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EMERGING ISSUES IN STATE CONSTITUTIONAL LAW

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THE RENAISSANCE OF STATE CONSTITUTIONAL LAW*

A. E. Dick Howard**

One of the richest veins in American constitutionalism—yet one often neglected—is that of the state constitutions. So intense is Americans' preoccupation with the United States Constitution, its evolution and interpretation, that there is a tendency to overlook the vital role of the state documents. In fact, the course of development of state constitutions has been played out in ways that often are quite distinctive.

There is, of course, overlap between state and federal constitutional law. Every state constitution, like that of the United States, has a bill of rights. Thus, in cases involving the rights of criminal defendants, for example, a state court must concern itself with the precepts laid down by both the federal and state constitutions.

Equally important, however, are the manifest differences between the United States Constitution and those of the states. One difference lies in the subjects covered by the respective documents. There are subjects—among them education, finance, and the environment—to which the federal Constitution gives little or no mention but which are treated at length in state constitutions.

More fundamentally, state constitutions spring from a tradition distinct from that of the document drafted at Philadelphia in 1787. A study of state constitutions, their history, and their development reveals basic assumptions, a philosophical framework, a level of discourse, and a set of usages that set them apart from the United States Constitution. Hence, as the nation celebrates the bicentennial of the federal document, state constitutions merit special attention in their own right.

In 1775, on the eve of revolution, Massachusetts asked Congress to draft a model constitution for all the states. Congress proved unwilling to take this step.[1] In 1776, when Virginia's convention instructed its

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[1] *See* WILLI PAUL ADAMS, THE FIRST STATE CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REPUBLICAN ERA 51-56 (1980).

delegates in Congress to introduce the resolution for independence, it added that the drafting of state constitutions should be left to the respective states.[2] The same Virginia convention set to work, in May 1776, to agree on a frame of government and a declaration of rights. George Mason, of Fairfax County, had a central role in the drafting of both documents. His Declaration of Rights was especially influential. It was the model for the bills of rights subsequently adopted in the other states, and it ultimately foreshadowed the Bill of Rights added to the United States Constitution in 1791.[3]

Commonly the first state constitutions were drafted by revolutionary conventions or by legislative assemblies, usually without referendum. At that early stage in thinking about constitutions, the notion of a convention elected for the express purpose of drafting a constitution—distinct from bodies elected to enact ordinary laws—was not well developed. It was Massachusetts that, in 1780, saw the first process whereby a convention was elected specifically to draft a constitution that was then submitted to the voters for their approval.[4]

The first state constitutions differed in some specific provisions. For example, the length of time for which legislatures were to be elected varied; governors were chosen in varying ways; some legislatures were to be bicameral, others unicameral; and provisions for the franchise were not uniform from one state to another.[5]

Despite such variations, on many major issues there was general agreement among the drafters of the first state constitutions. Those documents were not abstract tracts on political theory; they were grounded in Americans' experience during the colonial era. Thus, state constitutions reflected a belief in limited government, the consent of the governed, and frequent elections. They were based, in particular, on a Whig tradition emphasizing direct, active, continuing popular control over the legislature in particular and of government in general.[6]

Despite declarations about the separation of powers, the first state constitutions in fact made the legislature the dominant branch of government. In the years before the revolution, governors and judges, appointed by the Crown, were often the object of popular mistrust. It

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[2] PETER FORCE, ed., VI AMERICAN ARCHIVES 1524 (4th Series, 1837-53).

[3] For an account of Virginia's 1776 Convention, see A.E. Dick Howard, *'For the Common Benefit': Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816 (1968).

[4] *See* RONALD M. PETERS, JR., THE MASSACHUSETTS CONVENTION OF 1780: A SOCIAL COMPACT (1978).

[5] For an early, and famous, argument for bicameralism, see JOHN ADAMS, *Thoughts on Government*, in VI THE WORKS OF JOHN ADAMS 196-97 (CHARLES FRANCIS ADAMS ed. 1850-56).

