves of this privilege on several occasions.<sup>155</sup> Thus, state constitutions, unlike the federal Constitution, may be said in many instances to be true reflections of current social mores and values.

One of the most significant consequences of this fundamental difference between state constitutions and the federal document is that it facilitates the state judiciary's attempts to discern the framers' intent. In many instances, the framers of a particular provision of a state constitution are not dead historical figures. Instead, they are individuals currently sitting in the state capitols, whose oral and written comments on their actions are readily accessible. Furthermore, because constitutional revision at the state level is less cumbersome than the federal amendment process, state constitutions are revised and amended relatively frequently. As a consequence, a great deal of legislative history is available in many cases,<sup>156</sup> many provisions are framed in terms that have particular meaning to the modern mind, and it may be assumed that the normative values expressed have undergone continuing review by both the people and their elected representatives.<sup>157</sup>

#### IV. CONSTITUTIONAL INTERPRETATION AT THE STATE LEVEL

By now, it should be apparent that because of the substantial differences between the state constitutions and their federal counterpart, many of the noninterpretivists' arguments lose their force when applied to state constitutional analysis. At the state level, constitutional revisions are continually under consideration, and amendments are frequently found on the ballot at election time. Moreover, it is the function of elected state representatives to monitor whether the existing constitution accurately reflects con-

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<sup>155</sup> After the Supreme Court of California held that capital punishment violated the state constitution, the voters amended that document to overturn the court's decision. See CAL. CONST. art. I, § 27 (1982 amendment overruling *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 958 (1972)); see also CAL. CONST. art. I, § 27 (abolition of independent state exclusionary rule); *In re Lance*, 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985) (upholding state constitutional amendment broadening police search and seizure power); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (discussion of California amendment initiative process).

<sup>156</sup> Depending upon the practice of the particular state, there are journals of the constitutional conventions, committee reports, debates, and other forms of legislative history available.

<sup>157</sup> Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 387 (1984).

temporary values. Thus, the frequently amended state constitutional provisions cannot fairly be dismissed as the outmoded pronouncements of a by-gone generation of aristocrats. Additionally, the argument that the true intent of the framers cannot reliably be discerned loses much force when applied to the more modern—and more frequently examined—state documents. These considerations militate strongly in favor of using the interpretivists' approach to determine the effect of a state constitutional provision.

A state jurist's approach to the question of underlying intent, however, should be a pragmatic one. What constitutes the "original intent" analysis for a state constitutional provision would not necessarily satisfy the purist interpretivist who advocates strict adherence to the Framers' "original intent" at the federal level. Constitutional interpretation based on underlying intent means more than simply discerning what the original framers of a state constitution thought to be a desirable result. For me, factors of equal importance are the language of the provision itself,<sup>158</sup> the provision's place in the overall structure of the state constitution,<sup>159</sup> all the relevant common law that may have been codified (or rejected) in a particular amendment and case law construing the provision shortly after its adoption.<sup>160</sup> Also to be considered are the unique traditions, history and other surrounding circumstances that can be discerned through the exercise of ordinary common sense.<sup>161</sup>

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<sup>158</sup> See, e.g., *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 159, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 44 (1978) (comparing language of New York Constitution with fourteenth amendment to determine meaning of state constitution). If the provision is an amended version of a prior clause, the jurist can often gain insight by comparing the language and structural context of the old and new provisions.

<sup>159</sup> See, e.g., *Thomson v. Robb*, 229 Va. 233, 328 S.E.2d 136 (1985).

<sup>160</sup> Judicial opinions construing an older state constitutional provision that were written closer in time to when the provision was enacted can provide substantial guidance as to Framers' intent. See, e.g., *Brown, Construing the Constitution: A Trial Lawyer's Plea for Stare Decisis*, 44 A.B.A. J. 742, 745 (Aug. 1958) (judge must determine if prior decisions are consistent with intended meaning). This is because it is likely that judges deciding cases in close time proximity to the enactment of a constitutional revision or amendment are familiar with the intent behind the provision and better understand the meaning of the words in the context of the time of enactment.

