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Supreme Court of Oregon

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E PLURIBUS—CONSTITUTIONAL THEORY AND STATE COURTS*

*Hans A. Linde***

I. INTRODUCTION

Two hundred and fifty years after its founding under a colonial charter from King George II, Georgia has marked this milestone by adopting a new constitution. It is your tenth constitution. As a visitor from what was a distant, unexplored wilderness when Georgia adopted its first constitution in 1777, I do not know whether today's Georgians think of this latest version as a solemn and far-reaching political act or as a technical overhaul interesting only politicians and lawyers, as launching a new high-tech ship of state or as scraping the barnacles off an old, familiar one. The answer no doubt differs between those who are directly affected by some change from the constitution of 1945 and the majority who see no such effect. In any event, the new Georgia constitution will be important to all who devote their professional lives to the law of this state.

You have not brought me here from Oregon to tell you about the substance of Georgia's new constitution, and I have no such intention. But the adoption of this new constitution comes at an interesting time in constitutional law. It is a time of much scholarship and debate in a specialty that defines itself, perhaps not quite accurately, as constitutional theory. I say not quite accurately be-

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cause most of the discussion is not concerned with the theory of constitutional government or with particular constitutional provisions, although such scholarship also exists. The theorizing I mean concentrates on a single subject: the practice of judicial review by the Supreme Court of the United States.

This is also a time, however, when the other tributaries of American constitutional law are turning from mere trickles into wider currents and searching for deeper channels and stable banks. State courts are returning to their state charters to deal with issues that for forty years they left to be debated and resolved by the national Supreme Court. The question in the state courts no longer is whether to give independent attention to state constitutional issues, but how. As a result, state judges, the lawyers who appear before them, and those who act for and advise state governments face problems of sources and methods to which they had given little thought. Some of these are the same problems that interest the scholars of constitutional theory; many of them are not. What I would like to explore with you is the relationship, if any, between the world of the theorists and the world of the state courts.

Perhaps these two worlds today are too distant to discuss together in the short time available to us. The recent essays in general constitutional theory exclude the experience of the states just as the casebooks for law students do. As Professor Paul Brest notes, "despite the increasing activism of some courts, the state judiciary remains at the periphery of the scholars' vision."¹ Still, the juxtaposition deserves to be tried. One reason is that the theory and methods of contemporary Supreme Court opinions do not furnish the only proper model for decisions in the state courts. The second is that, if the theorists should widen their focus to encompass a view of the states, this might enrich not only their theories but also the teaching of the future lawyers, judges, and law clerks

¹ Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1105 n.228 (1981).

Some scholars, however, are devoting their efforts to state constitutional law. See, e.g., Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 *HAST. CONST. L.Q.* 1 (1981); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 *VA. L. REV.* 873 (1976); Swindler, *State Constitutions for the 20th Century*, 50 *NEB. L. REV.* 577 (1971); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 *S.C.L. REV.* — (1984); Williams, *State Constitutional Law Processes*, 24 *WM. & MARY L. REV.* 169 (1983). See also the monthly columns of Ronald K. L. Collins in the *National Law Journal*.

who will be responsible for our complex constitutional system. Let us take a look at the debate over theory and then turn to the problem of constitutional arguments in state courts. That will lead us, finally, to examining what the diversity of state constitutions means for the theory of judicial review.

II. THE SEARCH FOR LEGITIMACY

As I have said, the theorists reduce constitutional theory to a single topic. "The central issue in the constitutional debate of the past twenty-five years," writes Professor Philip Bobbitt, "has been the legitimacy of judicial review of constitutional questions by the United States Supreme Court."² Brest calls it "the historic obsession of normative constitutional law scholarship."³ Professor Michael J. Perry further narrows his subject to "the legitimacy of constitutional policymaking (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution."⁴ Professor Gerald Gunther sees the "central problem" of legitimacy to lie in the Supreme Court's creation of new substantive rights.⁵

² P. BOBBITT, *CONSTITUTIONAL FATE—THEORY OF THE CONSTITUTION* 3 (1982).

³ Brest, *supra* note 1, at 1063.

⁴ M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ix (1982).

⁵ Gunther, *Commentary—Some Reflections on the Judicial Role: Distinction, Roots, and Prospects*, 1979 WASH. U.L.Q. 817, 828.

Dean James E. Meeks opened a recent symposium by confessing surprise that another generation found something new to debate on the subject, but Professor Richard S. Kay, in the same symposium, found nothing surprising in the preoccupation of constitutional law scholarship with theories of judicial review. *Symposium: Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1, 187 (1981). Other recent symposia include *Judicial Review and the Constitution—The Text and Beyond: A Symposium*, 8 U. DAYTON L. REV. 443 (1983); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981).

It is not possible in this space to mention, let alone do justice to, all the participants in the contemporary discussion of constitutional theory as here defined. Some prominent contributions, besides those mentioned elsewhere in this lecture, include Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). See also J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980). The most comprehensive coverage of

Earlier debate over the "legitimacy" of judicial review meant debate about whether the judicial power extends to setting aside unconstitutional laws, the issue to which every law student is introduced by Chief Justice Marshall's opinion in *Marbury v. Madison*. That was a question of institutional authority separate from the merits of attacks on one or another law. The early question was not whether a law might indeed be unconstitutional, for instance by cancelling existing contracts or seizing private property without payment; rather, the question was whether the courts were bound to apply the law nonetheless.

What sparks today's theorizing about the legitimacy of judicial review is doubts about the legitimacy of its substance. These doubts concern the premises for decisions made in the name of constitutional law. They ask whether, on the evidence of the past thirty years, such decisions can be said either to have or to need any footing in a constitution beyond the purely circular observation that the existing practice of judicial review itself is an element of that constitution. This second question of "legitimacy" is not only about the role of the Supreme Court as an institution. It is also a question about norms for governing, if you assume, as I do, that legislators and other officials are obliged to govern constitutionally with or without judicial review. If the premises of constitutional law are wholly indeterminate apart from one or another theory of judicial review, then constitutional law addresses no meaningful norms directly to public officials.

Theorists treat judicial review as a problem in democratic theory because judicial review lets courts set aside policies adopted by elected and politically accountable officials, or indeed by the voters themselves. But there really is no comparison between the question of legitimate premises and the question of their enforcement by courts. It is no strain on our democratic beliefs when a court sets aside the action of officials, even elected officials such as a city council or a school board, because they have exceeded their authority or departed from a statute. The same is true when a court reviews whether a legislature has departed from the constitution,

constitutional law from a contemporary theoretician's perspective remains L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). Older classics are A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1963); A. BICKEL, *THE MORALITY OF CONSENT* (1975); and Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

as long as the court can point convincingly to a command democratically placed in the constitution itself. After all, when the constitution prohibits some action, even elected officials or a direct plebiscite are denied legal authority to take that action. But the strain on democratic theory increases with doubts about the cogency or the relevance of the asserted obstacles, until the last attenuated link to a preexisting mandate snaps and is replaced by an unadorned exposition of why the challenged law fails the court's vision of personal rights or the just society.

It is in this sense that constitutional theory today engages in a search for the legitimacy of judicial review, of judicial policymaking, in Professor Perry's words, "that goes beyond the value judgments established by the framers of the written Constitution."⁶ It is not the first time. Half a century ago, as now, the most vulnerable Supreme Court decisions were those that could show no plausible source other than that wondrous construction "substantive due process," for it is difficult with a straight face to tie these decisions, whatever their other merits, to the use of the words "due process" in the fifth or the fourteenth amendment. At that time the criticism was directed at the unconvincing misuse of these amendments to strike down laws protecting workers or consumers and other business regulations, and, when the critics became a majority in the Supreme Court in 1938, the Court banished the embarrassing formula for more than thirty years.

Today's theorists are at least as doubtful about the Supreme Court's premises. The difference is that, unlike their fathers in the trade, they do not aim to test and displace the Court's conclusions but to save them.⁷ Their chief concern is not with the Court's approach to freedom of speech, freedom of the press, and freedom of

⁶ M. PERRY, *supra* note 4, at ix.