[6] *See generally* ADAMS, *supra* note 1, at 129-275.

was the colonial legislatures that were expected to speak for the people's liberties. It was hardly surprising, therefore, that legislative primacy carried over into the original state constitutions.[7]

State governors were, by contrast, virtual ciphers. Only in New York and Massachusetts was the governor elected by the people. In the other states he was elected by the legislature, lacked the power of veto, and executed the laws with the advice of a council of state chosen by the legislature.[8]

Nor did state courts, at the outset, have much more status. The principle of judicial review—the power of a court to declare a legislative act unconstitutional—was not formally embodied in the first state constitutions (just as it was not explicitly spelled out in the United States Constitution). Gradually, after 1776, courts in several states began to declare and exercise the power of judicial review (thus anticipating John Marshall's reasoning in his 1803 decision in *Marbury v. Madison*).[9]

The art of writing constitutions was, of course, in its embryonic state in the 1770s. As the people of the states gained experience in self-government, changes in state constitutions could be expected. Indeed, from the start there were pressures for change. In Virginia, Thomas Jefferson (who had been in Philadelphia when Virginia's first Constitution was adopted) waged an unrelenting campaign for constitutional reform. In particular, he complained that the Constitution had never been submitted to the people for their approval, that it disenfranchised too many people, and that it left effective legislative power in the hands of the older Tidewater counties, to the neglect of the interests of the growing areas in the Piedmont and western regions.[10]

In the two centuries since the adoption of the first state constitutions, the evolution of those documents has reflected the great movements and controversies of American history. The early years of the 19th century saw the pressures of Jeffersonian and Jacksonian

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[7] Legislative assemblies, beginning with that called in Virginia in 1619, took early root in England's American colonies. *See* MICHAEL KAMMEN, DEPUTYES AND LIBERTYES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA (1969).

[8] In his NOTES ON THE STATE OF VIRGINIA, Jefferson criticized Virginia's 1776 Constitution for disregarding its own proclamation of the principle of separation of powers: "All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government." III WRITINGS OF THOMAS JEFFERSON 223 (PAUL LEICESTER FORD ed., 1892).

[9] A clear, and early, example is Trevett v. Weeden, 1 N.C. (Mart.) 42 (1787). For an especially interesting statement of the principle of judicial review by George Wythe, John Marshall's law teacher, see Commonwealth v. Caton, 8 Va. (4 Call) 5, 8 (1782).

[10] *See* III WRITINGS OF THOMAS JEFFERSON 222-29 (FORD ed.).

democracy, growth in the country's population and economy, and westward migrations. State constitutions were rewritten in ways that reflected the imperatives of that age. Property qualifications for voting were progressively abolished; representation in state legislatures was more nearly equalized; governors gained power and status; limits began to be placed on legislative powers (as people discovered that legislators, too, were capable of actions inimical to the common good); and explicit provisions were made for the revision and amendment of constitutions (a subject often neglected in the original documents). A central theme of state constitutional reform in the early decades of the 19th century was, in short, the extension of popular control over government.[11]

The years of Civil War and Reconstruction saw another period of great activity in the writing and rewriting of state constitutions. Between 1860 and 1875, 18 states adopted new or revised constitutions.[12] Economic regulation was a major issue—governmental responses to the building of railways and the activities of banks and corporations. In the South, race was an issue. Reconstruction brought constitutions obliging former Confederate states to respect the rights of the newly freed slaves. With the end of Reconstruction, southern states rewrote their constitutions, often institutionalizing Jim Crow and achieving widespread disenfranchisement of blacks through registration and other requirements.[13]

The era of populism and progressive reform movements was mirrored in the state constitutions. Progressives pressed for forms of direct government—the initiative, referendum, and recall (Oregon leading the way). By the mid-1920s, 19 states had adopted constitutional provisions for popular initiative of legislation, 14 states had provided for initiative of constitutional amendments, 21 states for referendum, and 10 states for recall measures.[14]

Concurrently with the rise of expanded notions of the roles of government, including the delivery of services, some observers began to seek to recast state constitutions in a managerial mode. Where the first state constitutions had emphasized direct and active popular control

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[11] *See* MERRILL PETERSON, DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820's (1966); FLETCHER GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1930).

[12] Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57, 66 (1982).

[13] A common example was the so-called "grandfather clause," aimed at disenfranchising blacks. Such clauses were invalidated in Guinn v. United States, 238 U.S. 347 (1915).

