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THREE ESSAYS IN AMERICAN JURISPRUDENCE

By

Dennis NettikSimmons

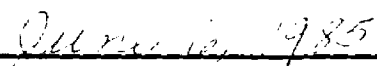
B.A. University of Montana, 1980

Presented in partial fulfillment of the requirements
for the degree of
Master of Arts
University of Montana
1985

Approved by


Chairman, Board of Examiners


Dean, Graduate School


Date

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TOWARDS
THE DEVELOPMENT OF STATE CONSTITUTIONAL JURISPRUDENCE

I. INTRODUCTION

The purpose of this article is twofold. First, I want both to show that state constitutions have been an important source of fundamental law and a basis for judicial review and to argue that the bar and bench of every state should take seriously the potential of its state constitution. Second, I want to define what I call, "constitutional jurisprudence," to indicate briefly how it affects legal argument and judicial decision-making concerning the federal Constitution, and to urge lawyers and state courts to articulate a constitutional jurisprudence for their own state constitution, based on legal, historical, and cultural characteristics of their state.

This article, then, will begin with a definition of constitutional jurisprudence, together with some introductory remarks about its importance. This introduction will be followed by an historical survey of the role of state constitutions as a basis for judicial review, from the colonial period to the present, to demonstrate the precedent for and potential use of state constitutions. It will be argued that the current state court judicial review demonstrates a need for a constitutional jurisprudence to guide the construction of a state constitution. Once this historical foundation has been laid, it will be appropriate to consider the concerns addressed by theories of

constitutional jurisprudence concerning the federal Constitution and to examine some examples of such theories. Finally, these jurisprudential concerns will be considered in light of some distinct differences between state constitutions and governments and the federal Constitution and government. From this analysis, it will be concluded that in many important respects, theories of federal constitutional jurisprudence are not appropriate to state constitutions.

II. CONSTITUTIONAL JURISPRUDENCE AND ITS LEGAL ROLE

From its latin derivation, the term, jurisprudence, means wisdom about law. This wisdom, however, is not simply knowledge of the laws; rather it is an attempt to understand how the laws fit together and what sort of overarching principles provide the glue to keep them together.¹

Constitutional jurisprudence is a species of jurisprudence. It is concerned with a certain kind of law, fundamental law. A constitution is fundamental in that it founds the institutions that will be responsible for enacting all other laws and purports to demarcate the respective powers of and restrictions upon these institutions.

Because the United States Constitution does not explicitly address what legal effect it should have, answering this question has been the primary task of constitutional jurisprudence in this country. This question has been asked as two theoretically distinct but practically interrelated

questions.² First, if the constitution has some legal effect, what is the courts' role in enforcing it? In other words, what is the scope of the courts' power of judicial review? Second, since the constitution itself does not articulate a principle to guide interpretation of it, how are the courts to interpret it?

Different persons who have reflected on these questions have given a variety of answers. Their readings of the Constitution, of course, often reflect concerns that have arisen within a broader context of historical analysis and political philosophy.

But how is constitutional jurisprudence pertinent to legal argument or judicial decision-making? During an address he made at a jurisprudence conference last spring,³ Chief Judge of the Ninth Circuit Court of Appeals, James Browning, though not intending to belittle jurisprudence, candidly stated that he did not consult jurisprudential theories when he voted on outcomes of cases before his court. Given traditional legal education, his comment is quite understandable. At first glance, the processes of legal argument and decision-making do not seem to require an understanding of how various laws, including constitutional provisions, fit together. Since Marbury v. Madison,⁴ the permissibility of judicial review has been firmly established, and lawyers and judges have been taught to look only to the words of the provision at issue and the con-

struction that courts in prior cases have given to it.

Nevertheless, in the same way that scientific data is meaningless without a theory,⁵ the words of a text do not interpret themselves. As theologians, literary critics, and historians have discovered, some interpretational theory is required to interpret texts.⁶ An argument for constitutional jurisprudence also relies on this premise; since laws are texts, a principle or theory of interpretation, outside of the texts but inspired by or related to the texts, is required to interpret them.

As legal realists have recognized, all judges, whether consciously or unconsciously, bring to their judicial review and their interpretation of constitutional provisions extraneous principles, experiences, and emotions.⁷ The argument for a constitutional jurisprudence is that these factors should be made explicit and consistent. If constitutional jurisprudence is thus defined, it is clear that state court judges, even more than federal judges, need constitutional jurisprudence; they need a theory not only for the federal Constitution but also one for their own state constitution.

That different jurisprudential theories have led to different interpretations of the same provision strengthens, rather than weakens, an argument for constitutional jurisprudence.⁸ For if we assume a subjective interpretation of constitutional provisions by judges, surely a consistency

among a judge's subjective interpretations founded on a jurisprudential theory would be of greater service to society than inconsistent interpretations. First, this would be true because persons could at least formulate certain expectations on the basis of which they could lead their lives with some confidence.⁹ Secondly, connecting a legal argument or decision to an explicit, jurisprudential theory would provide a better foundation for debate about the assumptions judges make but do not state in their opinions. Thus, if judges have articulated jurisprudential theories, ad hoc decisions, based on judges' idiosyncracies, would be exposed as just that.

III. HISTORICAL OVERVIEW

OF STATE CONSTITUTIONS AND JUDICIAL REVIEW

Over the past century, federal courts, armed with the fourteenth amendment, have extensively reviewed state laws and acts. Because of this federal court activity and the academic and political reactions to it, people--including lawyers and judges--have had the impression that state courts seldom engaged in judicial review based on provisions of their own state constitution.¹⁰ Not until very recently, on account of a retrenchment by the Burger Court in some areas of constitutional law, have many lawyers, judges, and commentators begun to take a close look at their state constitutions.¹¹ From the 1780s to the present, however,

state courts have quietly engaged in judicial review in many areas of state constitutional law.

A brief overview of state judicial review is important for two reasons. First, it emphasizes that state courts have not been as dormant as the lack of discussion about them would suggest. Second, although Marbury v. Madison and subsequent United States Supreme Court cases¹² established the right of the Supreme Court to review acts of both the coordinate branches of the federal government and the state governments, a state constitutional jurisprudence ought to begin with an examination of state court precedent for judicial review.

It is often overlooked that state constitutions had existed a decade before the federal Constitution was adopted. Eleven of the thirteen original colonies adopted constitutions for themselves within the eighteen month span from January of 1776 to June of 1777, when the Articles of Confederation were adopted.¹³ The other two colonies operated under their colonial charters.¹⁴

But constitutionalism did not spring forth fully developed from the minds of the colonials in 1776. The drafters of the first state constitutions were deeply influenced by political theorists, notably John Locke and Baron Montesquieu, who had recommended constitutional governments.¹⁵ They were also influenced by their colonial experience under English rule, particularly the extensive

power of Parliament and the arbitrary actions of colonial governors appointed by the King.¹⁶

Although after the Glorious Revolution of 1688 great concessions of power had been exacted from the King by Parliament, concessions that made up in part what was called England's unwritten constitution, the powers of Parliament itself remained unlimited; there was no written constitution that restricted it.¹⁷ The contrast between the unlimited powers of Parliament and the limitations imposed upon their colonial legislative bodies by written charters left its mark on the first state constitutions. The drafters of those constitutions intended as much to limit government as to establish it.¹⁸ They limited state government through both its design and specific provisions protecting individual rights.¹⁹

In turn, it was the outcry made at the state ratifying conventions for the addition of a bill of rights to the federal Constitution that prompted the first Congress to do so.²⁰ Thus, it was to the state constitutional experience that James Madison turned for ideas in drafting a federal bill of rights.

Likewise, the idea of judicial review did not begin with Marbury. Even during colonial rule, Americans invoked Lord Coke's assertion in 1610 in Dr. Bonham's Case²¹ that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the

common law will control it, and adjudge such Act to be void." These colonial assertions were later echoed by state courts as principles of state constitutional law in at least eight cases between 1780 and 1787.²² It was because of this preexisting context for judicial review in state courts, that assumptions about the propriety of federal judicial review could be made in the Federalist Papers²³ and by Justice Marshall in Marbury.²⁴

State courts continued to exercise judicial review and construe their state constitutions in the nineteenth century. Because the Supreme Court decided early on, in Barron v. Mayor of Baltimore,²⁵ that the federal bill of rights was not applicable to the laws or actions of state governments, the enforcement of individual liberties was left to the state courts. Thus, it was the state courts that were confronted with a great number of constitutional challenges concerning individual rights.

State courts, like the United States Supreme Court, took an interest in protecting individual property rights. The doctrine of economic substantive due process, which for a time in this century the United States Supreme Court pursued, had state constitutional decisions dating from 1855 for prototypes.²⁶ Whereas the federal courts abandoned the doctrine of economic substantive due process in the 1930s,²⁷ some state courts continued to apply it.²⁸

State constitutional decisions have not been restricted

to property rights. For example, significant decisions were made concerning the free exercise of religion;²⁹ a fact made poignant by the identification of many of the original colonies with particular sects. Such cases included permitting an atheist to be a juror,³⁰ eliminating religious tests for competency of witnesses and competency to vote,³¹ and granting conscientious objector status to avoid required service in the state militia.³² Freedom of speech and the press were also litigated.³³

Long before federal courts were construing the broad due process provisions of the fifth and fourteenth amendments, state courts were exercising judicial review of state government acts based on broad "inalienable rights" clauses in state constitutions.³⁴ For example, in one very interesting but unique 1848 case, the Tennessee court struck down, as violative of "the liberty of a free person" by restraining him from "the exercise of his lawful pursuits," an ordinance authorizing the arrest and fining of free blacks if they were out after ten o'clock at night.³⁵

Early in this century, many states even enforced state constitutional provisions concerning rights of the accused. For example, in the 1920s, long before the United Supreme Court made the fourth amendment applicable to the states through the fourteenth amendment, the Montana Supreme Court adopted its own exclusionary rule to enforce the Montana Constitution's search and seizure provision.³⁶

It is true that in this century state constitutions in many substantive areas were eclipsed by the federal Constitution. From the 1930s to the early 1970s the United States Supreme Court, through the fourteenth amendment, construed federal constitutional rights to afford greater protection than many states had provided through their own constitutions.³⁷ The Court first acted in the areas of freedom of religion and speech, but then in the 1960s, it revolutionized criminal procedure through its construction of the due process clause.

Since the early 1970s, however, some retrenchment has occurred in Supreme Court decisions in all these areas.³⁸ This retrenchment coincided with a desire in many states to articulate in their state constitutions some of the principles that had been invoked by the Warren Court.³⁹ Both of these series of events rejuvenated the use of state constitutions to protect fundamental rights. This revival of the significance of the state constitution has grown dramatically in the last few years. Not only have state constitutions become authority for state decisions, but a body of articles and commentaries on these decisions is beginning to develop.⁴⁰

This revival has encountered some obstacles. Many lawyers and judges, being used to relying on federal cases to argue constitutional law, have blurred federal and state constitutions. As a result of this blurring, the Burger

Court has considerably increased its discretionary review, and ultimate reversal, of cases that have been appealed by state executive or legislative branches from state courts which, on both state and federal constitutional grounds, afforded greater constitutional protection to individuals.⁴¹ Although acknowledging that state courts may construe their constitutions more protectively than the Supreme Court construes the federal Constitution, the Court has insisted that such state court decisions must clearly be based on independent and adequate state grounds.⁴²

This requirement means that although state courts may still construe both federal and state constitutions or even use federal opinions to aid in construing their own constitution, their decisions must evidence a clear demarcation between the respective analyses of the two constitutional provisions.⁴³ It also means that any federal case law used as authority for a particular construction of the state constitutional provision must be considered persuasive, not mandatory, authority.⁴⁴

Since federal authority is merely persuasive in construing state constitutions, state courts ought to examine it critically. To facilitate this evaluation of federal case law, state courts must first evaluate the jurisprudential concerns implicit in that case law. By doing this and then reflecting on the particular configuration of these concerns in its own state government and constitution, state courts

will have a basis for determining the appropriateness of a federal decision to the construction of their state constitution. They will also be well on their way toward developing a state jurisprudence.

IV. A SURVEY OF FEDERAL JURISPRUDENCE

As already stated, the two crucial questions of constitutional jurisprudence are: first, what is the scope of the courts' power of judicial review and second, how are the courts to interpret it? Not all theories of constitutional jurisprudence explicitly distinguish these two questions or treat them with equal significance. Some theories address one of the questions through the particular answer they give to the other. Nevertheless, because in principle the two questions are distinguishable and because some commentators have done so, they will be treated separately in this section. However, when a particular theory of interpretation strongly implies a corresponding theory of the scope of judicial review, it will be noted. In order not to be redundant, the impact of particular interpretational theories on the scope of judicial review will be discussed in the treatment of interpretational theories.

Before discussing these two questions, it might be helpful to have a framework into which to place the particular theories discussed. Thus, it is appropriate at this time to mention some of the significant concerns that these

theories address. There are at least four such concerns.

The first concern is about how we ought to balance democratic government and individual rights. Different theories, of course, weight the competing interests differently, some emphasizing democracy and others, individual rights.

A second concern is about what is the proper domain for the exercise of the sovereignty of the states and the federal government. This is often characterized as a concern for federalism. It not only arises in determining whether federal laws are constitutional and whether they thus preempt state laws, but federalism is also a factor that the Court must consider when it is asked to impose a constitutional standard upon all fifty states through the fourteenth amendment.

A third issue that concerns theories of constitutional jurisprudence is how to balance the roles of the other two coordinate branches of government with the role of the judiciary. This concern is inherent in both the concept and practice of judicial review, since judicial review requires the court to nullify the act of one of the other two branches.

The fourth concern pertains to the role of the judiciary itself. It addresses the judiciary's strengths and weaknesses. Whether a particular type of judicial review or judicial interpretation is appropriate often hinges on a

theory's assessment of the structure of the judiciary itself.

A. What Should Be The Scope Of Judicial Review?

Few, if any commentators, would seriously suggest that it is unconstitutional for the Court to review the acts of the states and the other federal branches of government. Although the Constitution does not explicitly provide for it, it had precedent in the common law and in the state courts. Likewise, as the Federalist Paper No. 78 and Justice Marshall in Marbury concluded, judicial review legitimately seems to follow from the assumptions that the court is to interpret the law in the cases that come before it and that a written constitution, though fundamental law, is still a law.

Disregarding the effect of interpretational theories on the scope of judicial review, the question boils down to whether courts should be prone to engage in judicial review or whether they should be reluctant to do so out of deference to the sovereignty of the states and the determinations of coordinate branches of the federal government. The jurisprudential positions corresponding to these alternatives have been characterized as judicial activism and judicial restraint.⁴⁵ It is important in using these designations, however, that a particular court's activism or restraint in particular areas be distinguished from a juris-

prudential theory of activism or restraint, which advocates activism or restraint as a matter of principle or analysis of the structure and function of the court.⁴⁶

An example of a theory that encourages judicial activism is that of Thomas Grey. Grey has argued that courts should enforce what he calls the "unwritten constitution."⁴⁷ Essentially, this would give the courts broad authority, on the basis of extra-constitutional principles discoverable by the court, to strike down laws promulgated by the states or other branches of government.⁴⁸ Like most theories advocating activism, Grey's theory is premised on a distrust for democratic processes and a concomitant allegiance to the protection of individual rights. It also demonstrates a faith in the unique capacity of the courts to discover these unwritten principles and to apply them to legislative or executive action.

At the other end of the spectrum, Alexander Bickel has argued for greater restraint by the Court on the basis of his structural analysis of the judiciary.⁴⁹ First, he notes, the "case or controversy" requirement of Article III, embodies a recognition about the domain of the governmental power of the judiciary that is deeply rooted in Anglo-American common law. Courts may interpret the Constitution only to decide cases or controversies. They are not structurally equipped to be constitutional or statutory rule-makers.

In addition to this structural need for courts to interpret the law in the context of a controversy, Bickel invokes the Court's weakness vis-à-vis the executive and legislative branches to argue for restraint. He echoes the remark in the Federalist Papers that whereas the legislative branch controls the purse and the executive, the sword, the judiciary has few, if any, resources, except the principled nature and moral authority of its opinions. For this reason, the Court ought to use aggressively both justiciability doctrines--advisory opinion, mootness, ripeness, political question, and standing--that permit it to decline deciding a case and less controversial decisional principles, like vagueness and delegation of powers, in order to conserve its power.⁵⁰

Jesse Choper has combined the insights of activists, like Grey, and of conservatives like Bickel to fashion a compromise position. He argues that courts are especially equipped to defend individual rights and that they should zealously do so.⁵¹ On the other hand, he maintains that courts should not police the relationships between states and the federal government or between the branches of the federal government. These entities themselves, he concludes from a study of such conflicts, are better equipped than the federal courts to resolve their own conflicts.⁵²

B. How Should The Constitution Be Interpreted?

The second question that a constitutional jurisprudence must address is what principle or principles should guide the Court in interpreting the Constitution. As will be seen, the answer to this second question significantly affects the scope of judicial review. The question of interpretation, as noted above, arises both from the lack of an explicit interpretational principle in the text of the Constitution itself and the necessity to use an extraneous interpretational principle in interpreting any text.

The variety of interpretational principles that, like those specifically addressing the scope of judicial review, have been advocated in theories of constitutional jurisprudence reveal different conclusions about the concerns listed above. These theories of constitutional interpretation have been characterized as being noninterpretivist, interpretivist, or a combination of these two.⁵³ As one would expect, very few persons hold either view in the extreme. One example from each extreme should suffice to demonstrate how each has dealt with the concerns.

Grey's theory about the "unwritten constitution," provides an example of extreme noninterpretivism. It is noninterpretivist in that even the text of the Constitution, not to mention any intention of the framers, restricts by analogy, at best, the kinds of values and the weight that the courts may give those values vis-a-vis other govern-

mental interests. In other words, the Constitution serves merely to inspire and to authorize the courts to protect individual rights through such broad provisions as the due process and equal protection clauses.⁵⁴ It is up to the courts to discover what "liberty" or "property" or minority is to be protected and what measures must be taken to protect them. Thus, individual rights are valued more than the democratic process or federalism concerns; and great faith and responsibility is placed upon the courts' ability to protect them.

