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Towards a Theory of State Constitutional Jurisprudence

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ESSAYS

TOWARDS A THEORY OF STATE CONSTITUTIONAL JURISPRUDENCE

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I. INTRODUCTION

The purpose of this essay 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 decisionmaking concerning the federal Constitution, and to urge lawyers and state courts to articulate a constitutional jurisprudence for their own state constitution, based

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on legal, historical, and cultural characteristics of their state.

This essay, then, begins with a definition of constitutional jurisprudence, together with some introductory remarks about its importance. This introduction is 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 is argued that 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 is 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 are considered in light of some distinct differences between state constitutions and governments and the federal Constitution and government. From this analysis, it is 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, what is the courts' role in enforcing the Constitution? In other words, what is the scope of

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: A Functional Reconsideration of the Role of The Supreme Court 1 (1980).

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 decisionmaking? During an address he made at a jurisprudence conference in 1984, 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.[3] Given traditional legal education, his comment is quite understandable. At first glance, the processes of legal argument and decisionmaking 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 construction 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 theory of interpretation, outside of the texts but 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 formulation by a judge of a jurisprudential theory would inhibit ad hoc decisions, based on that

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 School of Law, May 18, 1984.

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. 1.

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: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (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).

judge's immediate reaction to a particular case; for if that reaction were to become the basis of decision, either it would have to be justified according to the jurisprudential theory or the theory would have to be modified to account for the judge's conviction in that particular case.

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.

Given this context, it is clear that state court judges, even more than federal judges, need an understanding of constitutional jurisprudence. They not only need a theory for the federal Constitution but also one for their own state constitution.

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

8. *But see* 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, 982-86 (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 Willamette L. Rev. 641 (1983).

constitutions.[11] From the 1780's 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 cases[12] 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 de Montesquieu, who had recommended constitutional governments.[15] They were also influenced by their colonial experience under English rule, particularily 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,

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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); 1 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, 49 (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, *quoted in* SCHWARTZ, *supra* note 13, at 196-99.

concessions which 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 the 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]

Thus, these first state constitutions also served as models against which the protections of the proposed federal Constitution were measured. It was the outcry for the addition of a Bill of Rights to the federal Constitution made at the state ratifying conventions that prompted the first Congress to do so; and it was to the state constitutional experience that James Madison turned for ideas in drafting a federal Bill of Rights.[20]

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 Case*[21] 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 Papers[23] 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 Balti-*

17. *See* A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS 91-100 (1965).

18. *See* ADAMS, *supra* note 13, at 55-93. 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 156-63, 266-71.

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, 2 Brown 255, 77 Eng. Rep. 647 (1610). For a discussion of its influence on colonial 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 485-86 (A. Hamilton) (Lodge ed. 1888).

24. 5 U.S. (1 Cranch) at 177.

more,[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 federal doctrine of economic substantive due process had prototypes in state constitutional decisions dating from 1855.[26] Whereas the federal courts abandoned the doctrine of economic substantive due process in the 1930's,[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

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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, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). *See also* Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463-93 (1982).

29. *See generally* C. ANTIEAU, RELIGION UNDER STATE CONSTITUTIONS (1965).

30. *See, e.g.*, McClure v. State, 9 Tenn. (1 Yerg.) 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. (4 Greanleaf) 527 (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); *cf. Ex parte* Smith, 38 Cal. 702 (1869) (prohibition of the playing of instruments or the presence of women in saloons after midnight does not violate inalienable rights).

if they were out after ten o'clock at night.[35]

Early in this century, many states enforced state constitutional provisions concerning rights of the accused. For example, in the 1920's, 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 1930's to the early 1970's 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. The Court first acted in the areas of freedom of religion and speech, but then in the 1960's, it revolutionized criminal procedure through its construction of the due process clause.[37]

Since the early 1970's, 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, af-

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 an historical account of this period, see F. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970); R. 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; Note, *supra* note 28; Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1982). *See also supra* note 11.

forded 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 the 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. Having done so, they will also be well on their way toward developing a theory of state constitutional jurisprudence.

IV. A Survey of Federal Jurisprudence

As already stated, there are two crucial questions of constitutional jurisprudence. First, what is the scope of the courts' power of judicial review? 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 are treated separately in this section. However, when a particular theory of interpretation strongly implies a corre-

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, 463 U.S. 1032, 1070 n.3 (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, 463 U.S. at 1090-91.