⁷ Earl Warren became Chief Justice 30 years ago, and many of the present generation of constitutional law teachers clerked at the Court when its theoretically difficult holdings and doctrines were pronounced. Deans Choper and Ely and Professors Gunther and White clerked for Chief Justice Warren, Dean Wellington for Justice Felix Frankfurter, Dean Sandalow for Justices Harold Burton and Potter Stewart, Professors Parker and Tribe for Justice Stewart, Professor Fiss for Justice William J. Brennan, Jr., Professor Grey for Justice Thurgood Marshall, Professor Brest for Justice John M. Harlan, all during the tenure of Chief Justice Warren. As a one-time clerk who now depends on clerks I have the highest regard for that unique experience; my only point is that it explains why so many theorists equate constitutional theory with theories about judicial review as practiced by the Warren Court, particularly with respect to equality and the so-called right of privacy.

religion, or to issues of criminal procedure, all of which may be criticized but not for lacking any constitutional source. The crux of the effort concerns what has been done in the name of equality, even without the help of the equal protection clause, and especially what has been done in the name of personal freedom of choice.

The crucial problem, says Professor Brest, is that "the rights at stake—variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate associations—are not specified by the text or original history of the Constitution."⁸ To borrow a refrain from T.S. Eliot's *Sweeney Agonistes*, the agenda for the past decade and for the coming years of medical and social change is "birth, and copulation, and death . . . birth, and copulation, and death."⁹ Theory, then, for those who nevertheless defend this agenda, means justification. The search is not for legitimacy but for legitimation. And what must be jettisoned is the text and original history of the Constitution and, with them, John Marshall's case for judicial review.

There are ways to do this. One poses a choice between interpretive and noninterpretive judicial review. Interpretation then is equated with literalism, or defined so as to show it to be impossible. The texts are old and usage has changed over time. Even when they were drafted, they probably meant different things to the drafters and others who debated and ratified them. History is fallible, both in preserving data and in assessing their significance. Indeed, the authors may not have intended to confine posterity to their own understanding of the text. Moreover, they probably meant their written guarantees only as selected specifications of wider principles and sometimes took care to say so, for instance in the ninth amendment. In short, we are told that text and history are endlessly manipulable, and the honest course is to abandon the pretense and openly embrace some other justification for overriding the legislative process.¹⁰

⁸ Brest, *supra* note 1, at 1064 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973)). See also P. BOBBITT, *supra* note 2, at 96-97 (adding *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977), and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)).

⁹ T.S. ELIOT, *COLLECTED POEMS 1909-1935*, at 147 (1936).

¹⁰ Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

All this, says Dean John Ely, leaves constitutional theory in a quandary.¹¹ We are offered a number of ways to escape it. Perhaps the most sensible is simply to deny that the choice is between literalism and ad lib improvisation. The idea that one need not play written notes to remain scrupulously faithful to a theme should, after all, be easy for a nation that invented jazz.

Professor Charles Black makes the valuable point that important assumptions and consequences are implicit in the constitutional structure.¹² Professor Karst, in last year's Sibley Lecture and elsewhere, maintains that equality among individuals is implicit in a constitution founded on citizenship and in turn implies nearly everything else.¹³ Ely defends judicial review when and to the extent that it reinforces the premises of representative government.¹⁴ There are other attempts to go beyond strict adherence to the original understanding and yet give current decisions some footing in a preexisting constitution. Brest coins the label "moderate originalism"¹⁵ for all such attempts, and he and other critics will have none of it. If we cannot or will not today decide according to the actual historic understanding of a text, as demanded by the redoubtable Raoul Berger, then the claim to have such a footing is a sham and we need another principle of legitimacy.

Candidates for such a principle include versions of fundamental rights, values, or ideals which are sought in contemporary consensus, or in tradition, or in some determinable value system even contrary to majority values. Another theory assumes that politics must pursue only what can be defended as the public welfare. All these theories insist that courts must control legislation in the name of constitutional law, but they also undertake to free constitutional law from the aging Constitution. Given that delicate mission, naturally they are easy targets for counterattacks from less exuberant theorists on the right¹⁶ and on the left from more radical

¹¹ Ely, *Toward a Representation Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

¹² C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

¹³ Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

¹⁴ J. ELY, *DEMOCRACY AND DISTRUST* (1980).

¹⁵ Brest, *supra* note 1, at 1089.

¹⁶ Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465 (1983); Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981);

critics who question the significance of the whole enterprise.¹⁷

I have unmercifully compressed more than you perhaps wanted to know about the acrobatics in the main tent of the theoretical circus. Actually, the theories and countertheories are brilliant, articulate, erudite, often witty, full of serious purpose, and well worth reading. The show itself is good fun, if your taste runs to such things as Tom Stoppard's plays.¹⁸ Those less fond of theory for its own sake, who include most law students and lawyers, may wonder whether anything practical follows from it.

One answer is that theory can shape the choice of good or bad arguments. Philip Bobbitt's interesting book¹⁹ presents constitutional theory as a typology of arguments that may or may not be persuasive for judicial review. Bobbitt examines in turn historical argument, textual argument, doctrinal argument, prudential argument, structural argument, and ethical argument. We shall return to these. But let us for the moment leave constitutional theory in its quandary and turn to the sideshow in the smaller tents of the state courts.

These should interest the practical sorts, for the state courts still are where most lawyers practice most of the time and where most people's rights are decided. Of course, most of these are rights under state statutes and common law, not constitutional rights. But that fact itself is significant, as we shall see, and there is at least one important exception. The exception is the state criminal process, which handles vastly more cases than the federal courts.²⁰

Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

¹⁷ Tushnet, *supra* note 10, at 824-27; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 573 (1983). For a self-designated spokesman for "the generation of the 1960's," see Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

¹⁸ T. STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* (1967); T. STOPPARD, *JUMPERS* (1972); T. STOPPARD, *TRAVESTIES* (1974).

¹⁹ See P. BOBBITT, *supra* note 2.

²⁰ In Oregon, for instance, 104,479 criminal cases were filed in state courts compared to 158 in the U.S. District Court. See OFFICE OF THE STATE COURT ADMINISTRATOR, TWENTY-NINTH ANNUAL REPORT RELATING TO JUDICIAL ADMINISTRATION IN THE COURTS OF OREGON (1982); ADMINISTRATIVE OFFICE OF THE COURTS—STATISTICAL ANALYSIS AND REPORTING DIVISION, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE-MONTH PERIOD ENDING DECEMBER 31, 1982 (1983). Each of these cases potentially involves the right to counsel, the

The bulk of constitutional caselaw is not about the validity of laws but about the conduct of law enforcement in default of legislative directives.

III. DISENTANGLING STATE LAW IN STATE COURTS

State courts function in a more complex legal world than the Supreme Court of the United States. The Supreme Court's agenda consists only of questions arising under the Constitution and the laws and treaties of the United States. The Court interprets the laws of only one legislative body, the Congress, from which virtually all other government action must derive its authority, and the Court needs to attend to only one court's precedents and doctrines, its own. When state laws are the object of Supreme Court attention, their substance is not the Court's responsibility. This makes briefing a federal case, if not easy, at least relatively straightforward.

State courts, by contrast, face the legislative output not only of the state legislature but of many other elected bodies. Some of the acts of these bodies must be based on statutes and some not. State courts also are responsible for the state's common law. As one common law court among equals, a state supreme court is accustomed to being offered precedent from other states, too often without regard to differences in the other state's written laws. Beyond this, every state court also is bound to apply federal law, not only the United States Constitution, acts of Congress, and treaties, but also federal regulations, executive actions, and caselaw based on nothing more than federal jurisdiction.²¹

These complexities have changed the familiar work of common law courts and counsel, who habitually rely on case citations and quotations from prior opinions to solve all problems. The states themselves have increasingly complex laws and regulations. Add the fact that today's lawyers learned about public law first and perhaps only in a first-year course in constitutional law and sin-

right to a proper charge, the right to jury trial, the right to legal evidence, and many more.

²¹ See, e.g., *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962).

State courts even may have to consider national foreign policy concerns that have not been formalized in any agreement or other executive action. This happened when the Supreme Court invalidated Oregon's reciprocal inheritance laws, *Zschernig v. Miller*, 389 U.S. 429 (1968), and it has interesting implications for the role of international human rights in domestic courts.

cerely believe that stating the desired outcome as a constitutional claim obviates any need to untangle lesser issues. It is not surprising, then, to find cases argued and decided on grounds drawn directly from Supreme Court opinions with neither counsel nor court stopping to examine the state's law. Nor is it surprising that state courts hesitate to add to the complexity by recognizing the separate level of the state's constitution ahead of the federal constitutional claim.