At the opposite end of the spectrum lies the radical interpretivist theory of Raoul Berger. To use Ronald Dworkin's helpful distinction,⁵⁵ Berger's interpretivist theory would require the courts to unearth and enforce the particular "conception" of the framers of the Constitution rather than to interpret the "concept" embodied in the constitutional text and to apply it to a modern society. Consequently, Berger's best known work is an attempt to perform an historical exegesis of the fourteenth amendment.⁵⁶ Based on this exegesis, he severely criticizes how the Court, in his opinion, has interpreted the due process and equal protection clauses more broadly than the framers intended.

Berger's constitutional jurisprudence demonstrates an unwaivering trust in and commitment to the democratic process and a corresponding doubt about the capabilities of

the judiciary to articulate the will of the people. His response to the tendency of activists to call upon the courts to solve social problems, even those involving individual rights, is that framers intended the amendment process to be the only remedy for new problems of a constitutional magnitude.⁵⁷ Every generation has the opportunity to update the conceptions of the framers by amending the Constitution; in lieu of constitutional amendment, legislation and the acts of electorally accountable agencies articulate the current will of the people. Likewise, the public's failure to amend the Constitution must be interpreted as their acquiescence to the framers conceptions.

In addition to these two extremes views, there are more centrist theories, both interpretivist and noninterpretivist. The centrist interpretivist theories would permit judges to look beyond the mere conceptions of the framers of the Constitution toward the concepts embodied in the text. Justice Hugo Black, for example, thought that the Court should derive these concepts from the plain meaning of the text and then apply these concepts to the current state of society.⁵⁸ Black's jurisprudence made it impossible generally to characterize him as advocating judicial restraint or activism. When he thought that the plain meaning of the text addressed a particular legal controversy, he took so activist a stance that he was criticized for being an absolutist.⁵⁹ In other decisions, for example in Griswold v.

Connecticut,⁶⁰ he demonstrated great judicial restraint when he thought that the particular right being advocated did not have a textual basis.

Black's method of interpretation reflected his resolution of the balance between democracy and individual rights and the other concerns that have been noted. His adherence to the text provided what he considered to be intelligible limits to both the democratic processes and the courts' vindication of individual rights. Likewise, he could assert both the importance of federalism and the supremacy of the Constitution. Furthermore, by permitting judges great latitude in applying these broad concepts to particular situations, Black demonstrated a good deal of faith in the ability of courts to limit the democratic processes.

Black's interpretational principle, however, has been criticized as being too simplistic.⁶¹ As argued above, since the text of the Constitution cannot interpret itself, it would be likely that nine different justices using Black's principle would both understand the text and apply the concept derived from it in different ways. Furthermore, it does not explicitly provide a way to understand the concepts of particular provisions in their constitutional context.

Somewhere between the jurisprudential theories of Black and Berger lies the theory of Ronald Dworkin. Dworkin criticizes both positions like Berger's that limit interpretation to the discovery of mere historical conceptions⁶² and the

positivist positions like Black's that leave a great deal of the interpretation to a judge's discretion.⁶³ Instead, he argues, judges ought to base their decisions on the concepts embodied in the text and fine-tune these concepts by consulting the documentary materials of our political institutions. Institutional materials, for Dworkin, would consist in prior case law, political theory, our cultural heritage, and aspirational documents like the Declaration of Independence.⁶⁴ Judges would consult these materials in order to develop an overarching legal theory. When deciding cases, they would then determine which potential outcome of the case best fits this legal theory. Ultimately, Dworkin has asserted, one of the outcomes advocated would better fit this theory than any of the others and thus should be chosen.⁶⁵

Dworkin's theory is explicitly based on his evaluation of the strengths and weaknesses of both the legislative branch and the judiciary. Legislatures, and democratic processes in general, he argues, are best suited to enact "policy" whereas judges are best suited to discover and apply "principles."⁶⁶ Policy takes into account the contingencies of society at a particular time and represents an attempt to determine what is best for the general welfare. Principles, however, are not transitory, being grounded in a stable view of human nature and the rights of individuals implicit in that view. For Dworkin, then, individual rights,

whether in conflict with other individuals or the government, are best understood and protected by the judiciary.

Principles or rights are not only more stable than legislatively enacted policies but they also have a higher priority than policies. Thus, when the two conflict, the rights of the individual are permitted to "trump" the will of the majority.⁶⁷ Judges, then, could not be activists in the sense of replacing legislative policies with their own, but only as vindicating individual rights.

Centrist noninterpretivist theories do not require as isolated an interpretation of each provision of the text, as do the interpretivists examined above. They do, however, place more explicit limits on judicial review than Grey would. These limits usually consist of a unitary, substantive or procedural principle of interpretation through which the rest of the Constitution is understood.

The best example of such a theory is that of John Hart Ely. His principle of interpretation is what I will call the pursuit of the ideal democracy.⁶⁸ Ely considers all of the other concerns of constitutional jurisprudence--individual rights, federalism, and the legitimate function of the judiciary--subsidiary to an overarching concern to attain this ideal democracy. As a result, due process or equal protection, for example, are directed only toward improving the democratic processes and ensuring that each person has a

right to participate in those processes; they have nothing to say about the outcomes of those processes.⁶⁹ Likewise, concerns about federalism would be reduced to a more general goal to facilitate democracy.

Ely places upon the courts the responsibility to facilitate the democratic process because of the federal courts' nondemocratic structure. This structure gives them the perspective necessary to police the democratic processes. Judicial review is beneficial to the democratic processes so long as the courts do not attempt to substitute their judgments for the actual outcomes of these processes.⁷⁰

Ralph Neely, a West Virginia Supreme Court justice has a similarly structured theory. Like Ely, he considers it to be the courts' role to facilitate government processes: "constitutional law is about institutions and the way they interact with other institutions."⁷¹ The primary function of judicial review is to "bring the myth system and the operational system into alignment."⁷² The myth system, for Neely, consists of our ideals about how government should function and what general values it should espouse.

Thus, the court has the responsibility to address the failures of the legislative and executive branches to function democratically. For example, from his own experience in state and national politics, Neely has concluded that the malfunction that most characterizes the legislative branch (he is referring both to Congress and his

experience with his own state legislature) is inertia; the legislative structure, he claims, is designed to kill bills, not pass them.⁷³ Even when the legislature acts, its bills very often consist of special interest legislation because it is only the pressure of special interest groups' lobbyists that push a bill through the process. The courts' job would be to force the legislatures to be more concerned with the state's general welfare by attacking special interest legislation with the equal protection clause. The executive branch, he believes, has the opposite problem: it is self-serving and thus over-active.⁷⁴ Thus, the courts would constrain the bureaucracy by forcing them to comply with the principles of due process.

Other theories that appeal to a single principle have been propounded by commentators like Harry Wechsler⁷⁵ and Alexander Bickel.⁷⁶ Like other centrist noninterpretivists, they allow for limited evolution in constitutional law. They do not, however, use a substantive principle of interpretation like democracy or the ideals about the operation of governmental institutions to structure this development. Both Wechsler and Bickel responded to what they considered the ad hoc judicial activism of the Warren Court by urging the courts to interpret the Constitution according to "neutral principles"⁷⁷ or through a "more faithful adherence to the method of analytical reason."⁷⁸ Since reason or neutral principles would be applied to substantive texts,

these theories closely resemble a kind of interpretivism. On the other hand, there is the suggestion that new substantive values might be discovered through this method since the court is to be "the voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles."⁷⁹

If Bickel's interpretational theory and his concern about excessive judicial review are understood together, an interesting balancing of jurisprudential results. Bickel's interpretational theory, like Dworkin's, seems to emphasize the unique capacity of the courts to discover, develop and apply principles. His theory about judicial review, on the other hand, is sensitive to the structural limitations of the courts vis-a-vis the other governmental institutions. The result is that the courts must use their capacities with prudence. If they act rashly, their power will be eroded and their contribution of principles to society will be of no consequence.

V. STATE CONSTITUTIONS

STATE COURTS AND JURISPRUDENTIAL CONCERNS

Now that the major concerns addressed by federal constitutional jurisprudential theories have been analyzed, it is appropriate to evaluate their relevance to state constitutions and state court judicial review. The following section will examine general features of state

constitutions and governments. These generalizations are only intended to question the relevance of the complete adoption by states of a federal constitutional jurisprudence and to suggest how such theories might need to be altered in considering state constitutions. Thus, what follows is not a full-blown state constitutional jurisprudence. Since each state is different from the others in many important respects, a constitutional jurisprudence must be developed for each state. This task must be left to others.

A. Democracy Versus Individual Rights

It is clear from an examination of federal constitutional jurisprudence that the primary concern has been what ought to be the relationship between democratic processes and individual rights and what ought to be the courts' role in it. Although the various theories of judicial review do reflect their adherents' subjective valuation of the importance of democratic government or individual rights, other factors do enter in.

Because the federal Constitution is two hundred years old, extremely difficult to amend, and fundamental law for the entire nation, it makes uneasy those who cherish democracy and frustrates those who seek fundamental changes in national policy. Likewise, federal judicial review has an inherently nondemocratic, if not antidemocratic, character because all federal judges (though appointed and approved by

elected officials) are not elected and serve for life. Consequently, these features of the federal Constitution and of the federal judiciary play an important role in how a theory limits or encourages judicial review and construes the constitutional text.

Most state constitutions and judiciaries do not share these features. To amend state constitutions, unlike the federal Constitution, does not require garnering as large a consensus throughout as large and geographically, culturally and politically diverse a jurisdiction. Thus, state citizens have a greater opportunity to amend their constitutions to articulate new shared ideals or individual rights. A large number of states in the 1970s did so. The new rights have

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judicial construction of a broad constitutional provision that was simply out of touch with the current ideals of the state could be vetoed through the democratic process of constitutional amendment. An example of this dialectic between the judiciary and the public occurred in California in the early 1970s. In 1972 in People v. Anderson,⁸² the California Supreme Court declared the death penalty to be unconstitutional. The next year, however, the people of California overruled the court's decision, reinstating the death penalty by constitutional amendment.⁸³

Unlike federal judges, most state justices and judges are either elected to the bench or subject to retention elections at the end of their terms.⁸⁴ This feature of state judiciaries changes the antidemocratic character of judicial review. Nevertheless, it is not fully democratic; because state citizens elect judges, knowing that on occasion they strike down or enjoin the acts of other elected officials, the election of judges takes on a character different from the election of other officials. In the ideal, the election of judges represents the attempt to select persons of principle who in the heat of controversy will persuade the public to abide by the constitutional principles they have adopted for themselves. Thus, the election of judges, like the adoption of constitutional rights for individuals, expresses an affirmation of judicial review.

Another important distinction between federal and state

judges is that federal judges have had solely an interpretive function; they are charged with interpreting the Constitution, federal statutes and federal regulations.⁸⁵ State judges, however, have had a common law tradition of making law within certain fields, for example in tort law.⁸⁶ This common law tradition in the state judiciaries demonstrates two things. First, it evidences an acquiescence to a judicial law-making function by the public. Second, it proves that at least where individual rights are concerned, state courts have the ability and legal resources to construe state constitutions more broadly than the federal constitution may be construed by federal courts.

B. Federalism and State Constitutions

Although states are subdivided into counties, this relationship between state and county governments vastly differs from the relationship between the federal and state governments, called federalism.⁸⁷ Therefore, the ways in which concerns of federalism affect theories of federal constitutional jurisprudence should be closely scrutinized by state courts.

One feature of this concern of federalism to protect state sovereignty from intrusion by the federal government is a mistrust about the degree of power a single court, namely the Supreme Court, should have over the lives of hundreds of millions of persons living in diverse geographi-

cal and cultural environments.⁸⁸ Such responsibility requires that the Supreme Court proceed very cautiously in reviewing the acts of state governments and before imposing a narrow rule upon the agencies of fifty states. It is true that the Court has some structural capacity to be sensitive to the possible impacts of its decisions on diverse states since it receives a great number of amicus briefs and since its members, at times, have represented a cross-section of America. Nevertheless, the diversity of the fifty states is an obstacle to federal judicial activism.

Single states, on the other hand, are significantly more homogeneous and state courts are responsible for far fewer persons, agencies and inferior courts. Likewise, most states have requirements that state judges have practiced in the state before they can be appointed or elected to the bench.⁸⁹ Further, in states like Montana, where there are regions--for example, urban and rural areas--with different political, cultural and legal perspectives, there often is significant representation of those areas on the appellate courts. Thus, it is possible for state judges to have more insight into the fiscal, administrative, political and cultural character of state government and to use this insight in responsive judicial review.

Moreover, the ideal of federalism also has an optimistic aspect in its concern for decentralization of power that has been often mentioned by the federal courts. Federalism

allows and encourages the states to serve as laboratories to test principles and policies that might someday be applicable to the entire nation.⁹⁰ This experimental function need not be confined to state legislatures or executive branches. State courts also could experiment in state constitutional law just as in the past they have experimented and learned from each other in common law. Perhaps, the day will come when federal courts are citing state constitutional case law as persuasive authority for a particular construction of a federal constitutional provision.

Finally, the principle of federalism affirms the benefits of having a federal government. The federal constitutional bill of rights and the federal courts' construction and application of those rights will continue to serve a very important purpose. Just as the relatively homogeneous character of the states has its virtues, so too it has faults. Whereas certain new ideals or rights may receive a consensus in a particular state, others which impact a very small minority in that state may be rejected.⁹¹ The federal Constitution can serve to ensure that at least the most fundamental rights be afforded all persons, notwithstanding the consensus attained in any one state.⁹² Likewise, the nondemocratic character of the federal judiciary might well complement the elected judiciaries of the states.

C. State Courts and Coordinate Branches of Government

The federal Constitution assigns particular powers to each of the three coordinate branches of federal government--the executive, the legislative and the judiciary. This specification of the legitimate powers of each of the branches was intended by the framers to protect the sovereign domain of the states by both limiting and fragmenting the federal government's powers. It is around this fragmentation of the powers of the federal government that the federal separation of power doctrine has been developed by the federal courts. It is the doctrine of the separation of powers that is invoked by the Court both when it settles a controversy between the other two branches and when it defers to the prerogative of one of the branches in a controversy between it and a state or individual.⁹³

Because states were intended to be the primary governments in our federal system, they had no need for such specific grants of power or limitations. Despite a general mistrust of government during earlier periods of state constitution writing, some states now have very flexible assignments of powers to their branches of government.⁹⁴ Nevertheless, a number of state constitutions, unlike the federal Constitution, do have an express statement regarding the separation of powers of the branches of state government.⁹⁵ The existence of such an express statement could have a number of jurisprudential implications. For

example, it could strengthen the judiciary's claim to be the branch to render the final interpretation about what is unconstitutional. Thus, it might justify zealous review of the coordinate branches to ensure that they are not exceeding their powers. Where a state constitution's provisions describing the powers of the respective branches are very detailed, the court would most likely rely on the text. But where the constitution has not specified the powers of each, the court would have to rely on a structural analysis like Ely's or Neely's. From the constitutional text, and state history or tradition, it would have to determine what function the coordinate branches serve in that state.

An express separation of powers statement could also require judicial restraint. The constitution would prohibit the court from usurping the powers of another branch by substituting the court's judgment for the latter's. There is some evidence that these provisions have engendered such restraint in state court judicial review. One commentator, for example, has found that the political question doctrine is rigorously applied in state constitutional adjudication.⁹⁶

In addition to explicit separation of powers clauses, there are other significant differences between the state and federal structures of government that affect this jurisprudential concern. As has been noted, state courts, unlike federal courts, have had a law-making function in areas of

state law. Also, as of 1975, ten states permitted courts to render advisory opinions at the request of the other two branches.⁹⁷ Both of these features demonstrate a more active role for the courts in state government.

Finally, the history of state constitutions and the amount of federal intervention into the operations of state government to enforce due process and equal protection demonstrate that state governments are more likely to fail to function democratically. Perhaps, because of the homogeneity or the small size of state governments, they have been more susceptible to being controlled by political machines.⁹⁸ Also, state legislatures that only meet biennially may have problems with delegation of their responsibilities to the executive branch.⁹⁹ Further, some states may not have the resources to equip their legislatures with significant staffs or to administer the laws they have passed.

These sorts of problems have plagued the operation of state government in the past. If they continue, vigorous judicial review might be warranted. Such review, however, need not consist in bailing out the other branches by simply substituting the court's judgment for that of another branch; rather, it would publicly hold the legislature or an agency accountable to fulfill its constitutional duty.

D. Justiciability:
Strengths and Weaknesses of State Courts

A nonjusticiable case is one that for one reason or another cannot be adjudicated. Reasons cited for nonjusticiability of constitutional cases have included that there was a lack of standing, that the controversy was not ripe, that the controversy was moot, and that adjudication of the controversy would require the court to answer a political question.¹⁰⁰ All of these reasons follow from a concept of the court as solely a decider of controversies. As such, the court may interpret the law only to the extent such interpretation is absolutely necessary to deciding the case. What these justiciability doctrines do is prevent the court from interpreting the constitution when there is not a real controversy that requires a decision.

The general principles of these doctrines have been applied by Anglo-American courts in all areas of the law.¹⁰¹ In federal law, however, they have taken on an additional significance. Article III of the federal Constitution gives the Supreme Court jurisdiction only over "cases or controversies." Over the years, the Court has fine-tuned these justiciability doctrines to construe its own appellate jurisdiction. In addition, commentators like Bickel have urged the Court to invoke these doctrines frequently both as a matter of preventing it from overstepping its legitimate function and as a matter of prudently conserving its

resources.

Some state constitutions do not have express case or controversy requirements.¹⁰² Nevertheless, most state courts have some version of the justiciability doctrines that they use even in common law adjudications. It is likely, however, that in constitutional cases a number of state courts simply adopted federal standards of justiciability because since the adoption of the fourteenth amendment, they have often been called upon to hear claims based on the federal Constitution, which ultimately could be appealed to the United States Supreme Court.