[14] M. BARBARA McCARTHY, THE WIDENING SCOPE OF AMERICAN CONSTITUTIONS 74 (1928).

over government, the managerial model emphasized efficiency and rational administration. A managerial conception of government has its roots in the thinking of Alexander Hamilton. He stressed the importance of executive leadership, preferring, in the national government, more centralization of power under a strong president.[15] (On this issue, of course, Hamilton and like-minded Federalists clashed with Jeffersonian Republicans of the time.) In the 19th century, managerial ideas of government gained ground under the influence of Bismarck's Germany and, in the United States, with the concept of public administration promoted by Woodrow Wilson, among others.[16]

In the 20th century, "good government" groups sought to "streamline" state government. They argued that state constitutions should be revised to give more power to the governor, make fewer offices elective (by way of the "short ballot," thus concentrating more power in the executive branch), focus control of the state's administration, and create a civil service. The paradigm of this kind of state charter is the National Municipal League's Model State Constitution (first drafted in 1921 and now in its 6th edition).[17]

Between 1921 and 1945 no state adopted a new constitution. But the years since World War II have been active ones. Some of the impetus has come from the states' greater role in the delivery of services (often as the implementors of federal programs). In 1955 the Kestnbaum Commission declared that state constitutions made it "difficult for many states to perform all of the services their citizens require, and consequently have frequently been the underlying cause of state and municipal pleas for federal assistance."[18]

Another impetus for state constitutional revision came with reapportionment of state legislatures. In the wake of the Supreme Court's 1964 "one-person, one-vote" decision in *Reynolds v. Sims*,[19] it was easier to win acceptance of moves to rewrite state constitutions. Between 1950 and 1980, 12 states adopted new constitutions.[20]

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[15] For Hamilton's views on the executive, see his notes to his speech of June 18, 1787, to the Federal Convention and also article IV of a constitution he later drafted, in IV THE PAPERS OF ALEXANDER HAMILTON 184-86, 259-65 (HAROLD C. SYRETT ed. 1962).

[16] For Bismarck's views on a strong and effective administration, see his letter to William I (January 22, 1878), in BISMARCK 52-56 (FREDERIC B.M. HOLLYDAY ed. 1970). Wilson's ideas on public administration may be found in WOODROW WILSON, THE STUDY OF PUBLIC ADMINISTRATION (1955). This article first appeared as *Study of Administration*, 2 POL. SCI. Q. 197 (1887).

[17] MODEL STATE CONSTITUTION (rev. 6th ed. 1968).

[18] Commission on Intergovernmental Relations, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO CONGRESS 37 (1955).

[19] 377 U.S. 533 (1964).

[20] Sturm, *supra* note 12, at 57, 73.

But proposed new constitutions failed of adoption in a number of states, including Maryland, New York, and Rhode Island. Sometimes the defeats could be traced to the political naivete of the framers (as in Maryland, where the proponents miscalculated feelings among local officers whose offices were to be struck from the constitution).[21] In other cases, proposed charters foundered on troublesome political issues (as in New York, where the proposal to repeal the "Blaine Amendment"—forbidding state aid to church schools—had as much to do with the negative vote as did any other single factor).[22]

Until recent years, much of the 20th century was a time of desuetude of interest in state constitutional law. This was even (perhaps especially) true among a state's own judges and lawyers. Several factors were at work as this decline of interest in state constitutional law set in.

Too often the states had an unimpressive record in protecting individual rights. Guarantees in state constitutions frequently went unenforced by state courts. In southern states, for example, state constitutions were interpreted as allowing legislatures to undertake a barrage of "massive resistance" measures (including even the closing of public schools) aimed at preventing desegregation in public education.[23]

State constitutional law was further eclipsed by the activism of the Warren Court. During the time of Earl Warren, the Supreme Court became an engine of reform, decreeing reapportionment of legislative seats, mandating an end to racial segregation in public programs, and working something of a revolution in criminal justice. During those highly charged years, state courts could do little more than try to keep pace with the high court's opinions. There was little time or opportunity for state judges to see to the development of doctrine under state constitutions.

The academic community played a part in emphasizing the primacy of federal constitutional law. Many professors and scholars, especially those writing about constitutional law, aspire to a national reputation. The United States Constitution and the Supreme Court are

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[21] *See* JOHN P. WHEELER, JR., and MELISSA KINSEY, MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-68, 202-03 (1970).

[22] McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207, 213 (1968).

[23] *See, e.g.*, County School Bd. v. Griffin, 204 Va. 650, 133 S.E. 2d 565 (1963), holding that Virginia's General Assembly was under no obligation to see that schools closed by a county were reopened—despite the seemingly clear language of the Virginia Constitution declaring that the General Assembly must "establish and maintain an efficient system of free public schools throughout the State." *See generally* ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE (1964).

popular subjects for commentary. With such orientation to national issues, state constitutional law tended to be neglected.