<sup>161</sup> See, e.g., *Brown v. Brown*, 287 Md. 273, 412 A.2d 396 (1980); *Anderson v. Regan*, 53 N.Y.2d 356, 425 N.E.2d 792, 442 N.Y.S.2d 404 (1981). Use of these factors comports with one commentator's suggested rules of construction: "(1) a document must be read in its entirety to understand the meaning; (2) absent words of art, the common understanding of words will be determinative of the meaning intended; and (3) the document must be construed in the circumstances surrounding its execution." *Brown, supra* note 160, at 745. See also *THE FEDERALIST* No. 78, at 490 (A. Hamilton) (B.F. Wright ed. 1961) (judiciary is least dangerous to the political rights of the Constitution); Galie, *The Other Supreme Courts*,

Unlike strict interpretivists, I would not advocate limiting the search for enlightening background information to the reported constitutional convention debates or the committee reports. Rather, under this somewhat more eclectic approach, such alternative guiding materials as secondary sources,<sup>162</sup> legislative history on statutes passed pursuant to the authority of a particular provision,<sup>163</sup> sister states' treatment of comparable provisions<sup>164</sup> and commentaries to any Model State constitutional provisions on which the state's own constitution was based,<sup>165</sup> would all be utilized in the service of finding an objective grounding for constitutional adjudication.

Such objective grounding is critical to avoiding subjective decision-making based on judges' personal views of how legal relationships in society are to be governed.<sup>166</sup> As the interpretivists argue, when judges interject their own values and social assumptions into their constitutional decision-making processes, they create the potential for abuse and unpredictability in the law. Moreover, they improperly arrogate to themselves the power to legislate an unwritten constitution that neither the People nor their elected representatives intended. No jurist, however wise or benevolent, should assume the power to impose his or her attitudes and wishes on the public as well as the litigants, who have a right to expect that their positions will fairly be considered without regard to the politics of the bench. Most importantly, the values of individual judges, and even their conscientiously-held beliefs about what is desirable for society, should not be interjected into the body of state constitutional law "for no other reason than that [judges] are strategically located to enforce their own views."<sup>167</sup> Similarly, litigants must be mindful that "[i]t is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely

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*supra* note 3, at 764.

<sup>162</sup> See, e.g., 2 W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 50, 335, 404, 433 (1973) (available historical documents for each state constitution).

<sup>163</sup> See, e.g., ITT World Communications, Inc. v. City of San Francisco, 37 Cal. 3d 859, 693 P.2d 811, 210 Cal. Rptr. 226 (1985); New York Pub. Interest Group v. Steingut, 40 N.Y.2d 250, 259, 353 N.E.2d 558, 563, 386 N.Y.S.2d 646, 651 (1976).

<sup>164</sup> Opinion of Justices, 384 Mass. 829, 425 N.E.2d 750 (1981); see Fischer v. Department of Pub. Welfare, 509 Pa. 293, 502 A.2d 114 (1985); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985).

<sup>165</sup> See generally NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963).

<sup>166</sup> Deukmejian & Thompson, *supra* note 4, at 1040.

<sup>167</sup> Bishin, *supra* note 51, at 1134.

because one prefers the opposite result" and should realize that "to make an independent argument under the state clause takes homework—in texts in history, in alternative approaches to analysis."<sup>168</sup>

There is more than adequate intellectual source material on which to base an independent body of objective state constitutional law. Thus, jurists need not choose between the rigidity of the strict interpretivists and the unpredictability of the impressionistic noninterpretivists. A particular state's own history or unique traditions may provide the basis for an interpretation differing from that which the nation's High Court has adopted in relation to a cognate federal constitutional provision.<sup>169</sup> Each state in our union has traditions derived from its own peculiar history and regional character. A state's individual traditions and regional history cannot be considered by the United States Supreme Court for the simple reason that it must interpret and apply a document that is meant to govern the entire nation—in all its diversity. State judges, in contrast, can and should take full advantage of this important ground for constitutional adjudication.

Moreover, the import of a state's idiosyncratic history and traditions may be found in the rich body of common law that the state possesses. Many state constitutions contained various bill of rights provisions before the federal Constitution was enacted. Decisional law construing these older bills of rights furnishes a fertile ground for discerning a particular state's values, especially in states that were interpreting these provisions before the United States Supreme Court became an important avenue of social redress.<sup>170</sup> New York, for example, first addressed the right to counsel in its 1777 Constitution<sup>171</sup> and has been in the forefront of the

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<sup>168</sup> Linde, *supra* note 29, at 392.