It is important that state courts that have no express constitutional case or controversy requirement realize that they may be free to adopt whatever standards of justiciability they believe are consistent with the role of the judiciary in their state. In several areas of constitutional law, some state courts have lower standing requirements than the federal courts'.¹⁰³ Likewise, a number of states permit their highest courts to render advisory opinions, the very type of judicial activity that the federal case or controversy requirement is intended to prohibit.¹⁰⁴

There are additional features of many state judiciaries and constitutions that would commend lower justiciability standards for litigating state constitutional questions. First, some state constitutions have provisions providing for a right to a judicial remedy for injuries to a person

that have been given new significance by the courts.¹⁰⁵ On its face, such a constitutional principle seems to encourage adjudication.

Second, state courts do not have near the number of appeals that the United States Supreme Court has. Thus, whereas the Supreme Court may have before it a number of cases on a certain constitutional point appealed within a short span of time and thus have the opportunity to select the one which has best framed the issues, some state courts may be lucky to have a case on a particular constitutional provision come up every ten years. If an active state judiciary is called for or is, at least, consistent with the other jurisprudential concerns, justiciability standards may need to be lowered to permit the desired level of judicial activism.

High standards of justiciability--especially of the sort that Bickel advocates--therefore, might not be as essential for state court adjudication of state constitutional issues as it is for the federal courts. The conservation of respect for the judiciary and of its resources, which Bickel thinks justifies high justiciability standards, is ameliorated by the features of state courts and constitutions that have been examined in the preceding subsections. Likewise, the greater propriety of state court activism would justify justiciability standards no more stringent than what would be necessary to construe adequately the

state constitutional provision at issue.

E. Some Features of Interpreting State Constitutions

State constitutions, like the federal Constitution, do not contain provisions stating how the rest of the constitution should be interpreted. Certainly, the ways in which each state deals with the jurisprudential concerns that have been discussed above will fundamentally affect the principles of interpretation that are accepted in that state, just as they have affected principles of interpretation in theories of federal constitutional jurisprudence.

There are, however, several other features of some state constitutions not yet discussed that might affect how one decides to interpret those constitutions or provisions. First, the fact that major portions of some state constitutions have been revised in the last twenty-five years¹⁰⁶ and that many significant provisions have been added to the constitutions in the last fifteen years¹⁰⁷ might call for a different method of interpretation than what might be applied to our two hundred year old federal Constitution that has received extensive judicial construction. State courts, faced with the prospect of interpreting their own constitutions without precedent from their own courts, might lose their nerve and uncritically apply case law from federal courts or other state courts.

Despite the paucity of case law, however, recent

constitutional provisions do have at least one advantage over older provisions. Because they have been passed recently, the court has first-hand experience of the way these values arose in the populace and were articulated in the constitution. In addition, whereas extensive historic research is necessary to understand the intentions of the framers of the federal Constitution, the delegates to a recent constitutional convention or the legislators who proposed recent amendments to it can be interviewed about their intentions.

Finally, though a state may not have "institutional materials" as rich as the Declaration of Independence or the Federalist Papers, judges and lawyers have a number of valuable resources to enrich the meaning of constitutional texts. For example, a state may have very sensitive historians who captured not only the events but also the very spirit of the state.¹⁰⁸ Likewise, the preamble to the constitution, if it is not considered legally enforceable, might express the tone of the rest of the constitution. Similarly, purpose clauses in state legislation passed pursuant to a particular constitutional provision can provide the courts with additional interpretations.

VI. CONCLUSION

The increase in cases brought and decisions rendered on state constitutional grounds in the last ten years ought to

be placed in its historical perspective. Although for most of this century state constitutions were overshadowed by the fourteenth amendment, they played a significant role in the eighteenth and nineteenth centuries, serving as both a model for the federal bill of rights and a basis for judicial review.

In addition to reflecting on the historical roots of state constitutions and state court judicial review, lawyers and judges should begin to develop a constitutional jurisprudence for their state constitution. A constitutional jurisprudence will enable judges to approach their constitution with a theory that takes into account both the constitution and its cultural, historical, and political context. Well developed theories of constitutional jurisprudence will both inhibit ad hoc interpretations (or at least attempt to justify them) and provide a context for debate about the assumptions that judges inevitably make in deciding whether to engage in judicial review and how to interpret a constitutional provision.

Although theories of federal constitutional jurisprudence provide important materials for developing a state constitutional jurisprudence, the configuration of jurisprudential concerns that the federal theories address must be distinguished from the configurations posed by state constitutions and judicial review by state courts. By critically examining theories of federal constitutional jurisprudence,

state courts will be better able to evaluate the persuasiveness of federal case authority in construing a state constitutional provision. Such an analysis may also reveal jurisprudential questions and concerns unique to state constitutions and point the way toward developing a state constitutional jurisprudence.

NOTES

1. Jurisprudence can be "analytical . . . [which] is concerned with the clarification of the general framework of legal thought" H.L.A. HART, THE CONCEPT OF LAW (preface) (1981) Or, it can be critical, that is, it is an attempt to criticize how our laws, do in fact hang together, and to suggest what overarching principles ought to be reflected in the structure and content of our laws.
2. See J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 1 (1980).
3. Judge Browning's remarks were made at a conference entitled, "Standards and Limits for Judicial Decisionmaking--A Conference on Jurisprudence," held at the University of Montana Law School,
4. 5 U.S. (1 Cranch) 137 (1803). For a good analysis of this decision, see Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 DUKE L.J. 17.
5. For a discussion of the role of theory in scientific research, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).
6. For an attempt to use the study of literature in teaching legal analysis and writing, see J. White, THE LEGAL IMAGINATION (1973).
7. For a good statement of this "legal realist" claim, see Pound, The Call for a Realist Jurisprudence, 44 HARV. L. REV. 697 (1931).
8. But compare Ronald Dworkin's apparent conviction that a "Herculean" jurisprudence could lead to the "right" decision in a case. R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977). For a criticism of this view, see Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 GA. L. REV. 969, 982-986 (1977).
9. This would enrich the legal principle that there ought not to be ex post facto laws.
10. A good indication of this is the degree to which lawyers continue to neglect pleading state constitutional or statutory grounds in addition to federal constitutional grounds. Some state courts have begun to require that state grounds be considered first. See

Carson, "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLIAMETTE L.J. 641 (1983)

11. See, e.g., Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977); Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873 (1976); Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 KY. L.J. 421 (1974).
12. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) and Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821) (establishing the constitutional power of the Supreme Court to review decisions of state courts).
13. See W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 5 (1980); B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234-379 (1971) (for the texts of the state bills of rights).
14. SCHWARTZ, supra note 13, at 289 (Connecticut and Rhode Island).
15. See P. SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY 37-39 (1980); C. WILTSE, THE JEFFERSONIAN TRADITION IN AMERICAN DEMOCRACY 37 (1935).
16. See ADAMS, supra note 13, at 20 (the colonists considered some of Parliament's acts void); See also the colonists 1765 Declaration of Rights and Grievances, which expressed their concern about the arbitrariness of the Crown's rule of the colonies. Schwartz, supra note 13, at 197-199.
17. See A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 91-100 (1965).
18. See ADAMS, supra note 13, at 125-128, 308-311. For an example of how the states experimented and borrowed ideas from each other in this process, see SCHWARTZ, supra note 13, at 374.
19. ADAMS, supra note 13, at 295-311.
20. See SUTHERLAND, supra note 17, at 180; SMITH, supra note 15, at 288 (Madison presented a list of rights essentially identical to the Virginia state bill of

- rights).
21. 8 Rep. 114 a, 2 Brown 255, 77 Eng. Rep. 647 (1610) For a discussion of its influence on Americans, see SUTHERLAND, supra note 17, at 62.
 22. SCHWARTZ, supra note 13, at 403.
 23. For a discussion of judicial review, see THE FEDERALIST No. 78, at 485-486 (A. Hamilton) (Lodge ed. 1888).
 24. 5 U.S. (1 Cranch) at 177.
 25. 32 U.S. (7 Pet.) 242 (1833).
 26. See, e.g., Wynehamer v. People, 13 N.Y. 378 (1856).
 27. See, e.g., Nebbia v. New York, 291 U.S. 502 (1934).
 28. See Paulsen, Substantive Due Process in the States, 34 MINN. L. REV. 91 (1950); See also Developments in the Law--The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1463-1493 (1982).
 29. See generally C. ANTIEAU, RELIGION UNDER STATE CONSTITUTIONS (1965).
 30. See, e.g., McClure v. State, 9 Tenn. 206 (1829).
 31. See, e.g., Hroneck v. People, 134 Ill. 139, 24 N.E. 861 (1890).
 32. See, e.g., Dole v. Allen, 4 Me. 527 (4 Greenleaf 455) (1827).
 33. See, e.g., Dailey v. Superior Court, 112 Cal. 94, 44 P. 458 (1896) (right to stage a play based on defendant's story, during defendant's trial); State v. Sykes, 28 Conn. 225 (1859) (state prohibition of the sale of lottery tickets does not violate the right to a free press).
 34. See, e.g., St. Louis v. Roche, 128 Mo. 541, 31 S.W. 915 (1895) (law that makes associating with reputed thieves unlawful violates the right to personal liberty); ex parte Smith, 38 Cal. 702 (1869) (prohibition of the playing of instruments or the presence of women in saloons after midnight violates inalienable rights).
 35. Memphis v. Winfield, 27 Tenn. (8 Humph.) 707, 709 (1848).

36. State ex rel. Samlin v. District Court, 59 Mont. 600, 198 P. 362 (1921).
37. For a historical account of this period, see MCCLOSKEY, THE MODERN SUPREME COURT (1972).
38. See supra note 11.
39. See Galie, The Other Supreme Courts: Judicial Activism Among State Supreme Courts, 33 SYRACUSE L. REV. 731, 734 (1982) (listing unique state constitutional provisions).
40. See, e.g., Carson, supra note 10; Galie, supra note 39; Developments, supra note 28; Gerstein, California's Constitutional Right to Privacy: The Development of the Protection of Private Life, 9 HASTINGS L.Q. 385 (1982). See also supra note 11.
41. There was a significant number of such cases in the 1983 term alone and an even greater number of petitions in 1984. See Michigan v. Long, 103 S.Ct. 3469, 3491 (1983) (Stevens, J., dissenting).
42. See Elison and NettikSimmons, Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds, 45 MONT. L. REV. 177 (1984).
43. Michigan v. Long, 103 S.Ct. at 3476.
44. Id.
45. See DWORKIN, supra note 8, at 137.
46. Historical analysis of the exercise of judicial review by the Supreme Court demonstrates varying degrees of activism during different periods of the Court's history, concerning different issues. See C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922); MCCLOSKEY, supra note 37.
47. Grey, Do We Have an Unwritten Constitution, 27 STAN. L. REV. 703 (1975). He makes a framers' intent argument for his view in Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought 30 STAN. L. REV. 843 (1978).
48. Grey, 27 STAN. L. REV. at 705.
49. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (alluding to THE FEDERALIST No. 78, at 483 (Hamilton) (Lodge ed. 1888)).

50. Id. at 111-198.
51. CHOPER, supra note 2, at 167-168.
52. Id. at 379, 414.
53. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 1 (1980).
54. Grey, supra note 47, 27 STAN. L. REV. at 708-709.
55. DWORKIN, supra note 8, at 134-136.
56. R. BERGER, GOVERNMENT BY JUDICIARY (1977). For a response to his critics, see Berger, The Scope of Judicial Review: An Ongoing Debate 6 Hastings Con. L.Q. 527 (1979).
57. BERGER, GOVERNMENT BY JUDICIARY 132, 299.
58. See H. BLACK, A CONSTITUTIONAL FAITH 14 (1968); See, e.g., In re Winship, 397 U.S. 350, 377-378 (1970) (Black, J., dissenting) (the "document itself shall be our guide, not our own concept of what is fair, decent and right . . . I prefer to put my faith in the words of the Constitution itself . . .").
59. For an example of Black's "absolutism" see Konigsberg v. State Bar, 366 U.S. 36, 56, 68 (1961) (Black, J., dissenting). For criticism of his absolutism, see BICKEL, supra note 49, at 141, 162-163.
60. 381 U.S. 479, 507, 509 (1965) (Black, J., dissenting).
61. See, e.g., ELY, supra note 53, at 11-41.
62. See DWORKIN, supra note 55.
63. Id. at 31-39.
64. Id. at 107, 126-127.
65. Id. at 81. See also supra note 8.
66. Id. at 82-86.
67. Id. at 85.
68. ELY, supra note 53, at 77. The issue is "whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those

processes have been reached, has been unduly constricted."

69. Id. at 101-102. In Chapters 2 and 3, Ely criticizes the attempt by the Court to propagate substantive values either through interpretivism or noninterpretivism. Id. at 11-72.
70. But see Dworkin's criticism that Ely's attempt to have the courts escape making value judgments fails. Ely neglects to see how there is a substantive question involved even in his procedure-oriented theory: what is the right conception of democracy? Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469 (1981).
71. R. NEELY, HOW COURTS GOVERN AMERICA 210 (1981).
72. Id. at 113.
73. Id. at 55.
74. Id. at 113.
75. Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
76. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978).
77. Wechsler, supra note 75, at 19 ("A principled decision, in the sense that I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").
78. BICKEL, supra note 76, at 173.
79. Id. at 98, quoting H.M. Hart, Forward: The Time-Chart of the Justices, 73 HARV. L. REV. 84, 99 (1959).
80. See Galie, supra note 39.
81. See D. LOPACH, L. MCKINSEY, T. PAYNE, E. WALDRON, J. CALVERT & M. BROWN [hereinafter Lopach], WE THE PEOPLE: THE WORKINGS OF A POPULAR GOVERNMENT 2-8 (1983).
82. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
83. CAL. CONST. art. I, sec. 27.

84. See S. LOWE, RESOURCE MATERIALS FOR NATIONAL CONFERENCE ON JUDICIAL SELECTION AND TENURE 16-21 (1974).
85. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
86. For an argument that the common law function of the courts ought to be revived by granting them the power to overrule obsolete statutes, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).
87. Although there is a possibility for more powerful local governments in states, like Montana, whose constitutions provide for "home-rule" powers, local governments never possess the sovereignty that states possess. Whereas it is "the state legislature that determines the availability, means of adoption, and scope of these powers," LOPACH, supra note 81, at 226, the states possess inherent sovereignty and powers, limited only by those powers specifically granted to the federal government.
88. The classic statement of the principle of federalism is Justice Black's opinion in Younger v. Harris, 411 U.S. 37, 44 (1971).
89. See, e.g., MONT. CONST. art. VIII, sec. 9 (two year residency requirement); MO. CONST. art. V, sec. 21 (required to have been a qualified voter in the state for nine years).
90. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It 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.").
91. See CHOPER, supra note 2, at 252.
92. See Developments, supra note 28, at 1357 (arguing that the federal bill of rights should be a "settled floor of rights" and that state rights could "amplify, or supplement" this federal floor).
93. See, e.g., Chaddha v. Immigration and Naturalization Service, 103 S.Ct. 2764, 2784 (1983); United States v. Nixon, 418 U.S. 683 (1974).
94. Compare, for example, the detailed 1889 Montana Constitution to the lean 1972 Montana Constitution. See also LOPACH, supra note 81, at 62, 111.

95. See, e.g. MONT. CONST. art. III, sec. 1; ARIZ. CONST. art. III.
96. See Stern, The Political Question Doctrine in State Courts 35 S. CAR. L. REV. 405, 411 (1984).
97. See Comment, The State Advisory Opinion in Perspective, 44 FORDHAM L. REV. 81 (1975).
98. See NEELY, supra note 71, at 115-116.
99. See LOPACH, supra note 81, at 69.
100. See BICKEL, supra note 50.
101. The principle behind the constitutional justiciability doctrines, that there must be a bona fide controversy, is implied in such common law elements as damages, proximate cause, and privity of contract. For the procedural ability of appellate courts to decline review, see Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 643-650 (1971).
102. The Montana and Alaska Constitutions, for example, do not have this expression in their judicial articles.
103. For example, some states have lower standing requirements to exclude evidence seized improperly. See, e.g. Commonwealth v. Sell, ___ Pa. ___, 470 A.2d 457, 466 (1983); State v. Settle, ___ N.H. ___, 447 A.2d 1284, 1286 (1982).
104. See Comment, supra note 97.
105. See, e.g. MONT. CONST. art. II, sec. 16; ALA. CONST. art. I, sec. 13. For two cases construing this provision, see White v. State, ___ Mont. ___, 661 P.2d 1272 (1983); Sax v. Votteler, ___ Tex. ___, 648 S.W.2d 661 (1983).
106. States that in the last twenty-five years have revised at least significant blocks of their state constitutions include: Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Michigan, Montana, North Carolina, Rhode Island, and Virginia.
107. See Galie, supra note 39.
108. For example, Montana has the works of K. Ross Toole: MONTANA: AN UNCOMMON LAND (1959); TWENTIETH-CENTURY MONTANA: A STATE OF EXTREMES; THE RAPE OF THE GREAT PLAINS: NORTHWEST AMERICA, CATTLE AND COAL (1976).

**AMERICAN INDIAN RELIGIONS AND THE FIRST AMENDMENT:
CONSTITUTIONAL PROTECTION OF THE NATURAL ENVIRONMENT**

I. INTRODUCTION

In 1969 Congress passed the National Environmental Policy Act¹ and ushered the nation into a decade marked by a concern for the protection of the natural environment. Subsequent legislation promoted protection and improvement of air and water quality,² set aside wilderness areas,³ and sought the protection of endangered species.⁴ These laws reflected a growing awareness in American culture of both the importance of the natural environment to human beings and its fragility.

Some environmentalists, however, have been disappointed with the narrow interpretations given to these laws by agencies and the courts.⁵ This paper, however, is not concerned primarily with the sheer effectiveness of current laws to protect the natural environment. Rather, it is intended to examine a deeper question that once raised, might challenge the priority that sheer effectiveness has as the criterion for what constitutes "good" environmental laws.