44. *Id.*

sponding theory of the scope of judicial review, it is noted.

Before discussing these two questions, it is helpful to have a framework in 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.

The first concern is about how we ought to balance democratic government and individual rights. Different theories, of course, weigh 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, judicial review 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 jurisprudential 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 rulemakers.

In addition to this structural need for courts to interpret the law in the context of a controversy, Bickel invokes the Court's political weakness vis-á-vis the executive and legislative branches to argue for restraint. He echoes the remark in the Federalist Papers

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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 ("courts do appropriately apply values not articulated in the constitutional text, and appropriately apply them in determining the constitutionality of legislation").

49. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (alluding to THE FEDERALIST No. 78, at 483 (Hamilton) (Lodge ed. 1888)).

that whereas the legislative branch controls the purse and the executive wields 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 the justiciability doctrines—advisory opinion, mootness, ripeness, political question, and standing—which permit it to decline deciding a case and the 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.

As with the scope of judicial review, a variety of interpretational principles has been advocated in theories of constitutional jurisprudence. These competing principles 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, few people 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. Under Grey's approach, the Constitution serves merely to inspire and to authorize the courts to

50. *Id.* at 111-98.
51. CHOPER, *supra* note 2, at 167-68.
52. *Id.* at 258-59, 379, 414.
53. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).

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" interest 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 the 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, 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

54. Grey, *supra* note 48, at 708-09.

55. DWORKIN, *supra* note 8, at 134-36.

56. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). For a response to his critics, see Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527 (1979).

57. BERGER, GOVERNMENT BY JUDICIARY 132, 299.

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 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, 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, when resolving issues of individual rights.

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. Likewise, such an approach 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 conceptions[62] and the positivist positions like Black's that seem to leave a great deal of the interpretation to a

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58. *See* H. BLACK, A CONSTITUTIONAL FAITH 14 (1968). *See, e.g., In re* Winship, 397 U.S. 358, 377-78 (1970) (Black, J., dissenting) (the "document itself should 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, 68 (1961) (Black, J., dissenting). For criticism of his "absolutism," see BICKEL, *supra* note 49, at 141, 162-63.

60. 381 U.S. 479, 508 (1965) (Black, J., dissenting).

61. *See, e.g.*, ELY, *supra* note 53, at 11-41.

62. *See* DWORKIN, *supra* note 8, at 134-36.

judge's discretion.[63] Instead, he argues, judges ought to base their decisions on the concepts embodied in the text. But their interpretations must square with a constitutional theory that includes both the institutional history and the political morality in which the institutional history is embedded.[64] By appealing to political morality embedded in the Constitution, judges can avoid either limiting their decisions to the particular conceptions of the framers, or merely basing them on the judge's own political and moral convictions. Ultimately, Dworkin seems to assert, one of the outcomes advocated in the case would better fit this morality 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, 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. When the two conflict, the rights of the individual are permitted to "trump" the will of the majority.[67] Thus, judges should not be activists in the sense of replacing legislative policies with their own, but only in vindicating individual rights.

Centrist noninterpretivist theories do not require as isolated an interpretation of each provision of the text, as do the interpretivist theories examined above. They do, however, place more ex-

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63. *Id.* at 31-39.

64. Dworkin argues that the judge must first turn to "the constitutional scheme as a whole" in order to construe a particular right. *Id.* at 106. Further, this "scheme" (what Dworkin also calls the institutional history) may be insufficient to construe a right. Then, the judge must turn to political philosophy. *Id.* at 107. But to turn to political philosophy is not to exercise a noninterpretivist discretion. The moral concepts to which the judge appeals are those "presupposed by the laws and institutions of the community." *Id.* at 126. It may be necessary, however, to articulate these "presupposed" moral concepts by examining the life of the concept in the political and philosophical community. *Id.* at 126-27, 149.

65. *Id.* at 81 ("even when no settled rule disposes of the case, one party may nevertheless have a right to win"). *See also* Hart, *supra* note 8.

66. DWORKIN, *supra* note 8, at 82-86.

67. *Id.* at 85.

plicit 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 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]

Justice Richard Neely, a member of the West Virginia Supreme Court, 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. The operational system, of course, is how the government actually affects our lives.