Recent years, however, have brought a revival of interest in state constitutional law. While the Burger Court (1969-1986) was no stranger to activism (the Court's controversial abortion decisions being examples), the headlong pace of the Warren years seemed to slacken. In criminal justice decisions, in particular, the Court cut back on earlier trends to impose national standards on state criminal procedures.[24]

The states themselves have become healthier entities. Once again the states merit the label of social and political "laboratories" that Justice Louis Brandeis once attached to them.[25] Partly as a result of the reapportionment of state legislatures, the states have been bolder in attacking the great problems of our time. State government has been revitalized, its administration improved, its spirit refurbished.[26]

Trends in national politics in the 1980s have obliged the states to accept more responsibility. President Reagan's call for deregulation, for a "new federalism," and for less stress on the role of the federal government have spotlighted the place of the states in the American polity.[27] State governors are often national figures; our two most recent presidents had been governors before assuming the nation's highest office.[28]

Virginia's Commission on Constitutional Revision, reporting in 1969 to the Governor and General Assembly, caught the spirit of the times. The commission premised its report on a belief "that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as the federal government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government." That many provisions in Virginia's Bill of Rights have parallels in the federal Bill of Rights was, in

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[24] Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 59 GEO. L.J. 151 (1980).

[25] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[26] For examples of economic initiatives, see DAVID OSBORNE, LABORATORIES OF DEMOCRACY: A NEW BREED OF GOVERNOR CREATES MODELS FOR NATIONAL GROWTH (1988).

[27] For President Reagan's call for a "new federalism," see his *Address Before a Joint Session of the Congress Reporting on the State of the Union, January 26, 1982*, I PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1982 72, 76. (1983). For recent studies on this "new federalism," see the National Governors' Association's FEDERALISM AND THE STATES 13-20 (1986); and THE STATUS OF FEDERALISM IN AMERICA: A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL 1-10, 58-71 (1986).

[28] An incumbent governor became the Democratic Party's nominee for the presidency in 1988.

the commissioners' judgment, "no good cause not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians."[29]

State courts, too, have caught the spirit. In the 1960s, state courts were often the object of mistrust (at least, such seemed the tone of many United States Supreme Court opinions). Today, state courts are far more professional and much better equipped to do their job than was true even a few years ago. State courts now have professional administrators, and there are respected institutions (such as the National Center for State Courts at Williamsburg) dedicated to the welfare of state courts.[30]

One finds ample evidence that state courts have begun to take state constitutions seriously. Some of the country's leading state judges—Oregon's Hans Linde and California's Stanley Mosk have been especially vocal—have called for a renaissance of state constitutional law. Scholars and law reviews no longer neglect the subject. Lawyers have begun to realize the importance to their clients of understanding that a state's constitution may, in a given case, offer an attractive alternative to reliance solely on the United States Constitution.[31]

It is important to understand that a state court, in interpreting a state constitution, is not obliged to tie its reading of that document to the meaning of the federal Constitution. A state judge is, of course, obliged to enforce the United States Constitution just as much as is a federal judge. But the state and federal constitutions are separate documents, each to be enforced in its own right, independently of the other.

Thus, while a state court cannot do less than the federal Constitution requires, the court can look to the state constitution for imperatives quite beyond anything found in federal constitutional law. The United States Constitution places a floor beneath which a state and its courts may not fall. But the federal document is no barrier to a state's shaping a body of state constitutional law independent of that based upon the United States Constitution. Indeed, if a state court decides that a state statute or other action violates the state constitution, such

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[29] THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 11, 86 (1969).

[30] *See* MARY CORNELIA PORTER and G. ALAN TARR, STATE SUPREME COURTS: POLICY-MAKERS IN THE FEDERAL SYSTEM (1982).