Yet in many states this reluctance is yielding to the original logic of the federal system. It once again is becoming familiar learning that the federal Bill of Rights was drawn from the earlier state declarations of rights adopted at the time of independence, that most protection of people's rights against their own states entered the federal Constitution only in the Reconstruction amendments of the 1860's, and that it took another hundred years and much disputed reasoning to equate most of the first eight amendments with due process under the fourteenth. Of course this did not repeal the guarantees found in the states' own constitutions. But, in fact, most state courts had a poor record of taking seriously the individual rights and fair procedures promised in their states' bills of rights. Those guarantees rarely seemed to demand anything other than the familiar and accepted practices in the local communities and courthouses. State courts issued and still issue gag orders against the press without much concern whether their constitutions guarantee freedom to speak, write, or publish on any subject whatever. State courts did not probe very deeply into what a state's promise of equal privileges and immunities might mean for blacks or for women. Issues such as prayer in the public schools or trials without counsel and the use of illegally seized evidence did not rank high among the state courts' priorities.²²

As a result, most of the individual rights and fair procedures that have occupied the Supreme Court's agenda for the past thirty years became associated entirely with federal law, even when they also were guaranteed in the state constitutions. Both academic commentary and lawyers' jargon reinforced the effect. People do not claim rights against self-incrimination; they "take the fifth" and expect "*Miranda* warnings." Unlawful searches are equated

²² On the last point, Georgia was an exception. See *Underwood v. State*, 13 Ga. App. 206, 78 S.E. 1103 (1913).

with fourth amendment violations. Journalists do not invoke freedom of the press; they demand their first amendment rights. All claims of unequal treatment are phrased as denials of equal protection of the laws.

This in turn creates a quandary for state courts, for lawyers, and, I might add, for law schools and students. The rediscovery of state constitutional law is still very new. Contemporary discussion in the law reviews began only in 1969.²³ The latest bibliographies now list more than 60 items without claiming to be exhaustive.²⁴ For state courts the problems are both practical and theoretical. Let me mention first the practical problems that a court must resolve before there can be any coherent view of the state's constitutional law.

Ordinarily an appeal is limited to issues properly raised first in the trial court and then on appeal. What should a state court do when faced with a constitutional claim that is phrased in federal terminology and cites only federal cases, though there could be an equivalent claim under the state constitution? Should the court translate such a claim into its state analogue, or should it proceed with the federal claim only? Must constitutional claims be identified by brand, or is there such a thing as generic constitutional law?

Obviously it is easier to ignore potential issues of state law when counsel cite only the familiar federal cases and formulas. But this course is less logical, because it places a state court in the position of holding that the state falls short of a national standard which the state law, if properly invoked, in fact would meet or exceed. When the state issue is omitted, an appellate opinion must take care to explain that it sets no precedent for the state's law. Moreover, in criminal cases, the bulk of all constitutional litigation, a failure to raise the possible state issue leaves open a later claim of inadequate assistance of counsel. If a court will decide only issues that the parties have argued, it needs a way to make parties argue

²³ Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969).

²⁴ Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 972-74 (1982); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 396 n.70 (1980); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 n.20 (1982). Of the 60 items listed in the bibliographies, only six were published before 1969.

the state law before the federal issue.

The practical problems intersect with the theoretical. In recent years some advocates and courts began to couple their customary briefing of a federal constitutional claim with a citation to the parallel clause of the state constitution and to conclude that the challenged action violated, for instance, both the fourth amendment and the state's guarantee against unreasonable searches or seizures. That proved to be bad practice because it is bad theory. The Supreme Court promptly disregarded such tacked-on state citations and at the end of the 1982 Term told state courts to speak "clearly and expressly" if their decisions are based on "bona fide separate, adequate, and independent grounds."²⁵ This may lead a conscientious trial or intermediate court to divide every typical constitutional claim into its familiar federal component and a state parallel component and to decide both whenever the court has little precedent under state law. In the state's highest court, of course, a successful state claim makes the federal issue irrelevant.²⁶

Why do not state courts always apply state law before reaching a federal question? In fact they routinely do so with state statutes or constitutional provisions that have no federal parallel. But when the Supreme Court has decided a point, many state courts take the decision as a kind of benchmark, presumptively correct also for state law. When they depart from federal decisions, state courts often begin by explaining that the Supreme Court permits them to interpret their state's law in their own way—a sign of how far we have lost sight of basic federalism.

If state courts either follow the Supreme Court's lead or feel obliged to explain why not, the reason is not only that counsel fail to brief state law. In the past thirty years, there have been far

²⁵ *Michigan v. Long*, 103 S. Ct. 3469 (1983).

²⁶ *But see State v. Badger*, 141 Vt. 430, 448, 450 A.2d 336, 346 (1982) (deciding both state and federal claims separately). For the consequences of citing both state and federal constitutional premises, and a bitter complaint about *Michigan v. Long*, see *State v. Jackson*, — Mont. —, 672 P.2d 255 (1983) (Shea & Sheehy, JJ., dissenting).

The Oregon Supreme Court recently dealt with these problems when the United States Supreme Court remanded *Oregon v. Kennedy*. 456 U.S. 667 (1982). This was a double jeopardy case in which the intermediate court had skipped over Oregon's double jeopardy clause. After additional briefs and arguments, the Oregon Supreme Court stated a somewhat more protective rule than the United States Supreme Court's holding under the fifth amendment and suggested that hereafter Oregon courts tell parties either to brief their state claims or to abandon them. *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983).

more Supreme Court decisions on freedom of expression, on equal protection, and on criminal procedure than in any state court. As I have said, counsel or courts looking for scholarly help on these issues find only commentary on Supreme Court cases and doctrines. Our law clerks come prepared for nothing else. As Justice Charles G. Douglas of New Hampshire has deplored, "[t]he federalization of all our rights has led to a rapid withering of the development of state decisions based upon state constitutional provisions."²⁷ Wisconsin's Justice Shirley Abrahamson also notes "an understandable human tendency on the part of state judges to view a Supreme Court decision on a particular topic as the absolute, final truth."²⁸ And she adds: "It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution."²⁹

Because the state is bound to comply with federal standards in any case, divergence from Supreme Court doctrines is criticized for making daily life in the trial courts more uncertain and difficult. Justice Stanley Mosk of the California Supreme Court, which has a distinguished but intermittent record of independent constitutional holdings, counters that such independent holdings can bring stability to the state's law in the face of frequent inconsistencies and changes in Supreme Court doctrines.³⁰ It is an illusion to seek stability by following the Supreme Court in deciding a state claim; for once it has been decided, does the decision not continue to bind the state's courts even when Supreme Court doctrine changes? Still, most courts that take an independent course tend to look first to those doctrines and then discuss whether or why the state should, as it is put, "go further" than the Supreme Court. The effect is to make independent state grounds appear not as original state law, but as a kind of supplemental rights that require an explanation.

Justice Stewart Pollock of the New Jersey Supreme Court re-

²⁷ Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1140 (1978). Justice Douglas continued: "The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from 'federally' oriented law schools." *Id.* at 1147 (emphasis in original).

²⁸ Abrahamson, *supra* note 24, at 964.

²⁹ *Id.* at 964.

³⁰ Mosk, *Discussion*, CENTER MAG., Sept.-Oct. 1981, at 17-18.

cently discussed three different ways in which state courts deal with overlapping state and federal claims.³¹ The Vermont court, for example, has chosen to decide the state and federal claims in separate parts of one opinion.³² This, however, makes the discussion of the federal claim pure dicta when the state claim succeeds. A similar practice in California was criticized because it implies that the result could not be changed by amending the state constitution.³³ The New Jersey court itself follows the supplemental approach I have mentioned, reaching a state claim only when federal doctrine fails to provide protection.³⁴ Justice Pollock observes that state courts should not look to their own constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled. He believes that a court can develop criteria to decide when to diverge from federal law. But in my view, to ask when to diverge from federal doctrines is quite a different question from taking a principled view of the state's constitution; in fact, this supplemental or interstitial approach prevents a coherent development of the state's law.

My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.³⁵ That approach has recently been followed by the Oregon Supreme Court.³⁶

³¹ Remarks of Hon. Stewart Pollock, New Jersey Supreme Court, on Reliance on State Constitutions at Conference of Chief Justices in Savannah, Ga. (July 25, 1983).

³² See *State v. Badger*, 141 Vt. 430, 450 A.2d 336 (1982).

³³ Bice, Anderson and the Adequate State Ground, 45 S. CAL. L. REV. 750 (1972); Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

³⁴ *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982).

³⁵ Linde, *Without "Due Process"—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Linde, Book Review, 52 OR. L. REV. 325 (1973) (reviewing B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971)).