Once goodness is conceived of as something more than mere efficiency, arguments that rely on a conception of law as purely instrumental fail. A richer conception of law acknowledges both its regulatory and its expressive character. Legislators and lawyers who hold this richer conception are concerned about not only producing a particular outcome but also accurately expressing the moral

insight that prompted their desire for that particular outcome. Ultimately, this distinction between the regulatory and expressive functions of law is blurred when a law is internalized by persons as a result of both functions. The affect of mass culture on our conduct demonstrates the potential importance of this expressive function of law on our internalization of it. Thus, a law or interpretation of a law that meaningfully expresses our moral intuitions, at least in the long run, will render its regulatory function more efficacious.⁶

It is this expressive character of law, then, that will be addressed in this paper. The inquiry will be about what kind of law or interpretation of law best expresses our environmental concern, given the political structure and tradition of the United States.

From an examination of environmental laws and other legal theories proposed to protect the environment, two different ways of understanding environmental concern will briefly be described. The first is what I call a homocentric conception. It will be argued that our environmental legislation, because of the utilitarian nature of the legislative process, necessarily expresses a homocentric conception. It will also be argued that even though at least two legal scholars, Christopher Stone and Laurence Tribe, attempt to rescue environmental concern from the utilitarian predicament by recognizing "rights" possessed by nonhuman

entities, their rights are also homocentric and thus fail to account for our deepest concern for the environment.

To understand the nature of the second kind of conception, a recent first amendment law suit brought by Americans Indians will be analyzed. Their legal theory for the protection of the natural environment flows directly from their religious conception of it. It will be argued that this religious foundation for environmental concern is neither homocentric nor misanthropic and that the first amendment thus provides an appropriate legal expression of environmental concern.

II. A HOMOCENTRIC ENVIRONMENTAL CONCERN

For the last five hundred years in western civilization, law has been a homocentric enterprise. By homocentric, I mean that it has been solely concerned with the perceived needs and wants of persons. Homocentrism resulted from a radical dichotomy between persons, who possessed minds, and nonpersons, which did not.⁷ Consequently, the notion that persons have obligations towards nonpersons has been, for the most part, meaningless.

Before the modern era, however, nonpersons were meaningful. Although persons were certainly considered to be the most important beings in the world, there existed a hierarchical understanding of the world which recognized both degrees of intrinsic significance of other beings and a continuity or interconnectedness between persons and the

rest of the world.⁸ This understanding of a person's relationship with the world resulted from the theocentric character of the ancient and medieval worlds. This theocentricity was also expressed in the inseparability of religious and civil laws in early ancient civilization.⁹

In the context of jurisprudence, the modern separation of the sacred and the mundane was made possible by Thomas Aquinas late in the medieval era when he made a distinction between divine and human law.¹⁰ Even so, St. Thomas' philosophy clearly contemplated the participation of human and natural law in eternal law. Thus, for him, law was ultimately theocentric.

The seeds, however, were sown; after the Renaissance, the Reformation, and the birth of modern science the relationship between the deity, persons and the world was severed.¹¹ The world was conceived to be a great impersonal machine; only persons had ethical significance.¹² In the seventeenth and eighteenth centuries this ethical significance of persons was expressed in the recognition that they possessed rights.¹³

Likewise, utilitarianism, a major political philosophy that arose in the nineteenth century and that undergirds the structure of our political processes, has not escaped homocentrism. Because its ethical criterion is based on the measurement of pleasure and pain, utilitarianism has the potential of taking into account the needs at least of all

sentient creatures.¹⁴ Nevertheless, such an environmental ethic is homocentric because it merely extends an ethic for relationships between persons to a relationship between persons and some of the entities of the natural environment. Despite this homocentricity--in fact, as a direct result of it--a utilitarian environmental concern seems to provide a way to understand environmental concern that is both philosophically satisfying and legally efficacious.

But utilitarianism is unsatisfactory in two major respects, due to its homocentrism. First, because it is based on human experience, albeit sentience, the range of an ethics that can only take account of pleasure and pain is limited to sentient entities.¹⁵ Although protection of the pristine state of nonsentient entities could be urged as necessary, for example, to protect the habitat of sentient entities, utilitarianism cannot address directly one's moral intuition about the inherent significance of the pristine character of nonsentient entities like a mountain or river.

The second flaw of a utilitarian theory is that it provides for the valuation of pleasure and pains. Valuation of the pleasure or pain of sentient nonhuman entities is extremely difficult. Whereas the commonality of human experience might enable us to sympathize with the pain or pleasure that our acts might cause other persons, we can empathize with nonhuman entities only by conceiving of them as human-like, a tendency which has the potential for

disastrous ecological results.¹⁶ Conversely, the valuation of pleasures and pains and our inability to measure them in nonhuman entities permits us to minimize the pleasure or pain to nonhuman entities caused by our acts. Thus, the effect upon the natural environment is rendered insignificant to the overall calculation by legislators of the pleasures and pains that would be generated by a proposed law.¹⁷

Reflecting the homocentric character of both natural rights and utilitarianism, our laws and jurisprudence pertain only to persons. The rest of the world is understood to be the property of persons.¹⁸ While the scope of who counts as a person and of what constitutes a person's property gradually has been enlarged,¹⁹ the dichotomy between persons and nonpersons has remained much the same. The environmental legislation that was passed in the 1970s, though providing legal cognizance of a person's interests in a clean, healthful environment²⁰ and in the cultural and aesthetic benefits of wilderness²¹ and of the preservation of species,²² embodies a concern for the environment only to the extent that persons derive benefit from it. Thus, environmental concern has been understood as something like a collective property interest.²³ Furthermore, even these property rights to a natural environment have not been accorded a fundamental status that is protected by the Constitution. Rather, they are merely the expression of

public policy. As such, their continued existence and enforcement may vacillate with public opinion and are subject to the pressures of special interests.

At least one scholar, Mark Sagoff, however, has attempted to anchor these cultural and aesthetic values in the Constitution, and thus to make the protection of the natural environment less susceptible to the utilitarian character of the political processes.²⁴ But because, for Sagoff, the protection of the environment is the result of the constitutional protection of human ideals--justice, integrity, power--that are symbolized for us by entities of the natural environment,²⁵ his theory is thoroughly homocentric and fails to account for the inherent significance of the natural environment. Indeed, this idealism is potentially more homocentric than utilitarianism, which can at least take into account the pains and pleasures of nonhuman entities irrespective of their human value.

Spurred by the environmental concern that has been expressed in the last decade, legal theorists have attempted to restructure our jurisprudence and moral theories to remedy the inadequacies of our legal heritage. Among such attempts are Christopher Stone's article, Should Trees Have Standing: Toward Legal Rights for Natural Objects,²⁶ and Laurence Tribe's article, Ways Not to Think About Plastic Trees: New Foundations for Environmental Law.²⁷ Their

concern is to place the protection of the environment on a jurisprudential foundation firmer than the utilitarian process. They appeal to our natural rights ideals for this foundation. Recognizing that traditionally only persons have been accorded rights, they argue that rights should be accorded to nonhuman entities.

In his article, Ways Not to Think About Plastic Trees, Laurence Tribe incorporates into his own views Christopher Stone's thesis that rights should be accorded to natural objects. Although Stone does not altogether ignore the philosophical implications of his rights thesis,²⁸ his article is primarily directed toward practical objections to according rights to natural objects. Tribe, on the other hand, attempts to place the discussion of the notion of rights for natural objects within a larger philosophical and jurisprudential context. In a subsequent article he also describes a constitutional basis for implementing these notions.²⁹ For this reason, the following discussion will focus on Tribe's thesis and address Stone's article only where appropriate.

Tribe's thesis may be summarized as follows. Since the analytic techniques that are employed in government policy analysis--market theory, cost-benefit analysis, etc.--are based on reason and are, therefore, value neutral, "there is nothing in the structure of the techniques themselves or in the logical premises on which they rest, which inherently

precludes their intelligent use by a public decisionmaker in the service of these 'intangible' or otherwise 'fuzzy' concerns," such as the significance of current decisions for future generations or other species.³⁰

The difficulties that are currently encountered in the use of these analytic techniques to evaluate such intangible concerns may be overcome by broadening our political and cultural perspective and by heightening the power of these techniques to express this new perspective. The obstacle to the development of heightened analytical techniques is that they are currently employed in a "social, political and intellectual tradition which . . . perceives the only legitimate task of reason to be that of consistently identifying and then serving individual appetite, preference, or desire."³¹

Tribe diagnoses this tradition to be the result of a "disintegration of reason" rooted in a "religious transformation."³² Human reason, which prior to the modern era had been considered to be "guided by the divine," became the slave of "ends ultimately private to each person and empty of intrinsic significance because not derived through any dialogue beyond the self."³³ This debasement of reason was accompanied by an intense consciousness of transcendence which "posit[ed] the radical dichotomy between God and world, between heaven and earth, and . . . between soul and body."³⁴

Although diagnosing that our world-view displays symptoms of an inordinate emphasis on transcendence, Tribe warns that it would be a mistake to return to a primitive experience of the immanence of the world:

[T]he sanctification of nature or of 'natural principles,' even if achievable and even if effective in actually protecting natural systems, would simply return us to the religious tradition that preceded transcendence, the tradition in which the divine, far from an other-worldly essence, was immanent in all that is."³⁵

He fears that "treating the existing order as sacred . . . might well relegate to permanent subjection many of those who are not now among the privileged, freezing the social evolution of humanity into its contemporary mold."³⁶

Tribe seeks to synthesize the consciousnesses of transcendence and immanence. Such a synthesis would acknowledge human freedom and the constraints of principles:

To be free . . . is to choose what we shall value; to feel that coherence over time and community with others while experiencing freedom is to choose in terms of shared commitments to principles outside ourselves; to make commitments without destroying freedom is to live by principles that are capable of evolution³⁷ as we change in the process of pursuing them.

The articulation of principles and the sharing of a commitment to them "may be augered by the dawning of environmental awareness in contemporary law and culture."³⁸ It is the task of law and culture both to "embody a sense of reverence for whatever stands beyond human manipulation" and to take "a stance of criticism toward all that is given and a commitment to the conscious improvement of the world."³⁹

At a minimum, we must begin to extricate our nature-regarding impulses from the conceptually oppressive sphere of human want satisfaction, by encouraging the elaboration of perceived obligations to plant and animal life and to objects of beauty in terms that do not falsify such perceptions from the very beginning by insistent 'reference to human interests.'⁴⁰

For this reason, Tribe adopts Christopher Stone's thesis that natural objects should be accorded rights.

Stone argues that it would not be inconsistent with the historical broadening of the class of persons who have been accorded rights to extend rights to natural objects.⁴¹ However, rather than critically examining the philosophic foundations of the notion of rights, Stone primarily attempts to rebut the practical objections to granting rights to natural objects. The centerpiece of his thesis is that the rights of natural objects would be exercised and defended on their behalf by human guardians who would assess and zealously pursue whatever might be in the best interest of those natural objects.⁴²

One of Stone's arguments for recognizing natural objects as possessors of rights is that only by doing so can we fully take into account actual or potential damage to the environment.⁴³ His ultimate hope, however, is that such changes in the law and stirrings of human empathy "can be coalesced into a radical new theory or myth--felt as well as intellectualized--of man's relationships to the rest of nature."⁴⁴

Tribe also emphasizes the need for the development of

the powers of human empathy through contemplating the needs that humans share with other animals and plants. In addition, he suggests that "[t]he very process of treating some places with respect may itself reveal and ever create conceptual possibilities beyond our conceptual possibilities."⁴⁵

In a subsequent article, Tribe suggests the role that the Constitution might play in this evolution of a new consciousness. As part of a "structural due process" the Court would strike down rules "as violative of due process, laws that make sense--but that make 'sense' only in terms of values and conceptions so out of touch with contemporary ideas that government is no longer willing to press such values and conceptions in the laws' defense."⁴⁶ Presumably, the use of structural due process by the courts to protect the environment would require that those new "conceptual possibilities," he speaks of in his first article, be widely adopted by the public.

Tribe's attempt to wrest our tradition from the want-centered homocentrism fails for three reasons. First, his lopsided faith in reason makes impossible the synthesis of transcendence and immanence that he desires. Second, the location of a nonrational source of environmental concern in the faculty of human empathy is no less homocentric. Third, Stone's rights-thesis, which Tribe adopts, has too much homocentric philosophical baggage to serve as a foundation

for our deepest environmental concern.

Tribe's optimism about the powers of reason permeates his entire discussion. Although he acknowledges that it has become instrumental and has lost its power to generate ends,⁴⁷ his extensive discussion about the potential of analytic techniques solely treats reason as instrumental.⁴⁸ On the other hand, he speaks of "bodies of principle which we perceive as external to our choices and by which we feel bound" but does not describe the source of these "bodies of principles."⁴⁹ Presumably, they are "generated by reason":⁵⁰ for the "purpose of reason is to evolve a comprehensive understanding of mankind's place in the universe"⁵¹ To obscure the matter further, Tribe states that "we must be able to reason about what to choose."⁵²

Tribe, therefore, has used reason in three senses: it generates bodies of principle, it enables us to choose values in terms of these principles, and as an analytical tool it allows for the implementation of these values. He has not, however, specified whether these three powers of reason are related and how they relate to experience.

The problem with Tribe's notion of reason is that it stands alone. Though admitting that at one time reason was perceived as guided by the divine, and rejecting Hume's contention that it should be guided by passion, Tribe apparently has opted for reason guided by reason.⁵³ Tribe perceives "intrinsic significance--sanctity, if you will--in

the very principles . . . according to which we orchestrate our relationships with one another and with the physical world of which we are a part" rather than in the relationships themselves.⁵⁴

Similarly, Tribe attempts to found the significance of other species of life in the human capacity to empathize with them. "As least so long as we remain within empathizing distance of the objects whose rights we seek to recognize, it seems reasonable to expect the acknowledgment of . . . rights [for natural objects] to be regarded as more than fictitious."⁵⁵ Since Tribe conceives the powers of empathy to rely on similarities between humans and other species,⁵⁶ it is a thoroughly homocentric source of concern. This homocentrism becomes even more evident, when one considers the utilitarian origins of our modern notion of empathy. The utilitarian conception of moral obligation is that it is merely a sentiment possessed by humans, rather than an obligation that is rooted either in those to whom there is the obligation or in a transcendent third entity, such as natural law or God.⁵⁷

Tribe's emphasis on the power of reason and human empathy is accompanied by a subtle rejection of the claims of the nonhuman or a transcendent "Other," such as a divinity. Both transcendent divinity⁵⁸ and immanent divinity⁵⁹ are rejected.

Thus, Tribe rules out the only way to make sense of an

environmental concern that is not homocentric. What he needs to recognize is that what is most significant about our experience of the natural environment is that it is able to stir within us a nonhomocentric vision. It is such a vision, not human reason itself, that may be the source of moral insight.

In reflecting on his own experience with wilderness, Henry Bugbee, in an article entitled, Wilderness in America,⁶⁰ articulates a nonhomocentric understanding of the natural environment. He asks the question: "How does nature speak to our concern?"⁶¹ His inquiry begins with the realization that "[i]f wilderness may yet speak to us and place us as respondents in the ambience of respect for the wild--for Nature as primordial, it must be liberated from ultimate subsumption to human enterprise."⁶² Wilderness must be encountered with "disinterested interest."⁶³ By so approaching it,

[o]ne is brought to realize one is held within the embrace of what is proffered in its being proffered. No behind or beyond things themselves. . . . The givens of life are laid down. The foundations of the world are laid. Things are in place and stand firm. Beings stand forth on their own. They do not ask our leave.⁶⁴ They invite mutuality. That measure of trust.

To permit "[b]eings [to] stand forth on their own" and to acknowledge the otherness of the natural environment will not, as Tribe fears, require us to abdicate our humanity. Homocentrism must not be confused with a legitimate expression of our humanity. Whereas homocentrism squelches

the voice of the natural environment, our humanity is affirmed in this "partnership of man and nature."⁶⁵ Our encounter with the natural environment will engage all of our human faculties, including the transcendental powers of human reason, and thus evoke a uniquely human response.

Even as the things of the place command attention in the presencing of the world they are discovered to us from within the depth of responsiveness in confirmation of our mutuality with them In this fashion we are ordained in responsible relationships with beings given into our keeping in the very presencing of the world. The mystery of this, it would seem, can only deepen, and with its deepening enhance the sense the world might make. But one is charged to make good on that sense, and in the mainstream of human destiny within which its implications require to be worked out--within the full gamut of ambiguities, of perplexities and of the anguish that prevail in the received world.⁶⁶

Though Tribe aspires to a treatment of the natural environment that "reveal[s] and ever create[s] conceptual possibilities beyond our conceptual possibilities,"⁶⁷ this very expression of his aspiration in its speaking only about the concepts has a hollow ring. It does not take seriously enough the profundity of the natural environment's speaking. Furthermore, it stands in stark contrast to Tribe's understanding of human reason that has been analyzed above, if, as he also suggests, reason generates moral principles.

Likewise, there is something amiss in his and Stone's rights-thesis. To be sure, according rights to nonhuman entities is an expression of respect for a mutuality between ourselves and nature. Similarly, as a legal device, the

recognition of such rights would have the practical advantages that Stone suggests and could also be a provisional measure to instill within us a receptivity to the significance of the natural environment. The problem with the rights-thesis, however, is that its philosophical foundations are thoroughly homocentric. Thus, for it to account for our deepest concern for the natural environment, a total reconstruction of our understanding of rights would be required.

This reconstruction would be necessary because the very idea of rights has traditionally rested on a radical distinction between persons and nonpersons on the grounds that persons possess reason. Both Locke and Kant, whose political philosophies have significantly influenced our legal notion of rights, distinguished persons from nonpersons because of persons' possession of reason. For Locke, we "are born free as we are born rational"⁶⁸ and this natural freedom is the source of our "rights and privileges."⁶⁹ The rest of the world, however, is merely property given by God to humans "to make use of it to the best advantage of life and convenience."⁷⁰

Kant's ethics is best known for the principle that persons should not be treated merely as means but also as ends.⁷¹ The source of this moral significance of persons, for Kant, is their rationality: "man and generally any rational being exists as an end in himself . . . [since]

rational nature exists as an end in itself."⁷² On the other hand, "[b]eings whose existence depends not on our will but on nature's, have nevertheless, if they are irrational beings, only a relative value as means and are therefore called things."⁷³

Likewise, Mill's utilitarian account of liberty requires a rational subject. Liberty, for Mill, "comprises, first, the inward domain of consciousness"⁷⁴ From this flows the concept of individual sovereignty: "Over himself, over his own body and mind, the individual is sovereign."⁷⁵ The utility generated by this liberty of persons is so great that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection."⁷⁶

In addition to contradicting with our notions about rights, treating natural objects as possessors of rights might also distort the character of nature. Our notion of rights not only involves the glorification of human reason but also has an individualistic quality since rights are those claims which individuals have against other individuals or society as a whole. Conversely, the natural world, at least from an ecological perspective, is not simply a collection of individuals; rather, it has a symbiotic character.⁷⁷

Although radical changes in our notion of rights might

be possible--perhaps, as a result of according rights to nature objects--it makes more sense in both the short run and the long run to consider an environmental concern in a different sense. Perhaps, as John Rodman has suggested, in the process of rethinking our relations with other species, "we [will] discover anew that nonhuman species have their own structures and tendencies that have been systematically frustrated and distorted by the imposition of homocentric teleologies."⁷⁸ In being receptive to these tendencies and structures of nonhuman species we might enrich our own.