Thus, the court has the responsibility to address the failures

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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 101-03. 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 10 (1981).

72. *Id.* at 113.

of the legislative and executive branches to function democratically. 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 to pass them.[73] Even when the legislature acts, its laws 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 should 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 overactive.[74] Thus, the courts should 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 Herbert Wechsler[75] 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 "a 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 concerns results. Bickel's interpretational

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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 (2d ed. 1978).

77. Wechsler, *supra* note 75, at 19 ("A principled decision, in the sense 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 Hart, *Forward: The Time-Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959)).

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-á-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 examines 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 theory of state constitutional jurisprudence. Since each state is unique in many important respects, a constitutional jurisprudence must be developed for each state. This task is 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 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 in order to articulate new shared ideals or individual rights. A large number of states in the 1970's did so. The new rights have included state equal rights amendments, rights for the handicapped, rights to a clean environment, and the right of privacy.[80]

Since the state jurisdiction is comparatively small, there is less reason to object to stating these ideals or rights either in very specific terms or in very broad terms. Many state constitutions have or have had very detailed constitutional provisions, which by limiting their discretion, expressed great distrust in the branches of state government.[81] On the other hand, the relative ease with which state constitutions can be amended might justify greater use of broadly formulated state provisions and of the discretion of state judiciaries in reviewing the acts of state government. A 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 1970's. 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. Ideally, the election of judges repre-

80. *See* Galie, *supra* note 39.

81. *See* D. LOPACH, L. MCKINSEY, T. PAYNE, E. WALDRON, J. CALVERT & M. BROWN, WE THE PEOPLE OF MONTANA . . . : THE WORKINGS OF A POPULAR GOVERNMENT 2-8 (1983) [hereinafter LOPACH].

82. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

83. CAL. CONST. art. I, § 27 (adopted, Nov. 7, 1972).

84. *See* S. LOWE, RESOURCE MATERIALS FOR NATIONAL CONFERENCE ON JUDICIAL SELECTION AND TENURE 16-21 (1974).

sents 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 lawmaking function by the public. Second, it shows that at least where individual rights are concerned, state courts have the institutional 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 is a mistrust about the degree of power a single court, namely the United States Supreme Court, should have over the lives of hundreds of millions of persons living in diverse geographical and cultural environments.[88]

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85. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

86. For an argument that the common law lawmaking 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, 401 U.S. 37, 44 (1971):

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

Such responsibility requires that the Supreme Court proceed very cautiously in reviewing the acts of state governments before imposing a narrow rule upon the legislatures and 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 amici briefs and since its members, at times, have represented a cross section of America. Nevertheless, the diversity of the fifty states cautions against excessive federal judicial activism.

Individual 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 diverse 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.[90]

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.[91] This ex-

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States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

89. *See, e.g.*, MONT. CONST. art. VII, § 9 (must have been a resident for two years and have been admitted to the Montana Bar for five years); MO. CONST. art. V, § 21 (required to have been a qualified voter in the state for nine years).

90. For one study made of a number of state judiciaries that confirms this, see H. GLICK, SUPREME COURT IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE (1971) (finding that state appellate court justices usually had been very involved in state and local politics prior to serving on the court).

91. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dis-

perimental function, however, need not be confined to state legislatures or executive branches. State courts also could assist each other in the development of 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 minority in that state may be rejected.[92] The federal Constitution can serve to ensure that at least the most fundamental rights be accorded to all persons, notwithstanding the consensus attained in any one state.[93] 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 and individuals 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 powers 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 that branch and a state or individual.[94]

Because states were intended to be the primary governments

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senting) ("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.").

92. *See* CHOPER, *supra* note 2, at 252.

93. *See* Note, *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).

94. *See, e.g.*, Chadha v. Immigration and Naturalization Service, 462 U.S. 919, 951-52 (1983); United States v. Nixon, 418 U.S. 683, 703-05 (1974).

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 more flexible assignments of powers to their branches of government.[95] 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.[96] 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.[97]

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 lawmaking 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.[98] 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 en-

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95. *Compare, e.g.*, the detailed 1889 Montana Constitution *to* the lean 1972 Montana Constitution. *See also* LOPACH, *supra* note 81, at 62, 111.