³⁶ In *Sterling v. Cupp*, the Oregon Supreme Court stated:

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

290 Or. 611, 614, 625 P.2d 123, 126 (1981). See also *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983), and cases cited therein, *id.* at 262, 666 P.2d at 1318; *Hewitt v. SAIF*, 294 Or. 33, 41-42, 653 P.2d 970, 975 (1982).

I think most courts would take that approach for granted when a state statute rather than a state constitution is involved. Of course we pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers. The crucial step for counsel and for state courts, however, is to recognize that the Supreme Court's answer is not presumptively the right answer, to be followed unless the state court explains why not.

The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.

This, in summary, is the complex world of the state court in our federal system, a system that leaves the individual states responsible both for most civil and criminal laws and also for their own constitutions, subject to several layers of federal law. You will appreciate the temptation to reduce the complexity by leaving at least one layer, constitutional law, to the specialists in Washington, D.C. Nevertheless, courts are resuming their responsibility for the constitutional law of their states. As I have said, the question for lawyers as well as judges is not whether to do so, but how. That returns us to constitutional theory—how contemporary theory is relevant to the states, and how the states in turn may be relevant to constitutional theory.

IV. THEORY AS ARGUMENT

You will recall the quandary in which we left the theorists. Their quandary was how to justify Supreme Court invalidation of laws on grounds that do not plausibly apply some preexisting constitutional norm. Are the problems of sources and methods of judicial review identical in the state courts, or are they significantly different?

The most important answer for lawyers, and also for theorists, is that there is no single answer to this question for all states. State courts do not all face identical problems with sources, and they do not and need not follow identical theories of judicial review. My

own experience is with only one among fifty state supreme courts, and anything I might say about theory or practice in some states could be contradicted by examples from others. In fact, an examination of state court opinions in different states, or in one state over the decades, will show a wide swing between the most literal positivism and the blithest unconcern with any premise whatever, wider than any in the history of the United States Supreme Court. Nonetheless, are there reasons common to the position of the states to explain why state courts will welcome some premises more than others? I think there are.

Consider Philip Bobbitt's six types of arguments: the historical, the textual, the doctrinal, the prudential, the structural, and the ethical.³⁷ Three of these, those drawn from the history, the text, and the structure of the constitution, seek to attribute a present decision to a preexisting source. They are "originalist" arguments, in Paul Brest's term.³⁸ The other three, ethics, prudence, and judge-made doctrines, are "nonoriginalist" in the sense that they do not depend on showing that their premises were earlier made part of the constitution.

When these are viewed merely as lawyers' arguments, their use is no great mystery. Any advocate likes to persuade the court that a desired result is fair, just, moral, and good public policy, and most are only too willing to let the court choose its preferred route to that result—so eager, in fact, that some decline to commit themselves to any theory at all. The advocate with the less appealing side of the case in turn has the harder task of showing that the constitution does not command what the court might consider justice or good policy, and that neither text nor history nor any implicit principle supports the opposing view. Most lawyers only have one case at a time to win, so any concern about the choice of reasons and their implications is left to the court. Fortunately, courts are not obliged to explain that what is constitutional is also good, nor that everything good also is constitutional.

Still, even when you have an appealing claim, I cannot recommend adopting the nonoriginalist theory of judicial review in an actual argument to a court. Your argument had better be linked to some premise that can be said to be constitutional law apart from

³⁷ P. BOBBITT, *supra* note 2, at 3-119.

³⁸ Brest, *supra* note 1, at 1064.

the desired result in the case itself. Is this demand for a link to the constitution only a professional charade?³⁹ If nonoriginalist arguments are good constitutional law, why should you not ask a court simply to apply the enlightened moral consensus or societal values of the day to the merits of your case and cheerfully argue that nothing in the text or the history of the constitution is important for that purpose?

If you were to do that, you might lose even the most appealing case, and not for failing to play the professional game. The link to a constitution is essential for anyone to deal responsibly with the problem that the contemporary theorists ignore, the problem of federalism in constitutional rights. A state court cannot responsibly ignore it, and therefore neither can a responsible advocate.

An argument that invokes only extraconstitutional theories to override legislative enactments and claims that a link to a constitution does not matter would pose an insurmountable problem for either court, state or federal, for it does not offer a convincing way to explain why an extraconstitutional value belongs at the state or at the national level. The United States Supreme Court, whatever motivates it on the merits, necessarily must insist that such a claim arises under something in the Constitution of the United States, for this alone gives the Court jurisdiction under article III of the Constitution. If a state court, in turn, is to strike down a law enacted in its own state without asserting that such a law would be void throughout the nation, the court must have a basis in its own state's constitution.

Each of Bobbitt's six types of arguments may lead to decisions that differ from one state to another and from decisions under the United States Constitution.

A. *Text*

Some state courts make too much of identity or slight differences between the texts of similar constitutional clauses. The first step is to overcome the sense that divergence from Supreme Court doctrines is more legitimate when the state's text differs from its

³⁹ Professor G. Edward White, who defends judicial review for compliance with "moral intuition" and "fundamental values," distinguishes between "intraprofessional" and "supraprofessional" constitutional theories. White, *Reflections on the Role of the Supreme Court: the Contemporary Debate and the "Lessons" of History*, 63 *JUDICATURE* 162 (1979).

federal counterpart than when they are the same. In truth the state court is equally responsible for reaching its own conclusion in either case. A textual difference only makes this easier to see. It may alert courts and counsel to look past familiar caselaw and actually to read the state's text, on the assumption that those who drafted it were not incompetent in the use of English. It may alert them also to look into the origins and history of the state's clause.

In fact, the variance among texts will surprise you. Many states have clauses without a federal parallel; for instance, twelve states have adopted an equal rights amendment,⁴⁰ and eleven have written a "right of privacy" into their bills of rights.⁴¹ Some, including both Georgia and Oregon, specifically command humane treatment of persons arrested or in prison.⁴² Other clauses do have federal parallels but with important differences.

Take, for instance, the common provision that no citizen or class of citizens is to have any privileges or immunities that are not equally available to all citizens on the same terms.⁴³ Such provisions long antedated the Civil War, and their target, prohibition of

⁴⁰ The following states have equal rights provisions in their constitutions: CAL. CONST. art. I, § 8; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20 (1965, amended 1974); HAWAII CONST. art. I, § 3 (1968, amended 1982); ILL. CONST. art. I, §§ 17, 18; LA. CONST. art. I, §§ 3, 12; MD. CONST. Declaration of Rights art. 46; MASS. CONST. art. VI; N.M. CONST. art. II, § 18; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1 (1889, amended 1972); WYO. CONST. art. I, § 3.

The fate of state equal rights guarantees someday may furnish another illustration of the relationship between state and federal doctrines: If a federal equal rights amendment eventually is adopted, should Supreme Court methodology in interpreting that amendment displace a state court's precedents under the state's preexisting provision?

⁴¹ The following states have privacy provisions in their constitutions: ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 12; HAWAII CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MISS. CONST. art. III, § 23; MONT. CONST. art. II, §§ 9, 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

⁴² GA. CONST. art. I, § 1, para. 17, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison." OR. CONST. art. I, § 13 states: "No person arrested or confined in jail, shall be treated with unnecessary rigor." *See Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981) (opposite-sex searches held to be unnecessary invasions of prisoners' dignity).

⁴³ The following states have such privileges and immunities clauses: ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(b); CONN. CONST. art. I, § 1; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KAN. CONST. B.R. § 2; KY. CONST. B.R. § 3; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OR. CONST. art. I, § 20; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12; WYO. CONST. art. I, § 3.

special privileges, was quite different from that of the fourteenth amendment's equal protection clause. Your new Georgia bill of rights, in fact, just added the second type to the older one.⁴⁴ In Oregon we have noted that the state's clause demands equal treatment among individuals as well as among classes and therefore calls for something more than the Supreme Court's familiar classification formulas.⁴⁵

Analogous contrasts can be drawn among clauses concerning free speech, the right to bear arms, judicial remedies, and many others.⁴⁶ But identity or differences among texts is not decisive; each is only a starting point for further inquiry.

B. History

The several states also present different problems regarding the use of history in constitutional law. Historical argument may focus on the legislative history of a particular clause, or on the social and political setting in which it originated, or on the fate of the clause in subsequent constitutions.