What is needed, then, is not an escape from our humanity but a new conception and experience of what it means to be human--a conception and experience that takes into account the intrinsic significance of the nonhuman world. The enrichment of our notions of what it means to be human and of what is our relationship to the natural environment, however, is not to be found solely in our exercise of the critical powers of reason. Reason cannot generate an environmental concern. Environmental concern begins with and grows out of a response with one's whole being, including one's reason, to the natural environment; this response is contemplative rather than critical or teleological. It is through contemplation that we hearken to the natural world and open ourselves to the possibility of insight into our relationship with it and, as Bugbee suggests,⁷⁹ with each other.

III. A RELIGIOUS BASIS FOR ENVIRONMENTAL CONCERN

It is in Tribe's rejection of divinity--immanent and transcendent--that his theory becomes homocentric. His article simply calls for a very sophisticated homocentric understanding of the natural environment where it has utilitarian value as not only a material resource but also an aesthetic and cultural resource. Without a notion of divinity, the environment can only be accounted for by analogizing it to, or placing its telos in, persons. In contrast, even solely transcendent or immanent religions have the theological potential to account for a significance to the natural environment apart from any reference to persons.

Purely transcendent or immanent religious responses to the world, as Tribe points out, are problematic and a synthesis of these responses suggests a richer and more satisfying account of the world and our relationship with it. The question posed by my criticism of Tribe, however, is whether the sacredness of the environment results from our treating it as sacred or, conversely, whether we ought to treat it with respect because it is sacred. The former alternative, I have argued, is unsatisfactory philosophically and thus provides a poor legal expression of our deepest concern for the natural environment.

A more satisfying understanding of the our relationship with the natural environment would entail an understanding

of divinity that embodied the synthesis of transcendence and immanence that Tribe seeks. Such a religious understanding of our environmental concern, though it would challenge the homocentric character of our political institutions, would not be entirely inconsistent with them. A recent first amendment case, Northwest Indian Cemetery Association v. Peterson,⁸⁰ where the court upheld the claim of some American Indians that the degradation of the pristine quality of the natural environment in a particular location would violate their right to the free exercise of their religion, demonstrates this assertion. This recent case was not decided, however, in a vacuum. Although prior courts in the 1970s, faced with similar claims, had great difficulties understanding American Indian religions and how the first amendment could protect them, a foundation was laid for the success of the American Indian claims in Northwest Indian Cemetery.

Before these first amendment cases are considered, however, it is revealing to examine briefly how for most of the history of the United States an exploitive, disrespectful attitude towards the environment has accompanied the attempt by our government to suppress American Indian religions. After these cases have been analyzed, a survey of central features of American Indian religions will suggest how some of the problems with understanding environmental concern that Tribe attempts to

solve are addressed by a religious understanding of the natural environment.

Although national laws in the last fifteen years have expressed a concern for both protecting the natural environment and ensuring the free exercise of American Indian religions,⁸¹ throughout most of the history of the United States the policies of the government have been antithetical to both concerns. Beginning with the first colonists, the attitudes of white Americans towards the American Indian religion/culture and their feelings about the vast wilderness of North America coalesced. The European discoverers and colonists were motivated, in part, by their religious aspirations to convert the heathen and to take dominion of New World in the name of their God. Because of their notions of property, these transplanted Europeans looked upon wilderness as a wasteland, which was in need of redemption through cultivation and development. A governor of the Indiana Territory stated:

Is one of the fairest portions of the globe to remain in a state of nature, the haunt of a few wretched savages, when it seems destined by the Creator to give support to a large population and to be the seat⁸² of civilization, of science and of true religion.

Consequently, the American Indians, who were at home in this fallen wasteland, were considered wasteful and wanton.⁸³

The history of the American Indian from the establishment of colonies in the New World until the 1930s

was marked by the step-by-step appropriation of their hunting, fishing, gathering, and cultivation grounds by white Americans. Even the reformers of the 19th century, who were sincerely concerned about the atrocities committed against the Indians, conceived of the Christian religion and the individualistic, agricultural/industrial culture as the same. The removal of the Indians onto small reservations, therefore, was intended not only to open up large tracts of land for white settlement but also to break down the nomadic and tribal religion/culture of the Indians.⁸⁴ Similar justifications were made for the Army's slaughter of the buffalo, the primary source of food for the Plains Indians.⁸⁵

The American Indian religions were attacked in other ways, as well. From President Washington's administration until well into this century, the policies of the federal government were wedded to the evangelical programmes of missionary societies.⁸⁶ Not only were the American Indians systematically proselytized under the auspices of the federal government, but the government also took aggressive steps to prohibit Indian dances, ceremonies, and rituals and to deter Indian children from learning their traditional languages and culture.⁸⁷

This correlation between our treatment of the environment and our failure to accord American Indian religions the first amendment protection that they deserved

is itself suggestive of the inherent connection between environmental concern and American Indian religions. Thus, just as the national oppression of American Indians reflected an exploitive attitude towards the natural environment, the political and judicial protection of American Indian religion in the 1970s reflected a new sense of concern for the environment. Given the importance of the actual treatment and quality of the environment to American Indian religious practices, it has been inevitable that a constitutional commitment to the protection of the exercise of their religion should result in the protection of the natural environment. Further, as will be argued below, it is appropriate that this constitutional protection of religious practices results in the protection of the natural environment.

The development of first amendment protection of Indian religions, however, began with practices that did not affect land use. Indians have prevailed in suits challenging prohibitions against wearing their hair in religiously significant styles,⁸⁸ challenging the prohibition of the use of peyote as a sacrament in religious ceremonies,⁸⁹ and justifying violations of fish and game laws where the acts were necessary for religious practices.⁹⁰

Because of white culture's traditional views about the environment and its ignorance about American Indian values, the first American Indian first amendment claims that sought

the protection of the environment were not successful. Though the courts in these prior cases did not absolutely preclude the possibility that such claims might prevail under different circumstances, their opinions demonstrated both the difficulties they had in comprehending the character of American Indian religions and a commitment to a homocentric understanding of the natural environment.

The first confusion introduced into the analysis was the notion of property interests. The first two district courts to hear such cases dismissed them because the Indians did not have a property interest in the lands, the sacred quality of which they sought to protect.⁹¹ Such a confusion evidenced a complete misunderstanding about the claimants' religious attitude towards the environment. Although both of the circuit courts of appeal to which these cases were appealed rejected the district courts' claims that lack of property interests in and of themselves barred the first amendment claims, the circuit courts did not altogether abandon property concepts. They stated that property interests still would be factors in an analysis of such first amendment claims.⁹²

The second problem with such claims has been the courts' mistaken attempts to distinguish between Indian culture or heritage and their religion. It is on this basis that one circuit court of appeals dismissed the Indians' claim.

The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake. The complaint asserts an "irreversible loss to the culture and history of the plaintiffs." Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.⁹³

A third problem has been the addition of a questionable new prong to the first amendment analysis that would enable courts to scrutinize the religious practices in question and to decide whether a person's religion has been burdened. Utilizing language from prior first amendment cases, the courts held that the religious practice or sacred location in question must be "central or indispensable" to the plaintiff's religion.⁹⁴ Although this prong may be a necessary check on the scope of the first amendment, it could be devastating to religious practices that differ from the Judaeo-Christian tradition's emphasis on the centrality of spiritual and intellectual religious expression.

Finally, when such first amendment claims have involved a request to regulate tourist access to or behavior around sacred grounds that desecrates those grounds--for example, littering or operating noisy motor vehicles--the courts have rebutted those claims by raising the spectre of the Establishment Clause.⁹⁵ Their contention has been that to regulate the access or behavior of others would be to involve the government in the maintenance of a "religious

shrine"--a clear violation of the Establishment Clause.

What is remarkable about the court's decision in Northwest Indian Cemetery is that although the court applied the analyses of these preceding cases, it decided in favor of the American Indian plaintiffs. This is because it demonstrated a willingness to comprehend the religious significance of the natural environment to the religions of the claimants.

In Northwest Indian Cemetery the Forest Service had adopted a forest management plan to construct a road and to harvest timber in a National Forest in California inventoried as a roadless area. Members of several Indian tribes challenged this decision, contending that it would amount to a burden upon their first amendment rights. They argued that for centuries their tribes had used the high country in this pristine area for religious purposes. The court accepted their claim that:

the area considered sacred encompasses an entire region rather than simply a group of individual sites . . . [and that] [for those Indians who] hike into the high country and use 'prayer seats' . . . to seek religious guidance or personal 'power' through 'engaging in emotional [and] spiritual exchange with the creator," [s]uch exchange is made possible by the solitude, quietness and⁹⁶ pristine environment found in the high country.

Like prior courts, the Northwest Indian Cemetery court made a determination concerning the centrality of the high country to the religion of these tribal members. Unlike

prior courts, it found that the high country was "central and indispensable" to the plaintiffs' religion because "the high country constitutes the center of the [their] spiritual world" and "[n]o other geographic areas or sites hold the equivalent religious significance for these tribes."⁹⁷ The court demonstrated sensitivity to the unique character of American Indian religions and analogizing to Wisconsin v. Yoder, a first amendment case decided by the Supreme Court that involved a Christian sect, concluded:

Degradation of the high country and impairment of such training would carry "a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today."⁹⁸

Based upon the evidence that was presented at trial, the court held that the Forest Service's plan to construct a road into the high country and to harvest timber "would seriously impair the salient visual, aural, and environmental qualities of the high country" and, for that reason, would burden the plaintiffs' religion.⁹⁹

The court in Northwest Indian Cemetery also carefully scrutinized the government's interests in the construction and logging and found that the construction "would not materially serve several of the governmental interests."¹⁰⁰ In addition, the court concluded that "even if defendants could [have] demonstrate[d] a compelling need for additional timber harvesting in the [area], means less restrictive of plaintiffs' First Amendment rights than the Management Plan exist[ed] that would [have] satisf[ied] that need."¹⁰¹

The Northwest Indian Cemetery decision demonstrates that the protection of the natural environment through the protection of a religious expression of environmental concern is compatible with our political institutions. Nevertheless, the analysis that it adopted from prior, similar cases does result in some limitations to a first amendment attack on environmental degradation. The claimant's interest in the environment must be religious rather than cultural. To protect particular sites, the claimants must demonstrate that the sites are central to the religion and indispensable. Furthermore, it seems unlikely that a single individual could claim to have a religious interest in the protection of a particular natural location without demonstrating that he is a member of a religious entity which has a long-standing tradition of holding that location sacred.

As the success of the claimants in the Northwest Indian Cemetery case demonstrates, however, such limitations can be overcome. If the courts carefully and sensitively will consider the nature of the American Indian religions and accord them the first amendment protection that they have been historically denied, sacred sites will receive protection. At the very least, government will be required to give due regard to the sacredness of those sites to others in its utilitarian analysis of the need for a particular development.

Granted this correlation between our government's treatment of the environment and the American Indians, as well as the success of a first amendment claim to protect the natural environment, why is a religious expression, and the legal protection of this expression, an appropriate expression of our deepest environmental concern? The answer is that unlike Sagoff's and Tribe's attempts to ground the protection of the environment on the protection of rights, grounding its protection in persons' rights to the free exercise of their religion is not homocentric. Of course, both religious practices and the legal principles that require that they be protected are human expressions. But, as noted above, there is a difference between a genuinely human response to the experience of the inherent significance of nonhuman entities and a homocentric concern for those entities. Because the legal protection of the environment is an expression of a religious perception of the environment, rather than--as for Sagoff--an expression of purely human ideals, it must acknowledge the religious belief that the environment is inherently significant.

Likewise, the legal protection of the environment through the protection of persons' rights to freely exercise their religion better accounts for the significance of the environment than would according rights to nonhuman entities, as Tribe and Stone have proposed. By not according rights to nonhuman entities, we recognize the human

character of our laws and institutions. Nevertheless, by protecting the environment through first amendment actions, we acknowledge the legal and moral significance of the natural environment. Thus, a religious understanding of the environment can account for both the differences between humans and nonhumans and the partnership between them.

Furthermore, to consider environmental concern to be a religious practice and thus permit it to be legally expressed in the invocation of the first amendment is not to argue that all environmental legislation should be repealed and that only constitutional litigation is an appropriate way to protect the environment. Nor is it to minimize the need for an expression of our environmental concern through the political process. Just as the Civil Rights Act of 1964¹⁰² was inspired by a fresh understanding of the fourteenth amendment, so too the understanding of environmental concern to be a human right protected by the first amendment should spark further environmental legislation.

In addition to actually serving as a legal basis for environmental concern, the protection of the environment through respect for American Indian religions has implications for the jurisprudential and philosophical problems that Tribe attempts to solve. By giving American Indian religions due regard, we might also discover a satisfying account of our deepest environmental concern. In

this regard, the synthesis between transcendence and immanence that Tribe seeks is expressed in the religions of the American Indian.

What this synthesis really entails is the spiritual and philosophical reconciliation of the necessary experience of human alienation from the rest of the world with the equally necessary experience that we are interconnected with it. The American Indians were sensitive to both aspects of human existence. They recognized that their lives were utterly dependent on the world and honored it as their parent; and yet, in order to sustain themselves it was necessary that they utilize their intimate knowledge of the ways of the world to slay and consume other creatures in it.¹⁰³

Their synthesis of both of these aspects of human existence is reflected in the transcendence and immanence of their deities. Black Elk has explained it in this way:

We should understand well that all things are the works of the Great Spirit. We should know that He is within all things: the trees, the grasses, the rivers, the mountains, and the four-legged animals, and the winged peoples; and even more important, we should understand that He is also above all these things and peoples.¹⁰⁴

The intimate relationship between persons and the natural world is further expressed in the transcendent character of American Indian religions. For example, even when an Indian attempts to become conscious of the transcendent spiritual world through a "vision-quest," the spiritual power is usually embodied in the appearance of

plants or animals in a vision.¹⁰⁵ In turn, this ephemeral vision is embodied in the material: in sacred bundles made of skins and containing sacred parts of animals or plants, or in sacred depictions of the spirit on teepees, or articles of clothing.¹⁰⁶

The pervasive sacredness of the natural world was not only experienced in abstract feelings or aspirations but was usually focussed on particular animals, plants and locations central to the subsistence of a particular tribe.¹⁰⁷ The synthesis of transcendence and immanence is expressed even with respect to these important species and locations. Identified with each of these natural entities is a divinity that is embodied by the entity but not encapsulated by it.¹⁰⁸ Each divinity is the guardian of that entity with which it is identified.¹⁰⁹ Since these guardians both protect the natural entity and assist persons in hunting that entity, they thus express the reconciliation of human subsistence with the intrinsic significance of these nonhuman entities. In Kantian terms, they could treat nonhuman entities as means but not solely as means; they were also ends.

The American Indians' religious experience of the natural world thus gave rise to an ethical relationship with natural entities. This ethical relationship, in turn, assumed the character of what we might call legal relationships:

In their ethical relations with persons of nature Indians assumed: first, that natural entities were essentially equal in value or worth to humans; second, that nonhuman persons expressed their intentions, needs dislikes, and rights; third, that non-humans entered covenants with humans for mutual benefit; there were social contracts between humans and non-humans; and fourth, there was reciprocity¹¹⁰ in these relations between humans and non-humans.

This ethical relationship with the natural environment was very significant. Their religions provided norms for mitigating the necessary human use of the environment. Not only were wasteful and disrespectful treatment of natural entities forbidden, even "boasting about hunting prowess . . . [and] denigrating comments about nature formations, thunder, mountains, rivers and other earthly entities" were addressed by religious rules.¹¹¹

Their vision of the interconnectedness of persons and the natural environment was so extensive that their religions not only regulated disturbances and depletion of the environment by persons, but also required human participation in the regeneration of nature. For example, the annual Sun Dance ritual often involved the self-infliction of suffering and personal sacrifice so that "the world and all beings may live, that life may be renewed."¹¹²

Furthermore, Tribe's criticism of "pagan animism"¹¹³ is not applicable to the American Indian traditions. Their ways of life did not "sanctify the present, with all its faults and inadequacies."¹¹⁴ They have been remarkably adaptive and integrative;¹¹⁵ in fact, far more so than European religions

have been. It is true that American Indians must face the challenge to integrate their traditions with the conditions of modern life. The success of some to do so should be instructive to all.¹¹⁶

Through their religions, the American Indians responded to their insight into the significance of the natural environment. It was neither a homocentric nor a misanthropic response; rather it affirmed both the natural environment and their own humanity. Even though most of us who are not American Indian will not be able to adopt their heritage, a receptivity to their experience of the world may engender in us new ways to experience the world and inspire us to seek the lost strands of our own traditions that have preserved in myths and rituals a similar concern for the environment.¹¹⁷ It is receptivity towards other ways of experiencing the world--particularly as those ways are expressed in other religions--that has the power to change our own society.

As a powerful human faculty, reason must play a crucial role in this integration; but it is incapable of being the source of an environmental concern. The exercise of the critical powers of reason in jurisprudence and philosophy can serve a therapeutic function by discerning the legal and philosophical obstacles to our experiencing the sacredness of the natural environment.