<sup>169</sup> See *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557-58, 503 N.E.2d 492, 494-95, 510 N.Y.S.2d 844, 846-47 (1986); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303-06, 501 N.E.2d 556, 561-63, 508 N.Y.S.2d 907, 912-13 (1986), *cert. denied*, 107 S. Ct. 1301 (1987).

<sup>170</sup> See Galie, *The Other Supreme Courts*, *supra* note 3, at 764-65 (discussing New York right to counsel); see also *People v. Witek*, 15 N.Y.2d 392, 396-98, 207 N.E.2d 358, 360-62, 259 N.Y.S.2d 413, 416 (1965) (and cases cited therein).

<sup>171</sup> See Galie, *The Other Supreme Courts*, *supra* note 3, at 764-65 (right to counsel first recognized by New York in its 1777 Constitution). Article XXXIV of the Constitution of 1777 provided that in "every trial on impeachment, or indictment for crimes or misdemeanors the party impeached or indicted shall be allowed counsel as in civil action." N.Y. CONST. of 1777, art. XXXIV.

development of that right ever since.<sup>172</sup> This history of solicitude for a particular right has been used by the New York courts as a foundation for fashioning a body of state constitutional law that is substantially more protective of that right than is the federal Constitution.<sup>173</sup> Indeed, in New York, our traditions, which include judicial concern for the rights of privacy and personal liberty, make up a vital part of our judges' psyches and cannot help but color our interpretation in areas such as suspects' and prisoners' rights and the right to counsel.<sup>174</sup>

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<sup>172</sup> See Galie, *The Other Supreme Courts*, *supra* note 3, at 764-65. Although New York courts always accorded the right to counsel special solicitude, *see, e.g.*, *People v. Witek*, 15 N.Y.2d 392, 396-97, 207 N.E.2d 358, 360-61, 259 N.Y.S.2d 413, 415-17 (1965), the Court of Appeals decisions in *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) (right to counsel attached immediately upon indictment and defendant must be advised of same), and *People v. Di Biasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960) (questioning of defendant in absence of attorney violative of Constitution), are often considered the beginning of New York's conscious effort to develop a body of law on that subject that was substantially more protective of defendants' rights. The special New York right to counsel was developed in a series of cases. *See People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968) (accused may not be questioned in absence of counsel, once attorney enters proceeding); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (held inadmissible any statement made subsequent to accused's request for counsel); *People v. Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (extended *Waterman* to include arraignment phase). Although the vitality of the New York right-to-counsel experiment fell into question in *People v. Woodin*, 31 N.Y.2d 753, 290 N.E.2d 436, 338 N.Y.S.2d 434 (1972), *People v. Lopez*, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied*, 404 U.S. 840 (1971) and *People v. Robles*, 27 N.Y.2d 155, 158-60, 263 N.E.2d 304, 305-06, 314 N.Y.S.2d 793, 794-96 (1970), *cert. denied*, 401 U.S. 945 (1971), its durability was reinforced in *People v. Hobson*, 39 N.Y.2d 479, 483-84, 348 N.E.2d 894, 900, 384 N.Y.S.2d 419, 422 (1976), in which the court treated those decisions as "departure[s] from a deliberately elaborated line of cases." After *Hobson*, the Court of Appeals went on to apply its highly protective right to counsel to a wide variety of situations. *See also People v. Cunningham*, 49 N.Y.2d 203, 207, 400 N.E.2d 360, 363, 424 N.Y.S.2d 421, 423-24 (1980) (state court free to extend accused's right to counsel under state constitution despite fact that Supreme Court has not yet recognized same right under federal Constitution); *People v. Settles*, 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978).