A recent study notes that the fifty states have had no fewer than 145 constitutions, not counting Georgia's latest one.⁴⁷ The second generation of American constitutions and succeeding versions were drafted under different geographic and historic conditions and reflected different concerns from the original 18th century charters, but western settlers often adopted large portions verbatim from another state.⁴⁸ Does this give extra weight to that state's judicial interpretations? Oregon still has its original 1859 constitution, while Georgia is on its tenth version. Does a state's reenactment of large parts of an earlier text endorse prior interpretations of that text? These are lawyer's arguments about statutes; they should have little force without evidence that such a result was deliber-

⁴⁴ GA. CONST. art. I, § 1, para. 2. This provision states: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." *Id.*

⁴⁵ See *State v. Clark*, 291 Or. 231, 630 P.2d 810 (1981); *State v. Edmonson*, 291 Or. 251, 630 P.2d 822 (1981).

⁴⁶ See Sachs, *Fundamental Liberties and Rights: A 50-State Index*, CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE (Legislative Drafting Research Fund of Columbia University 1980).

⁴⁷ Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: THE J. OF FEDERALISM 57 (1982).

⁴⁸ *Id.* at 63-66.

ately intended.

Recorded battles over specific constitutional clauses, however, can both elucidate and compel an interpretation. Many states have known battles over grand juries, local home rule, the initiative and referendum, the status of aliens or nonwhite citizens, taxes, and spending. Often you cannot argue intelligently about specific clauses without knowing their history.⁴⁹

Yet it does not follow that larger principles are confined to what the generation that adopted them was ready to live by. Theorists on both sides of the debate point out that the sponsors of the fourteenth amendment said that it would not alter existing practices in the schools or in elections. That is of doubtful importance when the enactment of a far-reaching principle is seen as a political decision.⁵⁰ Most political action depends on persuading a majority that the act will cause them no pain. No doubt the sponsors would have agreed that twenty other practices would survive unchanged, if the questions had been raised. Opponents know enough to get a limitation into the text rather than mere assurances in legislative debate, if they have the votes. Proponents of the wider principle, in turn, may disagree with the sponsors' concession but keep quiet rather than risk a limiting amendment. Each must expect to live with his choice. Agreement on principle may be possible if its implications are safely postponed to one's successors.

It was not uncommon for early legislatures to overlook principles that had just been announced in a newly adopted state constitution, for instance, to mix public offices in disregard of the separation of powers.⁵¹ Not long ago, the Oregon Supreme Court held that a constitutional provision for open courts forbade closing ju-

⁴⁹ See Hachey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485 (1979); Utter, *The Washington Declaration of Rights: A Guide for Washington Judges*, 7 U. PUGET SOUND L. REV. — (1984); Willner, *Constitutional Interpretation in a Pioneer and Populist State*, 17 WILLAMETTE L. REV. 757, 777-78 (1981).

⁵⁰ See, e.g., DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO Sr. L.J. 261 (1981). Tushnet points out that treating broadly phrased constitutional clauses as enacting a "principle" or "concept" still poses the question of what level of generality can be ascribed to the decision to enact the clause. Tushnet, *supra* note 10, at 790-92. See also Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59, 107-08 (1978).

⁵¹ See, e.g., Bunn & Gallagher, *The Standard of Review of Administrative Rules in Wisconsin*, 1982 WISC. L. REV. 691.

venile proceedings to the public.⁵² The state argued that a statute enacted at the time of the constitution permitted judges to exclude the public, so that the constitutional provision was not meant literally. Chief Justice Arno Denecke responded:

This is a dubious inference. Contemporaneous legislative actions should not necessarily be given much weight when construing constitutional principles. Constitutional draftsmen are concerned with broad principles of long-range significance; legislators are more likely to be concerned with the immediate. We have observed a political temptation to adopt an ideal as an abstract principle and then substantially undercut the ideal in order to accommodate an immediate concern. For example, the political generation that adopted the first amendment also attempted to suppress political criticism by enacting the Alien and Sedition Acts.⁵³

It is a different question what principle was meant in the first place. Did drafters who used the term "privacy" before *Griswold v. Connecticut*⁵⁴ mean anything at all like those privacy clauses that some states have adopted since that decision? Did these later states endorse that vague and evocative term only in the contemporary context of procreation, or did they mean to give courts a broad charter to invent future areas of personal autonomy in such matters as drug use, suicide, and all kinds of sexual relationships? By contrast, why did the Washington constitutional convention a century ago remove a clause identical to the fourth amendment and substitute one that forbids disturbing a person in his "private affairs" or "invading his home," not, let me note, without a warrant or "unreasonably," but rather "without authority of law"?⁵⁵ The Washington convention's records give no explanation whatever.⁵⁶ To me it sounds like a requirement of legislative authorization for executive law enforcement action—a truly radical idea compared to conventional fourth amendment law, though it is

⁵² *State ex rel. Oregonian Publishing Co. v. Deiz*, 289 Or. 277, 281, 613 P.2d 23, 26 (1980).

⁵³ *Id.* at 284, 613 P.2d at 27.

⁵⁴ 381 U.S. 479 (1965).

⁵⁵ WASH. CONST. art. I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

⁵⁶ See *State v. Ringer*, 100 Wash. 2d 686, 674 P.2d 1240 (1983); *State v. White*, 97 Wash. 2d 92, 640 P.2d 1061 (1982); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980).

central to European ideas of legality.⁵⁷

A different question of history arises when a clause comparable to the ninth amendment provides that unenumerated rights are "retained" by the people.⁵⁸ When a state repeats that guarantee in successive constitutions, does it refer to unenumerated rights recognized at the time of the first or of every subsequent constitution?

C. Doctrine

Arguments and opinions in state courts tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in the law reviews, and taught in the law schools. Many state courts uncritically adopted the doctrine called "substantive due process" as a way to apply prudential and ethical tests to legislation and never gave it up.⁵⁹ The resolution of constitutional issues consists in "balancing competing interests." Legal classifications are subjected to various "levels of judicial scrutiny." Infringements of freedom or equality may be justified by "a compelling state interest." A search or seizure is invalid only to the extent that it invades "a legitimate expectation of privacy." That

⁵⁷ The United States Supreme Court unhelpfully tends to write that police are "authorized" to do this or that when the Court means only that, if a state does choose to authorize the act, it does not violate the fourth amendment.

⁵⁸ Theorists seeking a source for judicial invention of new rights understandably have seized upon the ninth amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. There are two obstacles. The term "retained" implies rights of a constitutional nature existing at the time the guarantee was enacted, and the ninth amendment was directed against federal action and requires another source, presumably the 14th amendment, before it can be cited against a state. See *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring).

The same "savings clause" is common in state constitutions. See, e.g., GA. CONST. art. I, § 1, para. 28 (preserving "any inherent rights . . . hitherto enjoyed"); OR. CONST. art. I, § 33 (preserving other rights "retained by the people"). If such a clause is not to prevent every change in laws affecting someone's "rights" toward someone else, the asserted right must plausibly be one that, at the time the clause was enacted, would have been regarded as a right against governmental interference and sufficiently important to be of constitutional magnitude. See, e.g., *State v. Burrow*, 293 Or. 691, 701, 653 P.2d 226, 238 (1982) (Linde, J., dissenting). See also *In re J.P.*, 648 P.2d 1364 (Utah 1982) (parental rights retained as unenumerated rights).

⁵⁹ See Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1958); Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); Paulsen, *The Persistence of Substantive Due Process in the States*, 24 MINN. L. REV. 91 (1950).

is constitutional law, right? Not necessarily. All these are only contemporary verbal formulas of the United States Supreme Court, as ephemeral as the "original package" and "liberty of contract" doctrines proved to be in their day and "police power" deserves to be. None of these current formulas were constitutional law when I studied law, and each may be replaced by the next generation of Supreme Court justices. A state's constitutional law need not employ any of these doctrines, if you know how to persuade the state court of something better.

A state court need not reduce every issue to a balancing of interests. In deciding the issue of open courts, the Washington Supreme Court employed a balancing approach;⁶⁰ the Oregon court rejected it.⁶¹ A state court need not label some rights as "fundamental" and others not, for instance education or housing.⁶² It need not speculate what it would do if the legislature or the voters expressly designated some objective as a "compelling state interest"; it may avoid that formula in the first place. A state court need not explain the exclusion of evidence only as a pragmatic effort to deter unlawful police conduct.⁶³

Every law student learns that the Supreme Court interprets equal protection in terms of different levels of judicial scrutiny, but state judges may not agree that a formula for judicial action properly describes what is first a limitation on governmental action. They may decline to explain the state's guarantee of equal treatment in terms that do not describe the kind of laws legislators may not make, but only degrees of the judges' own scrutiny, even though this solipsistic formula appears in the interminable literature of federal equal protection doctrine.