NOTES

1. Pub. L. No. 91-180, 83 Stat. 852 (42 U.S.C. §§ 4321-4347 (1982)).
2. See Clean Air Amendments of 1970, Pub. L. No. 95-95, 84 Stat. 685 (codified as amended 42 U.S.C. §§ 7401-7626 (Supp. V 1980)). Although there had been preexisting legislation, the 1970 amendments represented a more radical commitment to the environment. See W. RODGERS, ENVIRONMENTAL LAW 209 (1977).

See Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (codified as amended 33 U.S.C. §§ 1251-1376 (1982)). These amendments contained "bold and innovative features" and represented a departure from past legislation. See RODGERS, supra note 2, at 360.
3. See, e.g. Alaska Lands Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101-3237 (1982)). Although the National Wilderness Preservation System was created in 1964 by the Wilderness Act of 1964, Pub. L. NO. 88-577, 78 Stat. 890 (16 U.S.C. §§ 1131-1136 (1982)), very few areas were preserved until the 1970s. See Id. at § 1332 (table of designated areas).
4. The Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 884 (16 U.S.C. ss 1531-1543 (1982)). The Act was amended in 1979 to include plant species as well as fish and wildlife. See Act of Dec. 28, 1979, § 1, 93 Stat. 1225.
5. See, e.g., Tobias and McLean, Of Crabbed Interpretations and Frustrated Mandates: The Effect of the Environmental Policy Acts on Pre-existing Agency Authority, 41 MONT. L. REV. 177 (1980).
6. For an analysis of the inadequacies of current laws to express the concern that environmentalists have and the negative effects of attempting to use these laws to give legal effect to these concerns, see A. FRAKT and J. RANKIN, THE LAW OF PARKS, RECREATIONAL RESOURCES, AND LEISURE SERVICES 79 (1982).
7. Although the classical world distinguished man from other animals because of his reason--man as homo sapiens--it was not until the modern era, beginning with Descartes' notion that mind and material things are different substances, that a radical dichotomy between persons and nonpersons resulted. For this dichotomy's effect on the mind-body problem, see R.

RORTY, PHILOSOPHY AND THE MIRRORS OF NATURE 45-61 (1979).

What makes this dichotomy homocentric is that even though there is still a belief in God--e.g. Descartes was a devout Catholic--this new conception of the mind and the rest of the world transformed the modern conception of God, so that theology itself became homocentric, it made persons and their material needs the focal point. See J. HABERMAS, THEORY AND PRACTICE 51 (Beacon Press ed. 1973).

8. See, e.g., PLATO, SYMPOSIUM; ARISTOTLE, METAPHYSICS bk. 12; ST. THOMAS AQUINAS, SUMMA THEOLOGICA I, q. 20.
9. See H. MAINE, ANCIENT LAW passim (1924); EARLY LAW AND CUSTOM 26-27 (1888).
10. See AQUINAS, supra note 8, qq. 91-96. See also Williams, The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. CAL. L. REV. 1, 52-64 (1983).
11. See generally W. JONES, A HISTORY OF WESTERN PHILOSOPHY: HOBBS TO HUME 43, 65-66, 114-115 (2d ed. 1969); J. NOSS, MAN'S RELIGIONS 669-670 (1956).
12. See JONES, supra note 11, at 179-180 (Descarte's philosophy expressed this view because of its radical dichotomy between mental and bodily substance).
13. See, e.g., J. LOCKE, SECOND TREATISE OF GOVERNMENT See also P. SMITH, THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY 26-56 (1980) (provides an overview of the moral philosophy that undergirded the American Constitution).
14. See J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION ch. 4; See also P. SINGER, ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS (1975) Our society has provided some protection against cruelty to animals. See, e.g., the Federal Laboratory Animal Welfare Act 7 U.S.C. § 42(c) (1976).
15. See J. Rodman, The Liberation of Nature?, 20 Inquiry 83, 89 (1977).
16. See, e.g., Schectman, The "Bambi Syndrome": How NEPA's Public Participation in Wildlife Management is Hurting the Environment 8 ENVTL. L. REV. 611 (1978).
17. The way in which a utilitarian political process can

sacrifice some persons for others, See J. RAWLS, A THEORY OF JUSTICE 180 (1971), would have a greater effect on nonhuman entities because to satisfy their desires produces less utility.

18. See J. LOCKE, supra note 13, ch. 5. The only way our Constitution speaks about the rest of the world is property. See U.S. CONST. amend. V, XIV ("life, liberty and property").
19. See C. STONE, SHOULD TREES HAVE STANDING: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 3-10 (1974).
20. For example, the goal of NEPA is to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . [as well as to] preserve important historic, cultural, and natural aspects of our national heritage" § 101(b), 42 U.S.C. § 4331(b). NEPA also recognizes "the responsibilities of each generation as trustee of the environment for succeeding generations." Id.

In some states this aspiration has reached constitutional status. See, e.g. MONT. CONST. art. II, sec. 3; N.C. CONST. art. XIV, sec. 5. They have not yet had, however, any significant legal effect. See Tobias and McClean, supra note 5, at 252-262 (1981).
21. See, e.g., 16 U.S.C. § 1131(a) ("to secure for the American people of present and future generations the benefits of an enduring resource of wilderness . . . for the use and the enjoyment of the American people . . .").
22. See, e.g., 16 U.S.C. § 1531(a) (an act to protect threatened species of fish, wildlife, and plants because "these fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people . . .").
23. See, e.g., L. THUROW, ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 105 (1980)
24. M. Sagoff, On Preserving the Natural Environment, 84 YALE L.J. 205 (1974).
25. Id. at 255, 258. For a criticism of the historical and legal of Sagoff's analysis, see Tribe, From Environmental Foundations to Constitutional Structures: Learning From Nature's Future, 84 YALE L.J. 545 (1975).

26. STONE, supra note 19.
27. 83 YALE L.J. 1315 (1974)
28. His article includes a section on what he calls, "the psychic and socio-psychic aspects." STONE, supra note 19, at 42-54. He connects our current attitudes towards the environment to our philosophical and religious traditions. He fails, however, to discern the connection between the idea of rights and those traditions. Thus, he does not recognize the difficulties in making the leap from persons to nonpersons. See Rodman, supra note 26, at 15.
29. See Tribe, supra note 25.
30. Tribe, supra note 27, at 1319.
31. Id. at 1325.
32. Id. at 1336.
33. Id. at 1334.
34. Id. at 1333.
35. Id. at 1337.
36. Id. at 1337-1338. Tribe, no doubt, is thinking of the way in which the Blackstonian theory of natural rights served to bolster the status quo, instead of criticizing it.
37. Id. at 1338.
38. Id. at 1336.
39. Id. at 1340.
40. Id. at 1341.
41. STONE, supra note 19, at 3-11.
42. Id. at 17-26.
43. Id. at 26-34 (actual damages would be assessed in litigation; potential damage would affect human negotiations).
44. Id. at 51.
45. Tribe, supra note 27, at 1346.

46. Tribe, supra note 25, at 553.
47. Tribe, supra note 27, at 1327.
48. Id. at 1317-1325.
49. Id. at 1327.
50. Id. at 1326.
51. Id. at 1327.
52. Id.
53. Id. at 1334.
54. Id. at 1339.
55. Id. at 1343.
56. Id. at 1344.
57. See J. MILL, UTILITARIANISM in 10 COLLECTED WORKS OF JOHN STUART MILL 211-213, 228, 259 (Robson ed. 1977) (Because moral sentiments are mental pleasures, they are merely pleasures of a higher sort.).
58. Id. at 1336 ("unable with [Pascal] to embrace God").
59. Id. at 1337.
60. 42 J. AM. ACAD. RELIG. 614 (1974).
61. Id. at 619.
62. Id. at 616.
63. Id.
64. Id. at 619.
65. Id.
66. Id. at 619-620.
67. Tribe, supra note 27, at 1346.
68. LOCKE, supra note 13, at sec. 61.
69. Id. at sec. 87.
70. Id. at sec. 26.

71. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 87 (L. Beck trans. & ed. 1949).
72. Id. at 86.
73. Id.
74. J. MILL, ON LIBERTY in 18 COLLECTED WORKS OF JOHN STUART MILL 225 (Robson ed. 1977).
75. Id. at 224.
76. Id. at 223.
77. See Rodman, supra note 15, at 95-98; Schectman, supra note 16; See also A. LEOPOLD, A SAND COUNTY ALMANAC 217-241 (1966).
78. Rodman, supra note 15, at 104.
79. Bugbee, supra note 60, at 620.
80. 565 F. Supp. 586 (N.D. Cal. 1983)
81. See supra notes 1-4; See Special Message to the Congress on Indian Affairs, July 8, 1970, [1970] PUB. PAPERS 564 (Richard M. Nixon) (calling for the rejection of termination and paternalism); American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)).
- Concern about the environment and Indian religions also coalesced for a brief period of time in the 1930s. Under the leadership of Commissioner of Indian Affairs John Collier there was an attempt to reverse the prior policy of assimilation and to encourage the preservation of Indian culture and tribal entities. See [1934] Sec. Int. Ann. Rep. 90. In 1934 Congress passed the Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. ss 461-479) (providing for the reestablishment of tribal entities and self-government). There were also corresponding efforts in conservation. See, e.g., Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 2, 48 Stat. 1269 (federal grazing lands were divided into districts "to preserve the land and resources from destruction and unnecessary injury" and funds were appropriated to study flood control and soil erosion in order "to protect and rehabilitate" these lands).
82. Quoted in A. WEINBERG, MANIFEST DESTINY 79 (1935).

83. See, e.g., Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823):

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.

See also C. Vechsey, American Indian Environmental Religions, in AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 37 (1980) ("The Puritans . . . believed that the Indians' religion affirmed the satanic quality of the wilderness, just as the devilish quality of wilderness proved the evil of Indians.").

84. See F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 103-131 (1976).
85. Id. at 94, 123. See also Vechsey, supra note 11, at 37.
86. See R. BEAVER, CHURCH, STATE AND THE AMERICAN INDIANS 8 (1966); F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1970); PRUCHA, supra note 84.
87. See PRUCHA, supra note 84, at 201-214 (the government set up Courts of Indian offenses to try such "crimes"); Id. at 268-283 (the government used compulsory attendance at government and contract boarding schools (religious schools) to isolate the young from the influence of their culture). See also F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 139-140 (1982 ed.).
88. See Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). But see New Rider v. Board of Education, 480 F.2d 693 (10th Cir. 1973), cert. denied, 414 U.S. 1097 (prohibiting Indian school boys from wearing their hair in braids did not violate their First Amendment rights).
89. See People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), cert. denied 417 U.S. 950 (1974). But see State v. Soto, 21 Or. App. 794, 537 P.2d 142, cert. denied, 424 U.S. 955 (1975) (merely asserting that the state had a compelling interest in prohibiting the use of peyote as part of religious ceremonies).

90. Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (the taking of a moose out of season by a native Alaskan for a religious burial ceremony, though not compelled by his religion, was sufficiently motivated by religion to be protected).
91. See Badoni v. Higginson, 455 F. Supp. 641, 644 (D. Utah 1977) ("The court feels that the lack of a property interest is determinative of the First Amendment question"); Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608, 612 (E.D. Tenn. 1979) ("Since the plaintiffs claim no other legal property interest in the land in question . . . a free exercise claim is not stated here").

Badoni concerned the use of Rainbow Bridge National Monument in southern Utah. In 1963 the Glen Canyon Dam was completed and the depth of the reservoir was gradually increased so that it covered the base of a large sandstone arch. This arch and other geological formations in the area had been holy sites to the Navajo people for over one hundred years, being regarded as the incarnation of gods. The plaintiffs contended that the reservoir had drowned their gods and that the access of boating tourists to the sites created by the reservoir and the National Park Service's construction of docks and allowance of tour boats desecrated the sites. The Badoni court also found that "even if the plaintiff's claims [had been] cognizable First Amendment claims . . . the interests of the defendant would [have] clearly outweigh[ed] the interests of plaintiffs." Badoni, 455 F. Supp. at 645.

The suit in Sequoyah was brought by three Cherokee individuals (including a medicine-man, Ammoneta Sequoyah) and two Cherokee tribal organizations to enjoin the the closing of the floodgates of the Tellico Dam in Tennessee. Closing the floodgates would have created a reservoir in the valley behind the dam. The plaintiffs contended that the flooding of the valley would cover burial and other sacred sites and would destroy the source of Sequoyah's medicine, all of which would result in a significant loss of spiritual power to the Cherokees.

92. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159, 1164 (6th Cir. 1980); Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980).
93. Sequoyah 620 F.2d at 1164-1165.

94. See Id. at 1164; Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983):
 plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.

Though acknowledging that "[b]ecause the plaintiffs' religions are . . . site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects," Id. at 742, the Wilson court did not find the plaintiffs' claim that "the expansion of the ski area will destroy the natural conditions necessary for prayers and ceremonies to be effective; and that the mountain as a whole, and not just parts thereof, is considered sacred" to be dispositive, since "evidence that all of San Francisco Peaks, including Snow Bowl, is sacred does not establish the indispensibility of the permit area." Id. at 745 n.7. For this reason the circuit court upheld the district court's affirmance of Forest Service decision to permit private parties to expand and develop a ski area in a national forest in Arizona.

But see Pepper, The Conundrum of the Free Exercise Clause--Some Reflections on Recent Cases, 9 N. KENT. L. REV. 265, 284-285 (1982; Stambor, Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods, 10 AM. IND. L. REV. 59, 67 (1983) (though other courts had mentioned the centrality of a particular practice to the plaintiff's religion, they had not employed it as an analytical standard).

95. See Badoni 638 F.2d at 179; Crow v. Gullet, 541 F. Supp. 785, 794 (D. S.D. 1982). But see Wilson 708 F.2d at 747 ("where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief").
96. 565 F. Supp. at 591.
97. Id. at 594.
98. Id. (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1971)).
99. Id. at 594-595.

100. Id. at 595-596 (Timber could be harvested without the proposed road section, there would be no net increase in jobs, and potential recreational use through greater access would be offset by diminished use of the area for its primitive qualities).
101. Id. at 596.
102. Pub. L. No. 88-352, 78 Stat. 242-268 (1964).
103. See Vechsey, supra note 83, at 12-13.
104. quoted in, J. BROWN, THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN 81 (1982).
105. Id. at 79-80.
106. Id.
107. See A. HULTKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA 123 (1981).
108. See Id. at 138-146.
109. Id.; Cf. STONE, supra note 19 (suggesting that humans be appointed as guardians for natural objects).
110. Vechsey, supra note 83, at 20.
111. Id. at 21
112. BROWN, supra note 104, at 103.
113. Tribe, supra note 27, at 1337.
114. Id.
115. See HULTKRANTZ, supra note 107, at 131.
116. In the field of law, for example, tribal courts are attempting to use both Anglo-American legal precedent and tribal custom to adjudicate cases.
117. For an example of an attempt to recapture certain strands of Christianity that involve an environmental concern, see W. GRANBERG-MICHAELSON, A WORLDLY SPIRITUALITY: THE CALL TO TAKE CARE OF THE EARTH (1984). Martin Heidegger has also described a relationship between persons and things that is similar to the American Indians' relationship. M. HEIDEGGER, The Thing in POETRY, LANGUAGE, THOUGHT (1971).

**PERSONS, POLITICS AND REASON IN
RAWLS AND PLATO:
A COMPARISON OF LIBERAL AND CLASSICAL WORLD-VIEWS**

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which assuredly I do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have the satisfaction in the sense that we are all engaged in a common venture.

Learned Hand¹

Learned Hand has not been the only jurist or commentator to speak disparagingly about Plato's political theory.² Such remarks about Plato are usually made in the context of a discussion of the American legal tradition of judicial review. In this context, allusions to Plato's guardians typify an extreme form of the doctrine of judicial review where judges would have a free hand in "trumping" the will of the majority³ whenever that will violates some higher law discoverable by judges. Thus, Plato's political theory is perceived to be radically antidemocratic and epistemologically naive.

More generally, the central features of Plato's political theory bespeak what has been called the "classical" world-view. For the last five hundred years, however, western culture has expressed what has been called a "modern" world-view, characterized by the political philosophy, "liberalism." Like all generalizations, at some point the attempt both to classify a variety of perspectives in a single category and to make sharp distinctions between

the world-views of two periods breaks down. Nevertheless, this attempt can be meaningful.

It can be meaningful in the following way. Although much of the time we simply conceive the world and our place in it as it has been passed on to us and is being propagated by our culture, sometimes we ask ourselves, "Why is our world understood in this way and not some other way?" We also may have experiences that are not explained or given satisfactory expression by our culture. So, we turn to the culture of another time or place.

To be sure, any attempt to escape our culture is fatally flawed. First, the inextricable relationship between even our most mundane ways of life and our loftiest cultural expressions does not permit us to graft a different intellectual world-view onto our current mundane course of life; at some point we must actually change our course of life. Second, at least where the different world-view or culture preceded ours, the reason ours is different is that the old one could not account for the experiences of our more recent ancestors.

Despite this futility of seeking a Golden Age, reflection on crucial differences between our world-view and the preceding one can be helpful. It can provide the perspective for understanding, as best we are able, the ways in which our world-view both expresses some of our deepest insights into our human experiences better than the

classical world-view and stifles others that were given expression in the classical world-view.

To this end, Plato's notion of justice, as representative of the classical world-view, will be compared with one that presents, I believe, the best contemporary expression of liberal political theory, John Rawls' A Theory of Justice.⁴ It will be argued that these two theories of justice rest on fundamentally different answers to two important questions about what it means to be human. The first question asks what is the inherent relationship between persons. And the second asks about the nature of human reason and knowledge.

Theories of Justice

Rawls states the general conception of his theory of justice to be: "All social primary goods--liberty and opportunity, income and wealth, and the bases of self-respect--are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."⁵ This general conception is further articulated as two principles of justice and two priority rules for their application. The principles are:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁶

The first priority rule is that the two principles of justice must be lexically ordered; the operation of the second principle must be consistent with the full operation of the first.⁷ In other words, liberty cannot be sacrificed to increase social and economic goods or equality. The second priority rule requires that the first part of the second principle--the difference principle--be subordinated to a requirement that there be fair opportunity.⁸ The rest of Rawls' book, A Theory of Justice, further clarifies these principles, argues that they are superior to three alternatives--utilitarianism, intuitionism, and perfectionism--and suggests how these principles would be embodied in social and political institutions.