<sup>173</sup> *See People v. Bethea*, 67 N.Y.2d 364, 367, 493 N.E.2d 937, 939, 502 N.Y.S.2d 713, 715 (1986); *People v. Bigelow*, 66 N.Y.2d 417, 422-23, 488 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985); *People v. Isaacson*, 44 N.Y.2d 511, 519-20, 378 N.E.2d 78, 82, 406 N.Y.S.2d 714, 718 (1978); *see also People v. Belton*, 55 N.Y.2d 49, 52-53, 432 N.E.2d 745, 746, 447 N.Y.S.2d 873, 874 (1982) (New York Court of Appeals limits Supreme Court's ruling allowing warrantless searches and seizures); *Cooper v. Morin*, 49 N.Y.2d 69, 73, 79, 399 N.E.2d 1188, 1190, 1193-94, 424 N.Y.S.2d 168, 171, 174 (1979) (pretrial detainees entitled to contact visits of reasonable duration under New York Constitution), *cert. denied*, 446 U.S. 984 (1980).

<sup>174</sup> *See Galie, The Other Supreme Courts*, *supra* note 3, at 764-65.

## V. OTHER CONSIDERATIONS

There are certain fundamental goals that any method of constitutional interpretation should serve. Before any of those goals can be considered, however, the constraints on judicial decision-making must be understood. First, appellate judges on most state high courts may only decide questions of law. Thus, factual issues such as the credibility of the parties' stories may not form a part of the analysis, regardless of what the judge may, in his or her heart, believe. Indeed, elementary principles of judicial economy dictate that the issues that the court must decide in a given case be narrowed to the extent possible, and, as a consequence, appellate courts generally must treat the facts established by the judgment below as "givens." Second, appellate courts are generally bound by the manner in which the issues have been framed in the court of first instance. There are many reasons for this fundamental rule, some of which are beyond the scope of this article. One obvious reason, however, is to ensure that the lower court record on which appellate review depends was developed in such a way as to contain all of the facts that might be pertinent to the legal issues that the high court is called upon to decide.<sup>176</sup>

Finally, pragmatic constraints such as time pressures and the quality of advocacy affect the manner in which state high courts approach constitutional, as well as common law and statutory, questions. Although most jurists do independent research and consider problems not addressed by the parties, we are forced to rely, to a great degree, on the briefs and oral arguments presented by the litigants—at least as a starting point. Hence, where the appellate briefs are inadequate or unimaginative and the oral argument lackluster, our own work product inevitably suffers.

We are also constrained by our own humanness. Obviously, no court is wholly unbiased, and judges will inevitably interject their personal values into their decision-making processes, regardless of how strongly committed they may be to the principle of objectivity. Judges, like legislators and other servants of the people, are fallible. Further, even given the same historical materials and legal precedent, judges will invariably disagree about what the correct outcome should be. Although we may strive for objectively sup-

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<sup>176</sup> See *People v. Dodt*, 61 N.Y.2d 408, 415, 462 N.E.2d 1159, 1163, 474 N.Y.S.2d 441, 445 (1984); *People v. Havelka*, 45 N.Y.2d 636, 642-43, 384 N.E.2d 1269, 1272, 412 N.Y.S.2d 345, 348 (1978).

portable answers, legal analysis is not and never will be a mathematical science that lends itself to absolute, indisputable solutions.

With all of that in mind, I nonetheless believe that judges must endeavor, to the extent of their abilities, to decide the constitutional questions before them in accordance with a methodology that is designed to promote objectivity. This obligation flows naturally from the extraordinary degree of trust that our society reposes in its judges, as well as from the fact that, as a necessary incident of our independence, we are not held accountable to the electorate in the same direct way as are our compatriots in the legislative and executive branches. Furthermore, the far-reaching social effects of our decisions in the area of constitutional interpretation dictate that we avoid decision-making based upon personal preference that may not withstand the test of time.

Another consideration in any methodology is the responsibility of the state high court jurist to remain sensitive to his role in the overall scheme of government, for the balance of governmental power is at stake every time an appellate court speaks, with all its authority, on the meaning of the Constitution. Regardless of the interpretive method employed, there will always be the occasional unpopular decision. Because controversy over constitutional decision-making is unavoidable, the method employed should at least be one that the public perceives as legitimate. Judicial methodology must foster in the people confidence that, even if every decision is not to their liking, the judiciary is acting within the scope of its constitutional mandate and adjudicating the cases before it in a fair and reasoned manner. As Justice Brennan has observed, "[t]he very lifeblood of courts is popular confidence that they mete out even-handed justice."<sup>176</sup> As one commentator has suggested, the following factors for evaluating the merits of a particular methodology commend themselves:

How well, compared to possible alternatives, does the practice contribute to the well-being of our society—or, more narrowly, to the ends of constitutional government? Among other things, the practice should (1) foster democratic government; (2) protect individuals against arbitrary, unfair, and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values, and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be ac-

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<sup>176</sup> Brennan, *supra* note 18, at 498.

ceptable to the populace.<sup>177</sup>

The expectations of the litigants and attorneys, who are directly involved in the process, should also be considered. Those who avail themselves of and practice in the courts are entitled to rely on a degree of consistency in the method by which their controversies will be resolved. In the area of common law adjudication, the litigants expect that prior precedent will be applied to their dispute and that both logic and public policy will be brought to bear on the problem. In controversies governed by statute, attorneys prepare their cases on the assumption that the language and legislative intent underlying the provision in issue will be determinative factors. The parties' right to know in advance what the ground rules will be in the disposition of constitutional controversies is of at least equal importance.

Any approach to constitutional interpretation should also serve, at the very least, two other significant goals. First, the method should foreclose, as much as is humanly possible, the injection of the judges' personal feelings, values and beliefs into the ultimate disposition. No jurist should feel entirely free to substitute his or her own beliefs for the normative values embodied in the written constitution that represents the organic will of the people. Second, whatever methodology is chosen, it should reflect the norms and values of the constitution while, at the same time, achieving substantial justice that has meaning to contemporary society. If operating properly, interpretive methodology should produce results that are either within the expectations of a majority of the people or, if that is not possible, are at least consistent with the long-term preservation of democratic government. A proper construction of the first amendment of the federal Constitution, for example, would probably preclude a local regulation prohibiting Nazis from conducting a peaceful march on a public thoroughfare, although such a result would likely be an unpopular one.<sup>178</sup> Nonetheless, the decision would be an appropriate one, because, in the final analysis, it would be supportive of the ideals of diversity and freedom of expression that are essential to a democratic system of government.

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<sup>177</sup> Brest, *The Misconceived Quest*, *supra* note 9, at 226.

<sup>178</sup> See A. NEIER, *DEFENDING MY ENEMY* 48-56 (1979).



## CONCLUSION

Moderates, such as Professor Ely, argue that there are times when pure interpretivist review breaks down; their arguments have much force in the area of federal constitutional analysis. Indeed, pure interpretivists like Professor Berger would point to "original intent" and conclude that the assumption of the fourteenth amendment's framers—that segregation, not integration, would be the norm—should guide the courts' decisions in the area of civil rights.<sup>179</sup> That argument is a theoretically viable one, and its analysis of the framers' intent is probably correct. Yet, most of us—regardless of our own prejudices—would find the interpretivists' conclusion abhorrent in a democratic society such as ours. Such egregious and counterintuitive results are precisely what impels many jurists to gravitate towards their activist colleagues.<sup>180</sup>

On the other hand, the noninterpretivists have their own embarrassing legacy. Decisions such as *Dred Scott v. Sandford*<sup>181</sup> and *Lochner v. New York*<sup>182</sup> are two examples. However, as Professor Ely points out, the work product of the Warren Court, the paradigm of consistent judicial activism, was overall a healthy development in American constitutional law, although its reasoning may not always have been as rigorous as some of us might have wished. Significantly, the Warren Court decisions were, for the most part, more concerned with protecting the democratic processes than with defining particular substantive rights.<sup>183</sup> As Professor Ely argues,<sup>184</sup> and as the Warren Court's legacy demonstrates, judicial activism that is process-oriented, that has as its goal the widening

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<sup>179</sup> See Berger, *The Activist Flight*, *supra* note 6, at 16-17.

<sup>180</sup> A degree of moral obtuseness may be inherent in the pure interpretivist viewpoint, in that the school's strict reliance on Framers' intent may also "reprise judges . . . from responsibility for moral and political character of their action." Schlag, *supra* note 25, at 285. See generally H. ABRAHAM, *THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS* 181-88 (6th ed. 1983) (judicial activism and judicial restraint in light of public policy); J. ELY, *supra* note 6, at 3 (public would not accept a judge using fundamental values he believed America stood for in statutory interpretation); Saphire, *Judicial Review in the Name of the Constitution*, 8 DAYTON L. REV. 745, 779 (1983) ("original interpreter" operates in "fantasy world" rather than from Framers' perspective).