96. *See, e.g.*, MONT. CONST. art. III, § 1; ARIZ. CONST. art. III.

97. *See* Stern, *The Political Question Doctrine in State Courts*, 35 S.C.L. REV. 405, 411 (1984).

98. *See* Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

force due process and equal protection suggest 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 control by political machines.[99] Also, state legislatures that only meet biennially may have problems with delegation of their responsibilities to the executive branch.[100] 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 for nonjusticiability of constitutional cases have included lack of standing, ripeness, mootness, and that adjudication of the controversy would require the Court to answer a political question.[101] 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.[102] 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 appel-

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99. *See* NEELY, *supra* note 71, at 115-16.

100. *See* LOPACH, *supra* note 81, at 69.

101. *See* BICKEL, *supra* note 49, at 111-98.

102. 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. 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, 643-50 (1971).

late 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, however, do not have express case or controversy requirements.[103] Nevertheless, most state courts have some version of the justiciability doctrines that they use even in common law adjudications. It is possible, 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.[104] 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.[105]

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.[106] 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

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103. The Montana and Alaska Constitutions, for example, do not have this expression in their judicial articles.

104. For example, some states have lower standing requirements to exclude evidence improperly seized. *See, e.g.* State v. Settle, 122 N.H. 214, 218, 447 A.2d 1284, 1286 (1982); Commonwealth v. Sell, 470 A.2d 457, 466 (Pa. 1983).

105. *See* Comment, *supra* note 97.

106. *See, e.g.*, ALA. CONST. art. I, § 13; MONT. CONST. art. II, § 16; TEX. CONST. art. I, § 13. For two cases construing this provision, see White v. State, ___ Mont. ___, 661 P.2d 1272 (1983) (holding that Montana's right to a judicial remedy provision is a fundamental right justifying strict scrutiny of classifications that deny it); Sax v. Votteler, ___ Tex. ___, 648 S.W.2d 661 (1983) (holding that a statute abolishing the tolling of the statute of limitations for medical malpractice actions brought by minors constitutes an unreasonable denial of access to the courts).

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 on the basis of other jurisprudential concerns an active state judiciary is called for, 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—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. *Special 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. First, the fact that major portions of some state constitutions have been revised in the last twenty-five years[107] and that many significant provisions have been added to the constitutions in the last fifteen years[108] 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

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107. 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.

108. *See* Galie, *supra* note 39.

provisions do have at least one advantage over older provisions. Because they have been passed recently, the court has firsthand 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.[109]

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 have captured not only the events but also the very spirit of the state.[110] Likewise, the preamble to the constitution, if it is not considered legally enforceable, might at least express the tone of the rest of the constitution. Similarily, purpose clauses in state legislation passed pursuant to a particular constitutional provision can provide the courts with additional interpretations.[111]

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 cen-

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109. Interviewing delegates to a recent state constitutional convention would be akin to using historical sources or legislative history to construe older constitutions or amendments. There would, of course, be a danger that the delegates interviewed would not or could not accurately describe the concerns of a significant number of the delegates, but this danger exists even when it is a transcript, record, or historical scholarship that is cited by the court. Further, Montana, for example, in its Administrative Procedure Act, has established a similar procedure—a legislative poll—to ascertain legislative intent for use in court proceedings involving the determination of the validity of administrative rules. *See* MONT. CODE ANN. § 2-4-403, -404 (1983).

110. For example, Montana has the works of K. Ross Toole: MONTANA: AN UNCOMMON LAND (1959); TWENTIETH-CENTURY MONTANA: A STATE OF EXTREMES (1972); THE RAPE OF THE GREAT PLAINS: NORTHWEST AMERICA, CATTLE AND COAL (1976). For an analysis of the use of history in judicial opinions by the United States Supreme Court, see C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 190-91 (1969) (describing four different uses of history: (1) to determine intent of framers, (2) to trace the evolution of a constitutional issue, (3) to symbolize the "spirit of the constitution," and (4) to emphasize a change in social circumstance).

111. How much deference the courts should give such legislative glosses, of course, would depend on the constitutional relationship between the legislature and the judiciary in a particular state.

turies, 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 theory of 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 theory of state constitutional jurisprudence.