[31] The literature on the subject of state constitutional law has become vast. For a bibliography, see DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, 317-335 (B. McGRAW ed. 1985). Professor Robert F. Williams, one of the more active scholars in this field, has written a casebook, UNDERSTANDING STATE CONSTITUTIONAL LAW: CASES AND COMMENTARIES, being published in 1988 by the U.S. Advisory Commission on Intergovernmental Relations.

a ruling, of itself, raises no federal question, and the United States Supreme Court will decline review of the case (citing the "adequate and independent state ground" doctrine).[32]

Examples of state courts' looking to state constitutions suggest the range of possibilities. Sometimes the state courts use state constitutions where the United States Constitution has little or nothing to say about the problem at hand. Other times a state court will use the state charter in an area in which federal doctrine exists but there is room for additional state interpretation. Several areas of adjudication will help illustrate.

Economic regulation. Before 1937, federal courts commonly used the due process clause of the 14th amendment to review state economic measures. For example, there were Supreme Court decisions invalidating minimum wage and maximum hour statutes as infringing the "right to contract."[33]

Since 1937 the Supreme Court has backed off from using the due process clause to oversee how the states order their economic affairs (although, of course, questions may arise under the commerce clause or some other provision of the Constitution). State courts, however, continue to review economic regulations more closely. For example, there are decisions in a number of states invalidating state laws restricting entry into particular trades or professions where it becomes evident that the purpose of the law is not to protect the public interest, but instead to give special advantages to some favored group.[34]

Church and state. The United States Supreme Court often turns to the first amendment's prohibition against an establishment of religion to strike down a state law conferring special recognition or benefit to a religious doctrine or entangling the state in the affairs of the church. Notwithstanding the considerable body of federal doctrine in the church-and-state area, state constitutions are sometimes found to be

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[32] The adequate and independent state ground doctrine has its origins in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874). The doctrine has been somewhat complicated by such modern decisions as Michigan v. Long, 463 U.S. 1032 (1983). *See* Greenhalgh, *Independent and Adequate State Grounds: The Long and Short of It*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 31, at 211.

[33] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (minimum hours); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (minimum wages).

[34] The Supreme Court of Nebraska has declared its responsibility to guard against "pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry . . . . " Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 788, 104 N.W.2d 227, 234 (1960). On state courts' review of economic regulations, *see* Kirby, *Expansive Judicial Review of Economic Regulation under State Constitutions*, 48 TENN. L. REV. 241 (1981); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463-93 (1982).

even more restrictive than the first amendment.

In a series of decisions the Supreme Court has invalidated state programs channeling state money to the support of religious schools.[35] In this area, the Court has been quite strict. The Justices have, however, recognized that some programs, such as reimbursement for the cost of bus transportation for children attending parochial schools, are permissible under what has come to be called the "child benefit" theory (that the program is seen as aiding the students, not the schools).[36] Such programs may, however, be struck down under some state constitutions, many of which have quite detailed and specific prohibitions against aid to religion, provisions whose specificity contrast with the general language of the first amendment.[37]

Criminal procedure. This is an area in which the United States has been quite active, especially since the 1960s. Through a process of "incorporation," most of the provisions of the Bill of Rights (originally adopted to bind the Federal Government) have come to apply to the states. Thus federal constitutional standards regarding police practices (such as interrogations and searches and seizures) and criminal trials (such as the right to counsel) bind the states as they do the Federal Government.[38]

Even in this highly "federalized" area of constitutional law, state constitutions play a role. In some instances a state constitution may explicitly require a standard not laid down in federal cases. For example, whereas the Supreme Court has said that states may have juries of fewer than 12 jurors in criminal cases, most state constitutions expressly command a jury of 12.[39] In other instances, a state court may construe a state constitutional provision similar to a federal provision as implying a higher standard of conduct. Thus, courts in some states have read the state ban on unreasonable searches and seizures as forbidding police actions that might be upheld under the Supreme Court's fourth amendment decision.[40]

Environment. Widespread concern for ecological values and the

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[35] *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975); Grand Rapids School District v. Ball, 473 U.S. 373 (1985).

[36] *See* Everson v. Board of Education, 330 U.S. 1 (1947).

[37] *See* Opinion of the Justices, 59 Del. 196, 216 A.2d 668 (1966), distinguishing *Everson* on the ground that the relevant Delaware constitutional provision was more exacting than the first amendment. Delaware's Constitution was amended in 1967 to authorize free transportation of students in nonpublic schools. DEL. CONST., art. X, §5.

[38] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment search and seizure and exclusionary rule).

[39] *See* Duncan v. Louisiana, 391 U.S. 145, 158-59 n. 30 (1968).