<sup>181</sup> 60 U.S. (19 How.) 393, 450 (1857) (Act of Congress which prohibited citizens from bringing slaves into territory was unconstitutional exercise of authority over property and did not render slave who was so removed a free man).

<sup>182</sup> 198 U.S. 45, 64 (1905) (state statute regulating employees' hours an unconstitutional interference with right and liberty of individual to contract).

<sup>183</sup> See *supra* notes 116-20 and accompanying text.

<sup>184</sup> See J. ELY, *supra* note 6, at 73-74.

of access to the voting booth and the soapbox, as well as the enhancement of individual freedom, may well be the best assurance that the beauty and spirit of our American democracy will be preserved despite the age of our federal Constitution.

These observations, however, have far less persuasive force when applied to state constitutional methodology. The Warren Court was faced with a federal Constitution that was resistant to change by amendment and was threatening to become increasingly irrelevant to a rapidly changing society.<sup>185</sup> The cataclysmic events of the 1960's cried out for change, and the democracy that we cherish was perceived to be in jeopardy.<sup>186</sup> In that context, the Supreme Court's decision to step in and use the Constitution as an agent for change was courageous and, probably, correct. The same conclusion, however, cannot necessarily be drawn about the contemporary environment facing our state high courts, which have the benefit of updated constitutions that are more readily amenable to change.<sup>187</sup>

This is not to suggest that state courts should adopt the interpretivists' position uncritically. In the final analysis, the interpretivists' rigid insistence on strict objectivity and avoidance of judicial legislating is unrealistic, since judges make law each time they adjudicate a controversy and their personal preferences inevitably creep into the process. Nor is the real issue the usurpation of legislative power by a nonmajoritarian institution such as the judiciary. Our governmental and political structure is, in reality, fraught with nonmajoritarian decision-making. The United States Senate, for example, makes its decisions by majority vote, but its members are not necessarily collectively representative of a majority of the People. Even our more truly representative body, the House of Representatives, makes many important decisions in committees that represent only a small fraction of the nation's voters. Moreover, the president, the governors and other elected officials often take action that does not truly reflect the majority view, as do the numerous state and federal agencies that regulate so many aspects of our daily lives.<sup>188</sup> Thus, there should be nothing so startling about a judicial decision involving the right of a minority voice to be heard,

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<sup>185</sup> See generally Berger, *The Activist Flight*, *supra* note 6, at 16-27.

<sup>186</sup> See A. COX, *supra* note 15, at 92.

<sup>187</sup> See E. CORNWELL, J. GOODMAN & W. SWANSON, *supra* note 19, at 7-10; *supra* notes 138-47 and accompanying text.

<sup>188</sup> See Bishin, *supra* note 51, at 1128-29.

even if the majority may well prefer to silence that voice.

The real issue, then, is the intellectual integrity of the process through which the decision is reached. While there are many state high court decisions on constitutional questions with which I personally agree on a moral level, I am also painfully aware that the journey the courts have taken to reach those results, in many instances, confounds lawyers and laymen alike. It is the process—the legal reasoning that supports the stated rationale, dictum and holding—that concerns me. Pure judicial activism *sans* analytical grounding lacks integrity and, as a consequence, is as likely to lead to bad results over time as to good ones. When state courts sacrifice method and reason, they jeopardize the confidence of the people, as well as the constitution they have sworn to protect.

In this era of growing constitutional independence among the state courts, no state court judge can afford to be a “knight errant, whose only concern is to do good.”<sup>189</sup> Therefore, “the state judge, when presented with the invitation to develop a body of state constitutional law, should pause to consider some of the dangers and hazards that may lie along the way.”<sup>190</sup> One may take judicial notice that lawyers and the judicial system have always been a target of public cynicism. By striving for objective analysis as a ground for decision-making and remaining sensitive to the limits of our proper role in this democratic system, we in the judiciary can minimize such cynicism and, at the same time, perform our most important function of balancing the value of democracy against the equally important value of individual human rights.

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<sup>189</sup> See Howard, *supra* note 139, at 941; cf. B. CARDOZO, *supra* note 80, at 141.

<sup>190</sup> See Howard, *supra* note 139, at 941.