In another lecture some years ago, I argued that laws need not be rational means toward some specific end.⁶⁴ This drew a number of responses defending judicial review for rationality as a good thing. These responses, however, missed the crucial point, the point that most constitutions impose no obligation on lawmakers

⁶⁰ See *Federated Publications, Inc. v. Kurtz*, 94 Wash. 2d 51, 615 P.2d 440 (1980).

⁶¹ See *State ex rel Oregonian Publishing Co. v. Deiz*, 289 Or. 277, 613 P.2d 23 (1980). Cf. *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318 (1980).

⁶² See, e.g., *South Burlington City NAACP v. Mt. Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983); *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979).

⁶³ See, e.g., *State v. Davis*, 295 Or. 227, 236, 666 P.2d 802, 808 (1983).

⁶⁴ Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

or on the people themselves to enact only rational laws.⁶⁵ A decision to set aside legislation should have some constitutional grounds beyond being a useful judicial function.

One state may adopt such grounds for a doctrine and another may not. Possibly some sections of your Georgia constitution demand that laws rationally serve public goals.⁶⁶ Oregon has no similar text; instead it has a strong tradition of direct legislation by the people. Doctrines themselves are not the constitution, either state or federal; they are only the judicial clichés of a generation.

State courts, I believe, are less wedded to mere doctrines even when they are committed to stare decisis, perhaps from intellectual modesty, perhaps because so many constitutional doctrines were not their own in the first place. The best arguments to an appellate court do not take judicial doctrine for granted; they are built upon curiosity about text and history and about the challenged law, and they invite the court to examine and improve past formulas for itself.

D. Structure

I shall say little about structural arguments except that state constitutions display a far greater (in fact, a bewildering) structural variety compared with that of the United States. Do district attorneys and school boards have more legal autonomy from state-wide standards merely because they are elected? Does electing a public utility commission or university board of regents imply any autonomy from the legislature or governor?⁶⁷ Must professional canons afford an elected prosecutor greater freedom of speech to ex-

⁶⁵ Bennett, "Mere" Rationality in the Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049 (1979); Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980); Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981).

⁶⁶ See, e.g., GA. CONST. art. I, § 2, para. 1 ("All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them."); *id.* § 1, para. 2 ("Protection to person and property is the paramount duty of government and shall be impartial and complete . . ."); *id.* § 1, para. 7 ("All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship.").

⁶⁷ See, e.g., *id.* art. IV, § 1, para. 1 (creating five elected members of the Public Service Commission); MICH. CONST. art. 8, § 5 (creating eight-member elected boards for state universities).

plain his official actions than, for instance, an appointed U.S. attorney or a civil servant?⁶⁸ Does the tort privilege for legislative debate limit a citizen's liability for defamation in debate of an initiative measure?⁶⁹ State legislatures commonly create agencies composed of interest group representatives; when is this an impermissible delegation of governmental power to private groups?⁷⁰ Before reaching a first amendment issue, recent litigation in Louisiana disputed whether a law requiring the teaching of "creation science" invaded a function constitutionally placed in an independent board.⁷¹ Untangling the relationship between state and local governments can make *National League of Cities v. Usery*⁷² look like child's play. Structural issues are the most truly constitutional issues, and they make the greatest demands on counsel's sense of constitutional theory.

E. Prudence

"Prudential argument," in Bobbitt's term, describes two kinds of reasoning. One is that a court should be concerned about its own role and the wisdom of letting itself be drawn into a particular dispute. This preoccupation, hailed as the "passive virtues" by Professor Alexander Bickel,⁷³ was a dominant theme of Justice Felix Frankfurter and his disciples.⁷⁴ Its focus, like that of today's theorists, was on the judicial institution rather than on the constitutional law of government. State courts do not share this preoccupation. State law often has lax rules of standing and mootness. Several states provide for judges to give advisory opinions.⁷⁵ If a

⁶⁸ See *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983).

⁶⁹ See *Adamson v. Bonesteele*, 295 Or. 815, 830, 671 P.2d 693, 700 (1983) (Linde, J., concurring).

⁷⁰ See *United Chiropractors v. Washington*, 90 Wash. 2d 1, 578 P.2d 38 (1978); *Humane Soc'y v. New Jersey State Fish & Game Comm'n*, 70 N.J. 565, 362 A.2d 20 (1976); *Commonwealth v. McKechnie*, 467 Pa. 430, 358 A.2d 419 (1976).

⁷¹ *Aguilard v. Treen*, 435 So. 2d 469 (La. 1983).

⁷² 426 U.S. 833 (1976); see GA. CONST. art. IX, § 11.

⁷³ A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

⁷⁴ P. BOBBITT, *supra* note 2, at 61-69; Gunther, *The Subtle Vices of the 'Passive Virtues'*—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 3 (1964).

⁷⁵ See Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949); Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 788-89 (1962). Frankfurter early criticized this device. Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

“political question doctrine” exists in a state court, I have not heard of it. What law students learn in the opening chapter of the typical casebook is not general constitutional law but federal jurisdiction.

But state courts are too vulnerable to prudential argument in the second sense, arguments about the pragmatic impact of the challenged law or of the desired judicial decision, about their benefits or costs as public policy. After a half century of realist orthodoxy, the notion that common law judges are policymakers is so firmly entrenched that it is uncritically carried over into reviewing the laws made by others. Such decisions do not depend much on facts actually presented to the court but rely simply on the experience of its members as former lawyers, legislators, and trial judges. In practice that is all there is to the “balancing” to which the Supreme Court has reduced contemporary constitutional law. Experience is hard to overcome by logic, as Holmes knew. But intuitive pragmatism is tempered in the state court when other states are shown to have adopted different policies and yet survived.

One of the “passive virtues,” however, deserves attention. It is both prudent and logical to avoid constitutional holdings when ordinary law suffices. That principle is often stated and more often ignored. A state court can hold that a police roadblock or search was not authorized by law before facing an issue under the fourth amendment or its state counterpart. A state court can interpret a regulation, or hold that it went beyond a statute, without reaching a constitutional issue. It can examine three levels of administrative delegation, procedure, and rules to decide whether a faculty committee has mishandled student admissions, whether its action was university policy, and whether such a policy was authorized by state law, rather than assuming that state law authorized something that the fourteenth amendment would not let it authorize.⁷⁶ A state court need not at once turn to the constitution for various immunities for a chief executive or other officials, as the United

⁷⁶ Cf. *Regents of the Univ. of Cal. v. Bakke*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *modified*, 436 U.S. 265 (1978); *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated per curiam*, 416 U.S. 312 (1974).

When constitutional battles over student hair styles split the federal circuits in the 1960's, a state court held simply that the subject was not within the delegated authority of school boards. *Neuhaus v. Federico*, 12 Or. App. 314, 505 P.2d 939 (1973).

States Supreme Court has done.⁷⁷

A competent argument can help the state court assure that the politically accountable policymakers face and decide an issue before the solution is frozen into constitutional law. This should apply, for instance, to the questions of life and death that arise from modern medical technology.⁷⁸ But the practice familiar to courts and counsel is to quote from cases, which often recite general constitutional formulas and skip arguments addressed to the state court's ordinary role in the state's law.

F. Ethics

Finally, what about appeals to the court's sense of social or moral values? Here is where the position of a state court differs most from that of the federal court.

On the one hand, a common law court is accustomed to arguments about right and wrong, about fairness and equity and social utility, in its ordinary responsibility for the state's law. State courts need not associate these with constitutional law, unlike a court that works only with federal statutes and otherwise must reach for the Constitution. Moreover, our daily work reminds us that most of the rights that are important in most people's lives are ordinary law, the laws under which we form and dissolve family relationships, incur and pay our debts, buy, sell, and own property, and pass it along at death. Major reforms have come by statutes, not by judicial decision, in such crucial settings as marriage, divorce, and adoption, in renting a dwelling, in fair labor standards,

⁷⁷ See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

⁷⁸ See *In re Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *Eichner v. Dillon*, 426 N.Y.S.2d 517, 73 A.D.2d 431 (1980). See also Baron, *Medicine and Human Rights: Emerging Substantive Standards and Procedural Protections for Medical Decision Making Within the American Family*, 17 FAM. L.Q. 1 (1983). A Canadian analysis, interesting for having to proceed without constitutional doctrines, is Dickens, *The Right to Natural Death*, 26 MCGILL L.J. 847 (1981). The subject has, in fact, been taken up by legislatures, first in California, Cal. Natural Death Act, 39A CAL. HEALTH & SAFETY CODE, §§ 7185-7195 (West 1976), and thereafter by a number of other states. See Baron, *supra*, at 30 n.108. The American preference for equating the moral analysis of difficult policies with constitutional law is illustrated in Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981). Another illustration is the legality of force-feeding hunger strikers. See Note, *Force-Feeding Hunger-Striking Prisoners: A Framework for Analysis*, 35 U. FLA. L. REV. 99 (1983).

and in compensation for injuries on the job. To repeat, state courts often can and should treat important problems under ordinary law, where they remain susceptible to future legislation, rather than reach by reflex for constitutional rhetoric.