Plato's statement of what justice is is even more pithy; it is the "principle of doing one's own business."⁹ Thus, for Plato, justice is a harmony both in the functioning of the various parts, or organs, within individual persons and in the roles of persons within states. This principle of justice is broad enough even to comprehend a harmony within the entire universe which is a "visible animal containing the visible--the sensible god who is the image of the intellectual, the greatest, best, fairest, most perfect--the one only-begotten heaven."¹⁰

Plato's conception of justice is thus best analogized to the life of a healthy organism or entire ecosystem where each organ or organism both contributes by and benefits from

carrying out its purpose within the whole according to its nature. Injustice, or disharmony, results from the failure of an organ or organism to do its part or from its attempt to perform the task of another.

Even from such a brief exposition of these two conceptions of justice, it is clear that they are significantly dissimilar. Rawls' theory emphasizes liberty and equality of persons in the state; Plato's suggests that what is important is the fulfillment of the innate functions and capabilities of each person and the harmony between persons and the overall health of the state that this will produce. Rawls' theory thus requires the state to maintain strict neutrality concerning persons' ends (so long as they are consistent with the principles of justice). Plato's theory, on the other hand, requires both that the persons of the state at least share the conviction that there are appropriate ends for each person and that the state, and each person in it, actively endeavor to discover and nurture them. Both of these differences result from the fundamentally different assumptions that Rawls and Plato make about the inherent relationship between persons and the nature of human reason.

The Inherent Relationship Between Persons

Liberal political theories, with the exception of utilitarianism, have a "contractarian" conception of the state where persons as autonomous individuals come together

and form a state in order to improve their individual lives. A contractarian understanding of society is a feature of liberals like Hobbes, Locke, and Kant.¹¹ In conceiving the individual to be prior to the state, these contractarian theories emphasize that persons are inherently significant as individuals. Therefore, as Kant states, "man . . . exists as an end in himself, not merely as a means to be arbitrarily used" ¹² Of course, this recognition can, and did, result in liberal conceptions of the state with different moral and political emphases. Compare, for example, the positivism of Hobbes to Kant's notion of duty.¹³

Rawls' theory of justice carries on the legacy of the contractarian tradition. It reflects the optimism of Kant, rather than the pessimism of Hobbes, but dispenses with Kant's metaphysical foundation for his ethic.¹⁴ Like other liberals, Rawls conceives a person to be fundamentally "a free and equal rational being."¹⁵ Thus, for purposes of deriving principles of justice in a society, he turns to a hypothetical coming together of persons, which he calls the "original position." The significantly liberal conception of the relationship between persons is preserved in Rawls' description of this original position and thus in his principles of justice. In this original position, persons are "mutually disinterested," i.e. "conceived as not taking an interest in one another's interests."¹⁶ But unlike, for example, Hobbes' perception of persons in the state of

nature, the parties of Rawls' original position are not egoists.

That the parties are mutually disinterested, however, implies that purpose of the state is solely the betterment of individual interests. Rawls even states that both the need for a state and for one that is just follows from the empirical fact that "everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life."¹⁷

Thus, Rawls, like all liberals, is primarily concerned about the significance of individual persons. This concern is expressed by conceiving of persons as autonomous. Because he is so protective of individual autonomy, Rawls, like all deontological liberals, conceives of individual persons as having a moral priority. This priority is evidenced most strongly in his criticism of utilitarianism.

Rawls primary criticism of utilitarianism is that it "does not take seriously the distinction between persons."¹⁸ At the personal level, it affirms the liberal notion that "[a] person quite properly acts, at least when others are not affected, to achieve his own greatest good, to advance his rational ends as far as possible."¹⁹ Likewise, the utilitarian must take into account the happiness of every person. Thus, utilitarianism is a liberal theory. Where utilitarianism goes astray, according to Rawls, is that "[t]he principle for choice for an association of men is

interpreted as an extension of the principle of choice for one man."²⁰

This extension, however, is not based on a classical-like understanding that persons in the state are inherently interconnected. Instead, it results from the pragmatic character of utilitarianism. Utilitarians simply claim that since we are already in a society, we must consider the good of society as a whole. Since they do not believe that there are inherent individual rights,²¹ they need not, like the deontologicals, imagine a pre-societal state of nature to explain and justify such rights. Utilitarians do refer to the empirically based principle of diminishing marginal utility, that they believe will assure the liberal ideal of equality. This principle states that the amount of utility that would be generated through the monopolization of goods and privileges by some persons and the consequential deprivation of others would be increasingly less and the disutility would be increasingly greater.²² Likewise, Mill in his essay, On Liberty, argues that the soundest rationale for individual liberty is utilitarianism.²³ Thus, utilitarians claim that there would be liberty and equality in a utilitarian state. Rawls, however, is not satisfied with the empirical character of the utilitarians' principle of diminishing marginal utility and the assumptions about persons that Mill makes in his argument for a utilitarian conception of liberty.²⁴ Rawls, like prior contractarians,

attempts to improve upon utilitarianism by conceiving of persons as radically distinct.

It is important to note, however, that Rawls believes that his theory of justice ultimately leads to an experience of a political relationship between persons far richer than this description of the persons in the original position--an aggregate of mutually disinterested individuals. For Rawls, this conception of persons in the original position is necessary to formulate principles that will ensure liberty and equality. The third liberal ideal, fraternity or social union, he argues, will naturally arise once the structure of our social institutions embody his principles of justice, even though these principles are derived from a conception of the mutual disinterestedness of individuals. The result would be that:

Ethical norms are no longer experienced merely as constraints, but are tied together into one coherent conception. The connection between these standards and human aspirations is now comprehended, and persons understand their sense of justice as an extension of their natural attachments, and²⁵ as a way of caring about the collective good.

Nevertheless, because Rawls' makes his argument that social union will occur on the basis of a particular psychological theory of moral learning,²⁶ the objections that he raises against the utilitarian's invocation of the principle of diminishing marginal utility may be raised against this feature of his theory.

Rawls criticizes the utilitarian's attempt to account for liberty and equality by joining to the theory of utilitarianism the empirical principle of diminishing marginal utility.²⁷ He claims that the equality and liberty of persons is so important that it should not be left to "arguments from general facts."²⁸ Rather, they should be "embed[ded] . . . more directly into [the theory's] first principles."²⁹

As we have seen, Rawls' accounts for fraternity by appealing to an empirical principle--a theory of moral learning. He thinks that it is important but fails to build into his theory of justice a sense of community, or what he calls "social union." Not only does he not pursue this ideal in the formulation of his principles of justice, but the original position, the condition for the formulation of his principles, explicitly requires that a sense of the interconnectedness of persons be suspended. His conception of primary goods, then, cannot include community as a good.³⁰

Thus, the question that he poses to utilitarians can be raised concerning his own theory of justice: if fraternity is important, it should be embedded into the theory's first principles. To be sure, he intentionally excludes community in order to argue "from widely accepted but weak premises."³¹ But can a rich conclusion like a conception of the state as a community result from such weak premises?

What reflection on the classical conception of the relationship between persons reveals, however, is that Rawls' premises are weak and widely accepted because they are fundamental principles of the liberal world-view that is predominant in our culture. Even the theory of moral learning that Rawls invokes to show how social union can come about reflects this liberal world-view.³²

Ironically, the crucial problem for the implementation of Rawls' theory of justice is that the mutual disinterestedness that characterizes the persons in his original position is morally acceptable in our society. Unlike the persons in the original position, however, we are not under a veil of ignorance. Thus, our mutual disinterestedness would lead us to reject the implementation of Rawls' theory because, for most of us, it would lead to a decrease in primary goods. It would seem, then, that Rawls must appeal either to an inherent sentiment for justice or to a concept of ourselves as inherently concerned about each other in order to convince us to adopt his theory.

Plato appeals to both. Like utilitarians, Plato assumes that the state is analogous to a single person. This assumption enables Socrates in the Republic to reflect on the nature of justice at the level of what we might call personal morality by considering what might constitute justice within a state.³³ Likewise, it enables Socrates to use analyses of the experience of justice at the personal

level to consider how a state could be just. This analogy between the person and the state is so strict that the very structure of state is analogized to Plato's conception of the structure of the human soul.³⁴

The basis for the analogy is that, as Socrates points out in the Crito, the state is like a parent to persons.³⁵ Like family, the state is both conceptually and factually prior to individuals, being the very condition for their birth and growth to maturity. Thus, in stark contrast to liberalism, persons cannot be conceived as stateless individuals who contract with each other to form a state. The state is the very condition for the complete development--moral as well as physical--of the person.

Because of this relationship between persons and state, politics and ethics are interconnected. Citizens take an active interest in making the state virtuous and the state, in turn, actively seeks to instill virtue within each of its citizens. Ideally, for Plato, the state would be classless.³⁶ There would be no need for a paternalistic ruler if the citizens were fully mature persons, i.e., rational and self-controlled. The active pursuit of virtue by each of its citizens not only would be in harmony with, but also would aid, the similar pursuit by everyone else.

Even when Plato considers what he calls the "feverish state,"³⁷ where the state has three different classes of persons corresponding to different levels of human maturity,

the state is conceived of as an organic unity. First, despite the disparity in human maturity, the contribution of each person is necessary and significant: "each man must perform social service in the state for which his nature was best adapted."³⁸

Second, by participating in a state, each person can attain a vicarious human perfection insofar as the state is made more perfect through the contributions of each. Thus, the full development of each person's capacities is consistent with and necessary for the full development of the capacities of the state. As Socrates states in the Republic: "[T]he object on which we fixed our eyes in the establishment of our state was not the exceptional happiness of any one class but the greatest possible happiness of the city as a whole."³⁹

It is clear, then, that the classical world-view, as exemplified in Plato's political theory, can account for an experience of our social relationships with each other as fundamentally given and not subservient to individual self-interest. By believing that a person's good consists in the pursuit of human virtue and that the state is both an expression of that virtue and a necessary condition for attaining it, the classical conception could reconcile the liberal conflict between the interests of individuals and the state. Thus, under Plato's conception of the state, even the person having what we could consider the lowliest role

in a society would experience to a greater degree "the sense that we are all engaged in a common venture"⁴⁰ than he could in our current system or even in Rawls' idealization of it.

Nevertheless, the interconnectedness emphasized in Plato's conception of the state seems to challenge our notions of equality and liberty. As is evident in Rawls' theory, the creation of a conceptual framework sufficient to account for our notions of equality and liberty results in conceiving of persons in a state as fundamentally unrelated. Conversely, a conception of persons as interconnected implies a conception of the state that is hierarchical and paternalistic.

The conflicts between liberty and paternalism and between equality and hierarchy raise a formidable obstacle to an attempt to combine intelligibly the moral insight of liberalism that each person has intrinsic dignity, which ought to receive "equal concern and respect,"⁴¹ with the classical world's aspiration for political unity that is capable of nurturing the individual. Is there a way to combine both of these insights? To answer this, we must first examine Rawls' and Plato's conceptions of reason. It is their conceptions of reason that lead to Rawls' quest for equality and liberty and Plato's acceptance of hierarchy and paternalism.

The Nature of Human Reason and Knowledge

That persons possess the power of reason has been

important to the liberal conception of liberty and equality. For example, in his Second Treatise Of Government, John Locke states that we "are born free as we are born rational."⁴² It is our reason that in our moral theories, radically distinguishes us from other things. Likewise, for Kant, it is our reason that provides us with "autonomy" which "is the basis of dignity of human and of every rational nature."⁴³

It is understandable, then, that as in their conceptions of the relationship between persons, classical and liberal world-views differ in their conceptions of human reason and knowledge. This difference is insightfully examined by Roberto Mangabeira Unger in his book, Knowledge and Politics.⁴⁴

According to Unger, whereas there are not problematic dichotomies between theory and fact and between reason and desire in classical thought, in the liberal conception of the person--what Unger calls liberal psychology--there are twin antinomies: theory and fact, and reason and desire. The antinomy of theory and fact arises from modern philosophy's rejection of "intelligible essences." Liberal thought

"denies the existence of a chain of essences or essential qualities that we could either infer from particular things in the world or perceive face to face in their abstract forms. And it therefore insists that there are numberless ways in which object and events in the world might be classified.

We cannot decide in the abstract whether a given classification is justified. The only

standard is whether the classification serves the particular purpose we had in mind when we made it.⁴⁵

This dichotomy between theory and fact results in a corresponding problem with the way liberalism understands reason and desire. If theory is evaluated solely on its success in serving our purposes, where do we get purposes and how can they be evaluated. This is what Unger calls the antinomy of reason and desire. The first factor contributing to this problematic chasm between reason and desire is the liberal conception of the mind as a kind of machine. It has only two operations: "analysis and combination."⁴⁶ The result of this conception of a passive mind is that it requires some entity to move it. This entity is desire. Thus, "[t]he mind machine, by itself, wants nothing; desire, unaided by understanding, can see nothing."⁴⁷

The essential character of the liberal conception of desires, according to Unger, is that they are arbitrary. They are arbitrary because of "the impossibility of using reason to justify their content."⁴⁸ The arbitrariness of desire makes ends solely a matter of the exercise of the will. "Understanding contributes to the organization of our goals by clarifying their interrelations, but it never ultimately determines their substance."⁴⁹ Thus, the antinomy of theory and fact parallels the antinomy of reason and desire: "Reason is as formal in the performance of its moral responsibilities as it is in the development of scientific

truth."⁵⁰

Jurgen Habermas, in his book Theory and Practice, also notes a difference in the classical and modern notions of reason and examines it in the context of what he calls "the transformation of classical politics into modern social philosophy."⁵¹ His analysis of this transformation shows how the liberal notion of reason is intimately related to how liberals conceive the inherent relationship of persons in a state.

As discussed in the preceding section, classical politics conceived persons as inherently citizens of a state. There is, as Habermas notes, a corresponding "interconnectedness of Ethics and Politics."⁵² This unity is founded on a particular theory of knowledge and "an ontology of human nature."⁵³

In liberalism, ethics and politics are separated because of its conception of reason and knowledge. Liberalism adheres to "the ideal of knowledge originating in Hobbes' time, the ideal of the new science, which implies that we only know an object to the extent that we ourselves can produce it."⁵⁴ Thus, knowledge can only be evaluated by reference to human desire. If human desires are arbitrary, we can share only the most basic desires. Thus, whereas "the theoretically based point of departure for the Ancients was how human beings could comply practically with the natural order, . . . the practically assigned point of

departure of the Moderns is how human beings could technically master the threatening evils of nature."⁵⁵ Ethics, which addresses the most controversial desires, must, therefore, be severed from politics.

Of these threatening evils of nature, the foremost threat has been perceived to be other persons.⁵⁶ Consequently, the notion of knowledge as manipulation of nature transforms classical politics into a political technology aimed at providing security and order. Thus, "the question of the 'wherefore' and 'to what end?' of human social life, . . . now yields to another question: how and by what means can the civitas be ordered and made tractable?"⁵⁷

Because Rawls' theory shares these liberal premises, it is equally subject to their problems. These problems first arise in his notion of moral theory and fact. For Rawls, moral theory must begin with a careful examination of fact: the formulation of principles is "an attempt to describe our sense of justice."⁵⁸ Of the everyday judgments we make about the justice or injustice of actions or states of affairs, however, only considered judgments, that is, "those judgments in which our moral capacities are most likely to be displayed without distortion," can be the basis for the formulation of moral principles.⁵⁹ Thus, moral theory is "a formulation of a set of principles which, when conjoined to our beliefs and knowledge of the circumstances, would lead

us to make these judgments with their supporting reasons were we to apply these principles conscientiously and intelligently."⁶⁰

Rawls, then has a two-part criterion for a good moral theory. First, it must "give a better match with our considered judgments on reflection than . . . [its] alternatives."⁶¹ Second, "as a whole [it must seem] on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask."⁶² Thus, Rawls' notion of theory is marked by the analytical passivity described by Unger.

On the other hand, Rawls suggests that a theory, once formulated, might exercise a regulative function, that is, "we may want to change our present considered judgments once their regulative principles are brought to light."⁶³ Because of the otherwise passive role that, for Rawls, theory plays, this suggestion raises the antinomy of theory and fact. First, if our moral capacities are consistent and intelligible, as Rawls seems to assume, it would seem that restricting our data pool of actual judgments only to considered judgments would lead us to a single theory that adequately describe all of these judgments. Second, assuming that for some reason one or several of our considered judgments do not fit a particular theory, what criterion would we use to decide whether to select a different theory

or to change those considered judgments? Without appealing to something like essences, the possible criteria seem to be either that the clearest and most strongly held considered judgments would control which theory we adopted, or that the theory describing the greatest number of considered judgments would control. Unfortunately, Rawls is silent about such criteria.

Likewise, Rawls' theory incorporates the dichotomy between reason and desire. Rawls makes the traditional liberal assumption, albeit with some empirical evidence to support it, that the normal state of affairs in a state is that while persons

have roughly similar needs and interests, or needs and interests in various ways complementary, so that mutually advantageous cooperation among them is possible, they nevertheless have their own plans of life. These plans, or conceptions of the good, lead them to have different ends and purposes, and to make conflicting claims on the natural and social resources available.⁶⁴

Thus, while Rawls does not affirmatively deny the possibility of a shared conception of the good within a state, he assumes for the purpose of formulating the principles of justice that persons may have whatever conception of the good they desire. Further, this state of affairs is perfectly legitimate even after the principles have been derived and embodied in the state's institutions, so long as a person's conception of the good is consistent with the principles of justice. It is this emphasis on

individual desires that makes it necessary for Rawls' to come up with primary goods, those things that everyone would want, whatever else they might want.⁶⁵

After deriving the principles of justice from conditions that include this "thin" theory of the good, however, Rawls does attempt to articulate a thicker theory of the good that includes a universally human "motivational principle."⁶⁶ This principle, which Rawls calls the Aristotelian Principle, is that "other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity."⁶⁷

The Aristotelian Principle enables Rawls to evaluate with a single principle all human activities and thereby avoid a cultural nihilism. Although this principle represents a step toward the classical conception of the good, it still embodies a dichotomy between reason and desire. Unlike the role of reason in the classical worldview, reason, for Rawls, cannot assist us in determining what our capacities are and how these capacities ought to be fitted into the state: "By itself the principle simply asserts a propensity to ascend whatever chains are chosen. It does not entail that a rational plan includes and particular aims, nor does it imply any special form of society."⁶⁸ Why, then, do persons choose one rational plan

and not another? According to this view, they choose one simply because they desire it. But both of the alternative accounts for this desire--random choice or a genetically and environmentally determined choice--undercut the liberal ideal of autonomy.