[40] *Compare* United States v. Robinson, 414 U.S. 218 (1973), *with* State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (search incident to arrest). For commentary on state courts' criminal procedure cases, see articles cited in *Developments in the Law—The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1369 n. 8 (1982).

environment is a relatively modern phenomenon. Although there has been considerable federal legislation protecting the environment (such as the National Environmental Policy Act), federal courts have refused to recognize a federal constitutional right to a decent environment.

State constitutions have much to say about environmental protection. Sometimes the doctrines invoked by state courts are of long standing. For example, courts often recognize a "public trust" in state resources such as rivers and tidelands. Other state constitutional provisions are of more recent origin. Thus state constitutions may permit the state's taxing power to be used in ways that encourage environmental values, or they may (as in Illinois) give individuals standing to sue polluters.[41]

Gender discrimination. Since 1971 the Supreme Court has decided a series of cases using the 14th amendment's equal protection clause to invalidate laws or government actions found to constitute invidious discrimination on the basis of gender (for example, preferring men over women as administrators of decedents' estates). The justices have, however, refused to say that gender, like race, is an inherently "suspect" classification.[42] Moreover, the much debated equal rights amendment to the federal Constitution fell short of the requisite number of states for ratification and thus never went into effect.

About a quarter of the states have constitutional provisions expressly dealing with gender discrimination. The precise language and ambit of those provisions vary from one state to another. Moreover, state courts have taken varying approaches to the interpretation of the respective clauses. But the provisions offer an opportunity for state courts to bring their own perspective to bear on questions of gender, and in at least a few instances those courts have used a stricter standard of review than that laid down in 14th amendment cases.[43]

Education. Nowhere does the United States Constitution mention education (not surprisingly, in light of the fact that public education

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[41] For a fuller discussion, see Howard, *State Constitutions and the Environment,* 58 VA. L. REV. 193 (1972).

[42] Four Justices (Brennan, Douglas, White, and Marshall) argued for this position in Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973), but failed to get a fifth vote.

[43] *See generally* Tarr and Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts,* 9 HASTINGS CONST. L.Q. 919 (1982); Comment, *Equal Rights Provisions: The Experience under State Constitutions,* 65 CAL. L. REV. 1086 (1977). On equality under the state constitutions, see Williams, *Equality Guarantees in State Constitutional Law,* 63 TEX. L. REV. 1195 (1985).

still lay in the future in 1787). The Supreme Court has nevertheless used the 14th amendment to place certain requirements upon the states' operation of schools. For example, the Court has ruled against segregation of the races in public schools and has said that students have at least some rights under the first amendment or the due process clause of the 14th amendment.[44]

The Supreme Court has refused, however, to use the 14th amendment to require that states equalize expenditures among wealthier and poorer school districts.[45] While total deprivation of education (as for aliens) would raise serious federal constitutional questions, the Court's ruling on school finance leaves the issue of comparative inequalities among school districts largely to state law.[46]

In contrast to the United States Constitution, state constitutions have detailed provisions on education. They typically address at length the powers and duties of the state and of localities in creating and running school systems. Courts in a few states have used the education articles of state constitutions to require more equal funding of schools throughout the state.[47] In general, there is a large body of state constitutional law touching many of the aspects of public education.[48]

In reviewing the above six areas of state constitutional law, one should note that state courts' use of state constitutions cannot be described simply in terms of the judicial decisions being "liberal" or "conservative." Such labels are difficult to apply to court rulings in any event. Certainly it would be misleading to suppose that the independent use of state constitutions is a liberal or conservative phenomenon when the groups or individuals who may stand to benefit from the decisions vary as widely as business groups, criminal defendants, and environmentalists. There is a danger that use of state constitutions will be simply "reactive," that is, that a judge disappointed with a United States Supreme Court doctrine will turn to a state constitution simply

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[44] *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (segregation); Tinker v. Des Moines School District, 393 U.S. 503 (1969) (expression); Goss v. Lopez, 419 U.S. 565 (1975) (hearings). More recent cases suggest more deference by the Court to school administrators. *See, e.g.*, Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988) (school principal's deletion of articles from school newspapers).

[45] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[46] In Plyler v. Doe, 457 U.S. 202 (1982), the Court held that Texas could not deny to children of aliens illegally resident in the United States the free public education it provided children of citizens or of legally admitted aliens.