On the other hand, a state court has reason for caution in describing even strongly held values as moral or social absolutes. First, a modest relativism in such matters is forced upon us by the federal system itself. When I studied law, New Yorkers who wanted a divorce without committing or pretending adultery had to go to Nevada. The states are still divided over the legal status of sin, such as gambling or various forms of sexual conduct. They may, like your Georgia constitution, prohibit lotteries but allow bingo.⁷⁹ Some states prohibit the sale of alcohol while others make it a profitable state business. A rule that may seem fundamental in one state is likely to be the opposite in one or more of the other forty-nine. Fortunately, the deepest division over fundamentals, legal segregation of the races, is behind us, and so, almost, is discrimination by sex.

A second reason for caution about moral values is that state constitutions, like state laws, are easily amended. When a court demonstrates in the most eloquent terms that the death penalty is a relic of barbaric vengeance contrary to the ideals of a humane society, what is the court to say when the people immediately amend their constitution to reinstate capital punishment?⁸⁰ Was the court wrong, or do constitutions matter more than fundamental values after all? If a state court can set aside initiated statutes in the name of fundamental values, why not initiated constitutional amendments adopted by the same simple majorities? But even

⁷⁹ GA. CONST. art. I, § 2, para. 8, states:

All lotteries, and the sale of lottery tickets, are hereby prohibited; and this prohibition shall be enforced by penal laws, except that the General Assembly may by law provide that the operation of a nonprofit bingo game shall not be a lottery and shall be legal in this state. The General Assembly may by law define a nonprofit bingo game and provide for the regulation of nonprofit bingo games.

GA. CONST. art. I, § 2, para. 8.

⁸⁰ The highest courts of Massachusetts and California declared that the death penalty violated their state constitutional bans against cruel and inhumane punishment. *See* District Att'y for Suffolk Dist. v. Watson, 381 Mass. 648, 664-65, 411 N.E.2d 1274, 1283 (1980); *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972). Initiative measures were adopted to reinstate the death penalty. MASS. CONST. pt. I, art. XVI; CAL. CONST. art. I, § 27 (1879, amended 1982).

nontextual theorists concede that a court is bound by constitutional amendments, at least for a generation or so.⁸¹

Most judges are modest about their capacity or their calling to resolve large philosophical issues, unlike the pragmatic issues at stake in familiar litigation. Even a judge who trusts his or her own value judgments may precisely for that reason decline to equate either justice or law with whatever values move a majority of the court. Also, because judges' factual and social assumptions are mostly self-generated, appeals to prudence and appeals to the court's moral sense or societal values are not very different. If a court is convinced that a law is unreasonable, it may say that the burdens imposed by the law are not justified by any practical purpose it serves, or it may say that the law is unfair or arbitrary or an intolerable invasion of liberty or privacy, without thinking of these as two different kinds of reasons. State courts are known to invoke the conventional moral and political rhetoric of their times. For an unconventional result we take care to claim the compulsion of the state's constitution. And state constitutions enshrine quite diverse values, not only those of privacy, humane treatment of prisoners, and state equal rights clauses to which I have referred, but labor, educational, and environmental rights, and many others.⁸²

V. FEDERALISM AS A TOUCHSTONE FOR THEORY

In the juxtaposition of constitutional theory and the work of the state courts, then, what may either learn from the other?

"Theory," said Holmes, "is the most important part of the dogma of the law," and he was speaking of state law.⁸³ Knowing the debate over constitutional theory can alert court and counsel to the problems of method. It can help avoid the extremes of naive literalism on one side and empty rhetoric on the other. Even better, a more sophisticated theory can help distinguish which constitutional directives government must follow literally and which textual criteria for choices of ends and means must be adaptable to reach contemporary as well as ancient circumstances.⁸⁴ If sensitiv-

⁸¹ Brest, *supra* note 10, at 229 n.94.

⁸² See Howard, *supra* note 59.

⁸³ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

⁸⁴ Compare, for instance, *State of Alaska v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980) (the invalidity of procedures such as the "legislative veto"), with the extension of freedom from unreasonable searches to include electronic eavesdropping.

ity to theory will not divert a court from its preferred decision in the case at hand, at least it may produce more cogent and useful opinions to guide those who must follow the state's constitutional law.

But theory can come at a high price for state law, unless taken cautiously. Because the theorists debate only the jurisprudence of a single court under a few clauses of a single Constitution (mostly the commerce, due process, and equal protection clauses and the first amendment), and because they reduce all issues to problems of value theory about freedom, equality, justice, and the limits of legitimate judicial action, scholarly theory is hostile to details and diversity in constitutional law. When theory becomes philosophy, it has little patience with such questions as whether guarantees against special privileges or immunities adopted in the Jacksonian era perhaps embody a commitment against a kind of unequal treatment different from that of the equal protection clause of the fourteenth amendment, or whether "privacy" in a search and seizure clause means something different from more recent clauses using the same word. But details and diversity are hallmarks of the state constitutions. To submerge the analysis of a state constitution in doctrines derived from the work of the United States Supreme Court serves neither the law nor theory itself.

Federalism, this country's gift to political theory, has lessons also for the theory of constitutional rights and judicial review. It cautions against facile identification between law and social values. Federalism divides our laws along state lines, but those lines do not match divisions in American society. They do not correspond to this nation's ethnic and religious diversity nor to our bitter disputes over changing customs. Yet we are not immune from communal conflicts over differences of race, language, and religion like those that bedevil nations from Africa, India, and the Middle East to Belgium, Ireland, and Canada.⁸⁵ What national theory treats as a minority often is a majority in part or all of a state. Languages other than English have been majority languages and may be again. This decentralized system of laws displays some divergent

⁸⁵ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking Nebraska statute which penalized teaching of any language other than English under the federal due process clause); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding criminal convictions for polygamy of practicing Mormons); *Reynolds v. United States*, 98 U.S. 145 (1878) (same).

legal rights among homogeneous societies and some dissimilar societies without significantly different laws.

Courts, of course, are quite accustomed to seeing differences in state laws without attributing these to different values or beliefs of the state's inhabitants. The values or beliefs that count are those that have been translated into law, often by people with different views from the present generation's. This is true of important differences in people's rights under state statutes and common law; it also is true of state constitutions. If Illinois has an environmental clause in its constitution⁸⁶ and Oregon does not, this does not say that the people of Illinois place environmental values higher than do Oregonians. It says something about adopting a constitution in 1972 as compared with 1859. But such differences also mean that one state court has a basis for constitutional decisions that another court lacks and cannot readily invent. The presence or absence of a clause in a constitution—an equal rights amendment, for instance, or a right of privacy—may or may not be evidence of societal values, but it is unmistakable evidence of societal action, of the choice whether to enact an idea into law. To bury such choices under a theory of noninterpretive adjudication deprives political action of its constitutional significance.⁸⁷

One cannot invalidate legislation in the name of constitutional law if one cannot plausibly claim to apply some constitutional norm. One may justify refusal to obey or to apply an intolerable law on all sorts of extrinsic moral or religious grounds; in that ancient conflict between power and conscience much law in the 20th century world deserves to lose. But within a legal system, a court legitimately can invalidate a law for being unjust or unreasonable only if there is a rule that laws must be just and reasonable; that is to say, if such a rule is identified as a constitutional norm. So much is mere tautology.

More important, in a federal system one must show whether and how the norm was made part of the national or of the state's con-

⁸⁶ ILL. CONST. art. XI, §§ 1, 2. Some years ago an article listed Florida, Illinois, Michigan, New York, Pennsylvania, and Rhode Island as states with a constitutional provision on conservation or environmental quality. Howard, *supra* note 59, at 197 n.16.