This liberal conception of rationality is significant to Rawls' formulation of his principles of justice. Rawls assumes that persons in the original position are rational. Rationality, however, "must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends."⁶⁹ Thus, his notion of human reason, at least for purposes of formulating a theory of justice, is reduced to an instrumental function. It assumes that a person has given preferences and that reason itself cannot generate or discover them. We simply find ourselves with desires and "a rational person . . . follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed."⁷⁰ Thus, rationality is reduced to a quantitative evaluation: the greater and the more probable are the more rational.

Even Rawls' attempt to go beyond "the simpler principles of rational choice (the counting principles)"⁷¹ by articulating a notion of "deliberative rationality" which could order life plans has this flaw. Deliberative rationality would lead us to choose a plan that

would be decided upon as the outcome of careful reflection in which the agent reviewed, in the light of all the relevant facts, what it would be like to carry out these plans and thereby ascertain the course of action that would best realize his more fundamental desires.⁷²

Once again, reason can only measure our desires, not the objects of our desire.

As both Unger and Habermas suggest, the classical world-view includes a far richer, though also problematic, conception of reason and knowledge.⁷³ First, because it assumes that there are essences, theories not only are able to classify facts, but insofar as theory is able to comprehend more of the essential nature of things it can also evaluate facts. Further, because the criterion of truth is how closely the theory corresponds to the nature of the thing rather than the purpose of the theoretician, reason is not reduced to the power to determine efficient methods to pursue nonrational desires.

Consequently, the use of knowledge in human activity does not have the manipulative character of its liberal counterpart, technology. The classical world-view conceived of human activity as techne, or in the context of ethical and political activities, as practical reason. Thus, reason is able both to discern the good of each thing and to determine how to nurture that thing into attaining its good. Thus, the crucial character of the classical conception of practical reason, as Habermas points out, is that "[f]or the

Ancients the capacity of goal-directed activity, skill, techne, was knowledge that always pointed toward theory as the supreme aim and the highest goal, just as was the prudence of reasonable action, phronesis"74 Second, there is no inherent dichotomy between reason and desire in the classical world-view. Each thing, in fact, desires to attain its good that reason seeks to comprehend.

It is Aristotle, rather than Plato, who carefully distinguishes practical reason from theoretical reason and recognizes the importance that the former has in political and ethical theory.⁷⁵ Nevertheless, Plato's conception of reason includes both types, treating them as different facets of one and the same reason. Likewise, although it is Aristotle who articulates the classical synthesis of reason and desire in his notion of final causation,⁷⁶ such a synthesis is implicit in Plato's conception of the world.

Although we generally think of Plato either as a mathematician or as a mystic, the very method of discourse in his dialogues seeks truth by a careful examination of persons' experience of the world. To be sure, his dialectic focusses on the clarification of concepts,⁷⁷ but the concepts themselves are drawn from a careful observation of a variety of human and natural activities. As Alcibiades says of Socrates in the Symposium:

Anyone listening to Socrates for the first time would find his arguments simply laughable; he wraps them up in just the kind of expressions

you'd expect of such an insufferable satyr. He talks about pack asses and blacksmiths and shoemakers and tanners, and he always seems to be saying the same old thing in just the same old way

This is particularly true when Socrates considers the nature of virtue and the art of legislation, where he uses numerous analogies to the activities of doctors and ship captains.⁷⁹

Likewise, Plato has a notion of reason that includes the artful or nurturing capacity of practical reason. The best example of his recognition of the importance of practical reason is in his description of the ideal leader of the state:

The political ideal is not full authority for laws but rather full authority for a man who understands the art of kinship and has kingly ability. . . .

Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right⁸⁰ for each member of the community at any one time.

Thus, the kingly art does not consist simply in knowledge of the good for persons but requires knowledge about the particular participants in the state and how to nurture them toward a particular expression of the good for persons. Of course, Plato realizes that this political ideal is impossible to actualize.⁸¹ Nevertheless, it is the same practical or artful character of reason that enables the legislator to do the next best thing by designing "the law for the generality of his subjects under average

circumstances."⁸²

Similarly, Plato has a conception of desire that does not conflict with his notion of reason. Unlike the liberal conception of reason and desire, where what a person desires is good simply because he desires it, for Plato, a person's deepest desire is for the Good.⁸³ Since everyone desires the good, there is nothing inherently wrong with our desires. Nevertheless, desire in and of itself is not sufficient to enable us to attain our good; both theoretical and practical knowledge is needed to guide our desire to its ultimate goal. Thus, it is our ignorance, resulting in a misdirected desire, that accounts for our evils.⁸⁴

Socrates, in his speech in the Symposium,⁸⁵ points out this relationship between reason and desire. He describes how this intrinsically good desire for beauty and happiness must be tutored so that it ascends from that which is less beautiful to that which is more beautiful and finally to beauty itself. Thus, reason is not the slave of the passions,⁸⁶ nor vice-versa; rather, there is a partnership between desire and reason.

Of course, Plato's theoretical premise for his conception of the coherency of theory and fact and of reason and desire rests on his conviction that there are Forms, including the Good, in which the world participates.⁸⁷ Further, the allegory of the cave,⁸⁸ the tale of Er,⁸⁹ and his notion of knowledge as remembrance⁹⁰ suggest that at

least in principle these Forms, especially the Good, can be comprehended through human reason. It is this belief in the existence of a comprehensible Good that we moderns, including Unger and Habermas,⁹¹ find most revolting. Spectres of facism, fanatacism, ideologues, etc. swiftly come to mind when we think of this aspect of Plato's philosophy.

What is ironic about our reaction, however, is that it is these sorts of dogmatic persons who, in Plato's dialogues, are most perturbed with Socrates inquiries.⁹² Thus, the Socratic dialogues demonstrate the critical function of philosophy. Granted that Plato seems to have had a stronger conviction than the historical Socrates that the Forms could be comprehended and that he had developed a powerful enough philosophical method to comprehend them, it does not obviate that the basis of Socrates' quest for the examined life was in his conviction, like Plato's, that there is a Good. All of the Socratic dialogues evidence a concern for the moral and social havoc in Athens during the Peloponnesian War, described by the historian, Thucydides, as a time when "words changed their meaning."⁹³

This critical function of philosophy is even invoked by Rawls. In discussing the possibility that theory may cause us to change some of our considered judgments, Rawls suggests that "[m]oral philosophy is Socratic."⁹⁴ But without a belief in the existence of a Good, how can Rawls'

moral philosophy be evaluative? Without such a conviction, Rawls is left with the liberal conception of the examined life: the clarification of what our desires are and of what is the most efficient means to attain them. Any conception of the examined life, other than this liberal conception, however, would question the rationality of our fundamental desires. Such criticism of the moral neutrality of our desires would pose a threat to the liberal notion of equality and liberty. For if the desires of some are not as rational as the desires of others, the former, like minors and persons found mentally incompetent in our society, would be subject to greater supervision by the state.

To be sure, the pursuit of liberty and equality produces a pluralism that can provide us with the opportunity to compare our desires and assessments of the most rational means with the desires and assessments of others. In this exposure to diversity, as Mill persuasively argues,⁹⁵ society as a whole and each member of it are in some way enriched. But it seems that mere exposure to diversity, without the belief that there is a better, more virtuous, or more appropriately human way for a person to live, cannot tell us why we should appreciate or integrate into our own life the different desires or life plans of another. Instead, diversity seems to result in self-complacency or in a smorgasbord approach to self-improvement rather than in a genuine receptivity that is both critical

and nurturing.

Concluding Remarks

Phaedrus: . . . How far superior to the other sort is the recreation that a man finds in words, when he discourses about justice and the other topics you speak of.

Socrates: Yes indeed, dear Phaedrus. But far more excellent, I think, is the serious treatment of them, which employs the art of dialectic. The dialectician selects a soul of the right type, and in it he plants and sows his words founded on knowledge, words which can defend both themselves and him who planted them, words which instead of remaining barren contain a seed whence new words grow up in new characters, whereby the seed is vouchsafed immortality, and its possessor the fullest measure of blessedness that man can attain unto.

This passage from the Phaedrus illustrates the way in which Plato's conception of the inherent interconnectedness of persons dovetails with his belief in the evaluative function of reason. It expresses a mutual commitment by the citizens of state to discourse concerning the good, secured by the conviction, which liberalism lacks, that there is a Good.

As noted in the introduction, since there is no way to erase the philosophical, cultural, and technological changes that eliminated the classical world-view, it would be unsatisfactory to replace our liberal world-view with it. Nevertheless, it is hoped that this attempt to understand one example of the classical world's conception of persons can provide a philosophical opening in the liberal assumptions we make about ourselves and the world; an opening that might enable us both to experience and to speak

meaningfully about our political interconnectedness and a richer understanding of our human faculties. The more ambitious task, however, will be to conceive of an ethical politics that acknowledges both liberalism's moral insight about the significance and dignity of persons and the classical world's insight about their political interconnectedness. To do so, will require us to conceive of and employ latent powers of human reason marked by a contemplative rather than a manipulative character.

Since the primary purpose of this paper is foundational, it does not discuss how the moral insights of the classical world and liberalism could be integrated in a state. That task remains. A sketch of one possible synthesis of these two insights--what might be called an egalitarian perfectionism--can at least suggest the kind of integration that I envision.

An egalitarian perfectionist theory would take seriously the perfection of each person in the state. Thus, the state, i.e. all of its citizens, would take an active role in discerning and nurturing the activities appropriate to the capacities of each person and to the state. As a result, a mutual concern for the perfection of each other would be facilitated through the structure and functions of political and social institutions. The primary structure would be one that encourages and enables political and ethical discourse that is both critical and visionary.

Although great deference in this public discourse would be given to those persons who have demonstrated their wisdom, both the classical and liberal belief in the ethical and political capabilities of each person and the liberal scepticism about the ability to attain certain knowledge would advise against absolutely entrusting the direction of the state to guardians or technocrats. These considerations would also warrant a public/ private distinction. Unlike a liberal distinction, however, the state or our public lives would not be treated merely as the means for achieving private goals. Rather, this distinction would be between those fundamental activities of the state on which a consensus had been obtained and proposed activities that lacked a consensus. The ultimate goal, of course, would be to achieve a consensus about as many activities as possible. But, in keeping with the critical nature of this public discourse, even activities about which a consensus had been reached would be subject to continued examination.

There would be two different levels to the private domain. The first level would be permanent. It would entail a sphere of action where the state would not interfere with a person's actions. Such a sphere would be necessary to express the insight of liberalism about the significance of individual persons. The second level of the private domain would be provisional. It would entail a sphere of action that could in the future be integrated into the public

domain as consensus is achieved about the state's role in such matters. Because of this private domain, there would have to be liberal principles of justice, like Rawls', to ensure that the significance of individual persons is in fact respected.

Thus, such principles of justice would play an important role in the state. Their justification, however, would be qualified by the recognition of the inadequacies of the liberal conception of the relationship between persons and of persons' faculties. Thus, the just society that Rawls' envisions would be considered a necessary but insufficient condition for a richer social life that has integrated into itself the moral insights of the classical world-view.

Of course, an egalitarian perfectionism faces a host of questions that demonstrate problems in synthesizing these two world-views. If the citizenry has the conviction that there is a Good but possesses a dose of scepticism about a person's ability to know it, how could the state, short of a consensus, justify the use of coercion in taking a public action toward that end? Given our pluralism, is it likely that a consensus could ever be obtained about public matters of any significance? If so, how would a consensus be obtained? How would people be persuaded to support these public ends? How would we ensure that a small minority of dissenters are not too hastily deemed irrational, i.e.,

unable to comprehend the public good? Etc.

All of these questions arise from the epistemology of the liberal world-view, which is radically sceptical about the possibility of evaluative moral knowledge. Further, it is difficult to imagine how this scepticism can be shaken. It does seem inevitable, however, that our world-view, like prior ones, will change. To be sure, the change will occur very slowly. It cannot occur by fiat or by a sheer act of will to adopt a new philosophical theory. It will grow almost imperceptibly out of careful attention to those experiences and sets of experiences--physical, emotional, intellectual, and spiritual--to which liberalism's conception of persons and the world fails to do justice.

NOTES

1. L. HAND, THE BILL OF RIGHTS 73 (1962).
2. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 334-337 (1977); Galie, The Other Supreme Courts: Judicial Activism Among State Courts, 33 SYRACUSE L. REV. 731, 791 (1983).
3. This is Ronald Dworkin's expression. R. DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1977).
4. J. RAWLS, A THEORY OF JUSTICE (1971).
5. Id. at 303.
6. Id. at 60-61.
7. Id. at 302.
8. Id. at 302-303.
9. PLATO, REPUBLIC 433b (P. Shorey trans.)
10. PLATO, TIMAEUS 92c (B. Jowett trans.)
11. See T. HOBBS, LEVIATHAN ch. 14-17; J. LOCKE, SECOND TREATISE OF GOVERNMENT; I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS. See also J. MURPHY, KANT THE PHILOSOPHY OF RIGHT 100-135 (1970).
12. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 86 (L. Beck trans. & ed. 1949).
13. Hobbes' conception of rights--that one can do whatever is necessary to protect his life--is so broad that it is meaningless; thus, in the commonwealth, legal rights are simply the dictates of the sovereign. Kant's notion of duty involves willing a supreme and universal law and thus results in the obligation to treat persons not only as means but also as ends.
14. See RAWLS, supra note 4, at 251-257.
15. Id. at 256.
16. Id. at 13.
17. Id. at 15.

18. Id. at 27.
19. Id. at 23.
20. Id. at 24.
21. See J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION ch. 1, sec. 4; ch. 2; J. MILL, UTILITARIANISM in 10 COLLECTED WORKS OF JOHN STUART MILL 227-230 (Robson ed. 1977)
22. For Rawls' statement of it, see RAWLS, supra note 4, at 159.
23. J. MILL, ON LIBERTY in 18 COLLECTED WORKS OF JOHN STUART MILL 224 (Robson ed. 1977).
24. RAWLS, supra note 22.
25. Id. at 496.
26. He relies on a tradition whose members include Rousseau, Kant, Mill, and, more recently, Piaget. Id. at 459.
27. Id. at 159.
28. Id. at 160.
29. Id.
30. They only include: "the bases of self-respect[,]. . . rights and liberties, powers and opportunities, income and wealth." Id. at 62.
31. Id. at 18.
32. Id. at 26. All of these authors firmly embraced the liberal tradition.
33. PLATO, REPUBLIC 368c ff.
34. See id. at 434e-435a (what was observed in the state must be tested against the individual and what is found in individual must be tested against the state); Id. at 436 (the soul has intelligent, emotive and nutritive components); Id. at 373b-415 (there are three classes in the feverish state: guardians, helpers, and farmers and craftsmen); Id. at 440e-441a (the analogy is explicitly made).

35. PLATO, CRITO 50e-51c.
36. PLATO, supra note 33, at 372a-d.
37. Id. at 372e.
38. Id. at 442d.
39. Id. at 420b.
40. L. HAND, supra note 1.
41. DWORKIN, supra note 3, at 272-273.
42. LOCKE, supra note 11, at sec. 61.
43. KANT, supra note 12, at
44. R. M. UNGER, KNOWLEDGE AND POLITICS (1975).
45. Id. at 32.
46. Id. at 37.
47. Id. at 39.
48. Id. at 42.
49. Id. at 45.
50. Id.
51. J. HABERMAS, THEORY AND PRACTICE 47 (Beacon Press ed. 1973).
52. Id. at 49.
53. Id. at 51.
54. Id. at 42.
55. Id. at 51.
56. See LOCKE, supra note 11; HOBBS, supra note 11.
57. HABERMAS, supra note 51, at 49.
58. RAWLS, supra note 4, at 46.
59. Id. at 47.

60. Id. at 46.
61. Id. at 50.
62. Id. at 53.
63. Id. at 49.
64. Id. at 127.
65. Id. at 260.
66. Id. at 427.
67. Id. at 426.
68. Id. at 430.
69. Id. at 14.
70. Id. at 143.
71. Id. at 416.
72. Id. at 417.
73. UNGER, supra note 44, at 194-195; HABERMAS, supra note 51, at 8-10.
74. HABERMAS, supra note 51, at 61.
75. ARISTOTLE, NICHOMACHEAN ETHICS bk. 6, ch. 5, 8.
76. ARISTOTLE, METAPHYSICS bk. 12, ch. 5.
77. PLATO, REPUBLIC 511a-e; PHAEDRUS 265d-266b.
78. PLATO, SYMPOSIUM 221e-222a.
79. See, e.g., PLATO, REPUBLIC 341a-342e.
80. PLATO, STATESMAN 294a-b.
81. Id. at 294c-294e.
82. Id. at 295a.
83. PLATO, SYMPOSIUM 202e-206a.
84. PLATO, MENO 77e.

85. PLATO, SYMPOSIUM 210a-212a.
86. Compare D. HUME, ENQUIRY CONCERNING HUMAN UNDERSTANDING bk. 2, sec. 5 ("Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.").
87. PLATO, PARMENIDES 131a-133b.
88. PLATO, REPUBLIC 514a-518d.
89. Id. at 614a-621d.
90. PLATO, MENO 81c-82a.
91. See supra note 73.
92. Consider, for example, the character, Euthyphro, in PLATO, EUTHYPHRO, and Socrates' description of his inquiries in PLATO, APOLOGY 21a-23b.
93. THUCYDIDES, THE PELOPONNESIAN WAR bk. 3, ch. 82.
94. RAWLS, supra note 4, at 49.
95. MILL, supra note 23, at
96. PLATO, PHAEDRUS 276e-277a.