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THE STATE AND THE FEDERAL COURTS IN GOVERNANCE: VIVE LA DIFFÉRENCE!

HANS A. LINDE*

I. ARE STATE COURTS MINOR FORMS OF UNITED STATES COURTS?

What is common to state and federal courts is easy to see—so easy that many lawyers, judges, and academics assume that federal formulas for review of official actions equally apply to state law.¹ The point of federalism, however, lies in the scope it leaves for differences. Our common commitment is to the rule of law, not to one common rule of law. The states' civil, criminal, and public laws diverge even though officials and citizens affirm common values like "freedom," "equality," "fairness," and "democracy."²

The commonalities are important, but so are the differences, which are more interesting. We should not assume one common analysis in the face of legal differences that are truly constitutional—that is to say, "constitutive" of government—and for which state courts take on responsibilities that federal courts decline. State courts also copy terms like "standing," "ripeness," and

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1. The present commentary will not rehash past critiques of this practice with respect to comparable state and federal constitutional provisions for due process, equality, freedom of expression and religion, and law enforcement. See Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

2. Cf. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1159-60 (1993) ("I am concerned only with those aspects of a state constitutional text that are of 'constitutional dimension.' Generally, this means the constitutional protections of liberty, equality, and due process, as well as the structuring of political institutions that aim simultaneously to realize these values and to represent constituent interests.").

“justiciability” that are used in federal courts and taught in law schools, though they are not the words of statutes or constitutions. Here, however, the practice in the state and the federal courts is even less identical.

Consider only a few recent examples. The Nevada Supreme Court ordered the Nevada legislature to fund constitutionally mandated schools, without the required two-thirds majority vote for new taxes, if necessary.³ In Massachusetts, the Supreme Judicial Court required the state legislature to choose either to appropriate election campaign funds required by law or to repeal the law.⁴ The Illinois Supreme Court reportedly ordered the state comptroller general to resume paying judges cost-of-living increases without awaiting actual litigation.⁵ The Oregon Supreme Court has “assumed” that it may, by writ of mandamus, order the legislature to fund the courts—the required adequate level presumably to be set by the court.⁶ It is hard to think of a federal court issuing similar orders to Congress or its members.

About a dozen states—by constitution or statute—authorize governors or legislators to obtain advisory opinions of state court justices.⁷ The Indiana Supreme Court is assigned a role in reviewing whether the governor has suffered an inability to discharge official duties.⁸ More often, state courts entertain and decide

3. *Guinn v. Legislature of Nevada*, 71 P.3d 1269, 1272 (Nev. 2003).

4. *Bates v. Dir. of Office of Campaign & Political Fin.*, 763 N.E.2d 6, 15 (Mass. 2002).

5. Abdon M. Pallasch, *Justices Say They'll Decide Pay Raise Issues*, CHI. SUN-TIMES, July 30, 2003, at 18. The order was later withdrawn on motion of the Illinois Attorney General to permit named parties to litigate the issue. Other courts have asserted “inherent power” to compel appropriations of funds that the judges deem necessary for their functions. For supporting sources, see ROBERT T. WILLIAMS, *STATE CONSTITUTIONAL LAW* 732-37 (3d ed. 1999).

6. *State ex rel. Metro. Pub. Defender Serv. Inc. v. Courtney*, 64 P.3d 1138, 1139 (Or. 2003) (“[W]e assume that this court’s power includes the authority to order the legislature to provide certain minimum levels of funding to sustain the core functions of the judicial branch.”).

7. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-46 (2001) (“State constitutions in Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize the judiciary to give advice when the legislature or governor so requests. In Alabama, Delaware, and Oklahoma, the advisory function is statutorily assigned”). These advisory opinions are not adjudications.