[47] Perhaps the best known decision is Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

[48] *See generally* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 874, 916-23 (1976).

to achieve a preferred result.[49] It is understandable that a lawyer who has his client's interest at stake may "forum shop," choosing whichever constitutional ground seems most advantageous. But judges, as well as scholars and others who care about the integrity of constitutional law, should seek a principled basis for state courts' decisions.

The case for an independent role for state courts should not be taken to be a case of unthinking activism. Judges are not knights errant, charged with doing good at every turn in the road. Judicial review by state courts, like that in federal courts, raises important questions about the proper place in a democratic society for counter-majoritarian court decisions.

The debate, familiar in both academic and popular circles, over the legitimate bounds of judicial review by federal courts raises questions that apply, in somewhat altered form, to state courts' displacing legislative or other political judgments. Some of the prudential restraints that should be on the mind of a federal judge should concern state judges as well. Thus, judges, on whatever court they sit, do well to consider limits on a judge's expertise (for example, in making judgments that resemble those usually made by legislatures), their capacity to make decisions requiring the allocation of public resources (such as how money is spent), and the courts' workload.

Judicial decisions based on a constitution, whether state or federal, trigger inevitable tensions between two principles, both built into our system of government. One is the principle that decisions should be made by agents ultimately accountable to the society's electors. The other principle is that of judicial review: the power of a court to enforce the commands of the Constitution, even in the face of a legislative or popular majority.

In American constitutional theory, this tension has never been fully resolved. At the federal level, there are some potential checks on judicial power, for example, in the president's power to fill vacancies on the bench and in Congress's power, under article III of the Constitution, to alter the Supreme Court's appellate jurisdiction.

Among the states, there are more opportunities for the expression of popular discontent with judicial decisions. In some states, judges stand for reelection, and their decisions may be a topic for debate in that election (the successful campaign mounted by conservatives against California's chief justice, Rose Bird, attracted national attention).

More generally, it is far easier to amend a state constitution than it

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[49] *See* Collins, *Reliance on State Constitutions: Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

is to amend the United States Constitution. Voters have used this power. Constitutional amendments in California and Florida, emphasizing the rights of the victims of crime, have curbed the ability of state courts to suppress the introduction of evidence challenged as being the product of an illegal search or seizure. In Massachusetts and California, constitutional amendments have overturned court decisions that had invalidated the death penalty on state constitutional grounds.[50]

Whatever one may think either of particular judicial decisions or of efforts to amend a state constitution, debate over the uses of those constitutions is healthy and to be encouraged. Constitutions serve many purposes, among them creating the instrumentalities of government, indicating how laws shall be passed, and defining which political institutions shall have how much say in governmental decisions.

But no function of a constitution, especially in the American states, is more important than its use in defining a people's aspirations and fundamental values. Americans have a long tradition of using documents to set down their basic laws. It is a tradition with roots in early English practices, such as the restatement of ancient liberties in documents like Magna Carta and the Petition of Right. It is a tradition that gained force from colonial acts such as the drawing up of the Mayflower Compact and, of course, that at independence required the citizens of the new states to base their polity upon written state constitutions.

That tradition has equal importance today. A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life. George Mason understood that precept when, in drafting Virginia's Declaration of Rights in 1776, he wrote that "no free government, nor the blessings of liberty, can be preserved to any people" but by a "frequent recurrence to fundamental principles."[51]

A study of constitutionalism in the United States is incomplete if one considers only the federal Constitution. That document deserves all the attention we can give it. But those who drafted it understood that an enduring and viable federal system rested as well on the pillars of the state constitutions. It is through those constitutions that the people of the respective states structure governments closer to them than is possible in Washington. Pluralism and a dispersal of power are among the buttresses of our free society. Maintaining the state constitutions

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[50] *See* Wilkes, *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?"* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 31, at 166.

[51] Mason's language appears today in the Constitution of Virginia, art. 1, § 15.

in good repair, and understanding their postulates, are important in carrying forward a system of government that has served us well for two centuries and gives hope and promise for the next century and beyond.[52]

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[52] Recent years have brought more collected attention to state constitutional law. Symposia worth noting include *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); *New Developments in State Constitutional Law*, 17 PUBLIUS: THE JOURNAL OF FEDERALISM 1 (1987) (G. Alan Tarr and Mary Cornelia Porter eds.); *State Constitutions in a Federal System*, 496 ANNALS 1 (1988) (Am. Acad. Pol. & Soc. Sci., J. Kincaid ed.).