⁸⁷ Conversely, it is hard to strike down a law as a denial of "due process" under a state constitution that has no due process clause, although the Oregon court has been known to do that. See, e.g., *Portland v. James*, 251 Or. 8, 10, 444 P.2d 554, 555 (1968). See also Linde, *Without Due Process*, *supra* note 35, at 135.

stitution. The theorists are hard pressed to show when and how the nation made a constitutional choice to nationalize the agenda of reproductive autonomy and sexual and family relationships. It hardly suffices to say that various provisions of the first ten amendments serve to protect personal autonomy and that therefore the fourteenth amendment made the Supreme Court and the Congress the guardian of anything that might fit this protean concept.⁸⁸ But a state court is in no better position to strike down a law by applying an asserted moral consensus or societal values. It too must ask why unique values happen to prevail in its state even against contrary enactments by the legislature or by the people themselves.

Constitutional text is important not for what a court must decide but for what it cannot plausibly decide. Text can confine a judicial interpretation when it cannot compel one. Judicial review can be not only interpretive or noninterpretive but misinterpretive. A long buried grub surprisingly metamorphoses into a butterfly and remains the same insect, and an underwater tadpole turns into an airbreathing frog; but some decisions have made butterflies grow from tadpoles, to the applause of theorists who prefer butterflies. There are limits to what can be explained as constitutional law before turning it into genetic engineering.

Most state constitutions are dusty stuff—too much detail, too much diversity, too much debris of old tempests in local teapots, too much preoccupation with offices, their composition and administration, and forever with money, money, money. In short, no grand vision, no overarching theory, nothing to tempt a scholar aspiring to national recognition. Serious theorists understandably care about methods, principles, and outcomes that have nationwide importance. They are willing to let the states pursue their local peculiarities by statutes, by common law, or by interpreting

⁸⁸ This kind of reasoning is sometimes presented as satisfying interpretivist standards. See, e.g., Laycock, *Taking Constitution Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343, 371-73 (1981). The limited extent to which nationwide rules for family and sexual relationships can be derived from federal constitutional doctrines is discussed well by Grey, *Eros, Civilization, and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983). More expansive theories are presented in Karst, *The Freedom of Intimate Association*, *supra* note 13; Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

or amending state constitutions; and who can blame them?

Yet I think this is a loss to theory. Let me suggest a number of reasons why I think this is the case, why theory would be enriched by broadening its perspective.

The experience of the states subjects theory to the test of comparison. The states demystify constitutional law. State constitutions have little mystique. Some have all the literary quality of the yellow pages. They have drafters, yes, but no "Founders"; no Federalist Papers; no equivalence of constitution and nationhood; no singularity, though some are quite singular; no sanctified judges; certainly no claim as a "civil religion"⁸⁹ or as the perfect embodiment of justice, when there are forty-nine others. They defy any single formula either of constitutional law or of judicial review.

Theorists debate the institutional role of the court rather than the substance of constitutional law.⁹⁰ Some states, like Georgia, expressly prescribe judicial review of the validity of laws;⁹¹ but Georgia did not even have a supreme court before 1845. Some states require more than a majority vote of the court or expect unconstitutionality to be proved "beyond a reasonable doubt," as if it were a fact.⁹²

Focusing only on a handful of issues, theorists treat constitutional law as the product of judicial decisions rather than as the premise for decisions. They do not demand that a purported constitutional rule make sense as a rule for governing before it can serve as a rule for deciding whether government has contravened the constitution. State courts are accustomed to seeing constitutions written and amended as directives to government quite aside from judicial review. So, in fact, are almost all provisions of the United States Constitution, including all amendments since the fourteenth. Why should not that amendment be seen in the same light?

⁸⁹ Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123.

⁹⁰ "Decide what courts should do and it will then be obvious how the Constitution should be deemed to apply," Professor William Van Alstyne said in a recent criticism of noninterpretive theory; on this foundation "neo-creationists continue to reinvent the Supreme Court in their preferred image, principally as a means to reinvent the Constitution to their preferred ends." Van Alstyne, *supra* note 16, at 233.

⁹¹ GA. CONST. art. I, § 2, para. 5 (judiciary shall declare legislative acts that violate the constitution void).

⁹² Satter & Geballe, *Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence*, 15 CONN. L. REV. 57, 67 (1982).

Theorists assume that judicial review is problematic because federal judges have lifetime appointments, because they are not "representative." Some state judges are appointed for long terms; most are elected. Does this really bear on the legitimacy of constitutional decisions? Should an elected supreme court, like yours in Georgia or ours in Oregon, decide cases with an eye to popular wishes more than our appointed colleagues in, say, Massachusetts or New Jersey?

Some theorists maintain that old constitutional texts lose their effect as law with the passage of time because the conceptions of a past age cannot govern the present.⁹³ Does this view equally deny legal force to aging statutes? And does it apply when many states like Georgia have repeated old texts in a series of later constitutions?

Theorists defend judicial invention of new constitutional rights because the United States Constitution is hard to amend. Does a constitution properly mean something different in a state where amendment is difficult from one where voters can initiate an amendment simply by collecting a few more signatures than for a statute?

Finally, some theorists ask, if the constitution does not enshrine and preserve our strongly held values, why should people respect it? It is an oddly nonlegal question. Any student of state constitutions knows that some of their provisions deserve very little respect, but they are nonetheless the law, and the same could often have been said about some federal provisions. "[T]he great fault of the present times," as Virginia's Judge Spencer Roane observed of his time 165 years ago, "is in considering the Constitution as perfect."⁹⁴

The constitutions require respect only of legislators, judges, and officials, not of the people themselves—the people, according to many state constitutions, have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.⁹⁵ In fact, the people of Georgia in 1789 adopted a constitu-

⁹³ See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

⁹⁴ S. Roane, Letter to the Editor, [Richmond] *Enquirer*, June 18, 1819, quoted in Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1981).

⁹⁵ OR. CONST. art. I, § 1. See also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

tion by means that deliberately disregarded the procedure prescribed in the existing constitution.⁹⁶ But more important, it is no small achievement to design a form of constitutional government that for two centuries and longer can politically accommodate changing populations, a changing economy, and, with the historic exception of slavery, changing social values—an achievement which this nation in fact has respected even during the most bitter controversies over specific policies.

Perhaps a look at the states can show theorists that the focus on courts as institutions leads to the wrong questions. In my view, what matters to the legitimacy of judicial review is not whether judges are elected for short terms or appointed for life. What matters is whether they act in a judicial mode rather than in a legislative mode, whether the court's decision plausibly can stand as applying a constitutional premise, however generously, rather than as a new choice among social values. Social values may not differ much among states, but political decisions to give values constitutional stature often have differed. As a result, rights may be constitutional in one state and not in another, whether or not they are "fundamental," and rights that have not been made constitutional may be more important than some that have been. This distinction in the states poses a test for theorists who would decide nationwide rights under article III without depending on anything that first has been politically enacted into the Constitution or laws of the United States.

Meanwhile, it is our good fortune that we need not wait for these nationwide decisions. The state constitutions offer those of you who will argue and decide constitutional cases the chance to question familiar formulas, to follow your own theories to a conclusion. State constitutions allow the people of each state to choose their own theory of government and of law, within what the nation requires, to take responsibility for their own liberties, not only in courts but in the daily practice of government. For better or worse, states may change their constitution, as Georgia has done. State courts may adopt doctrines that some of us deplore, and people may vote to abandon some of their liberties, as voters in Califor-

⁹⁶ The Georgia Constitution of 1789 was adopted without awaiting petitions from a majority of the counties, as required by the Constitution of 1777. See Stubbs, *Constitution-Making in Georgia*, 6 GA. B.J. 207 (1944).

nia and Florida recently chose to do.⁹⁷ The current revival of state constitutional law can be no excuse to weaken those national standards that protect us in every state.⁹⁸ But that revival in the states can once again, as it did 200 years ago, furnish a wide source of experience—your future experience—for those who will be responsible for the law of the nation, of the *unum* that the Constitution made *e pluribus*.

⁹⁷ Article I, § 12 of the Florida Constitution was amended by initiative petition so that the search and seizure clause "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12 (1968, amended 1982). Article I, § 28 of the California Constitution was amended by an initiative measure to provide that "Except as provided by statute . . . relevant evidence shall not be excluded in any criminal proceeding . . ." CAL. CONST. art. I, § 28(d) (1879, amended 1982).

⁹⁸ Cabranes, *The Need for Continued Federal Protection of Individual Rights*, 15 CONN. L. REV. 31 (1982); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).