8. IND. CONST. art. 5, § 10(d); see *In re Temp. Inability of Governor Frank L. O'Bannon to Discharge the Duties of Office*, 798 N.E.2d 838, 838 (Ind. 2003) (confirming temporary

disputes between state or local officials when federal courts would dismiss comparable cases for lack of “standing” or “ripeness” or some other shibboleth. Although the Supreme Court rejects taxpayer standing, state courts routinely allow individual taxpayers to challenge official acts with trivial fiscal impacts.⁹ A claim that state officials spend unappropriated funds or do not publish proper accounts may find a way into a state, but not a federal, court.¹⁰ Also, many state cases decide disputes between governors and legislators directly, often involving their respective powers, without needing a discharged official like Federal Trade Commissioner Humphrey to sue for his salary,¹¹ or an immigrant like Chadha to resist deportation.¹² The legality of executive vetoes is often litigated between legislators and governors,¹³ as is delegation to agencies that includes legislators.¹⁴

Let me briefly examine three questions. What explains why state and local officials often seek court decisions on issues of governance against which federal case law has erected many doctrinal hurdles? Do the same doctrines also apply to the position of state courts?

inability and transferring powers to the lieutenant governor).

9. See *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433-34 (1952) (dismissing taxpayers' appeal despite their standing in New Jersey court); *Lipscomb v. State Bd. of Higher Educ.*, 753 P.2d 939 (Or. 1988) (interpreting a constitutional amendment changing the governor's veto power).

10. Compare OR. CONST. art. IX, §§ 4, 5 (establishing the constitutional necessity of an appropriation for a withdrawal from the treasury), with U.S. CONST. art. I, § 9, and *United States v. Richardson*, 418 U.S. 166, 170 (1974) (denying standing to secure public accounting of “public money”).

11. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935) (disapproving of the President's dismissal of a commissioner with a statutory term).

12. *INS v. Chadha*, 462 U.S. 919, 956 (1983) (invalidating congressional disapproval of acts delegated to an agency). Denial of suits on behalf of congressional prerogatives is not ironclad. See, e.g., *United States Senate v. FTC*, 463 U.S. 1216 (1983). In *Chadha*, the Senate appeared in order to defend a legislative veto provision when the alien and the Department of Justice were on the same side. *Chadha*, 462 U.S. at 928; cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing a Senator's challenge to the President's termination of a treaty with no majority opinion); *McClure v. Carter*, 513 F. Supp. 265, 269 (D. Idaho 1981), *aff'd*, 454 U.S. 1025 (1981) (dismissing a Senator's congressionally authorized constitutional challenge to a judicial appointment).

13. See, e.g., *Geringer v. Bebout*, 10 P.3d 514, 515 (Wyo. 2000) (deciding a governor's suit against collective legislators concerning power to veto proposed constitutional amendments).

14. *Almond v. R.I. Lottery Comm'n*, 756 A.2d 186, 191 (R.I. 2000) (sustaining delegation of power to the lottery commission composed mainly of legislators, in a suit by the governor against the commission).

And is a difference between state and federal views of litigable issues likely to cause conflicts?

II. DISTINCTIVE ROLES OF STATE COURTS

The simplest reason why state courts are often called upon to resolve conflicts among public officials is that no one else has final authority to do it. Can we imagine a lawsuit by a president against an attorney general, like Governor Kirk Fordice's petition to the Mississippi Supreme Court to order the state's attorney general, Mike Moore, not to litigate certain claims involving Medicaid funds?¹⁵ Of course we cannot; presidents can simply replace the attorney general or other officials, although at some political cost, as President Nixon learned. Disagreements within the unified executive branch are resolved hierarchically within a department, or by largely unknown assistants in the Executive Office acting for the president. Few governors have similar executive power.

A. *Settling the Law in Decentralized Governments*

Although, after 1789, all states purported to follow the federal model of separating the branches of government, most, in fact, have splintered the executive branch among several independently elected officials, often with constitutionally assigned duties, and often from opposing political parties.¹⁶ Most state prosecutors are locally elected, notwithstanding the governors' stated obligations to see that the laws are faithfully executed. Moreover, many state programs are conducted by elected officials of cities, counties, and districts, who may get conflicting legal advice from their own or

15. *In re Fordice*, 691 So. 2d 429, 433 (Miss. 1997) (denying a petition to the supreme court for a writ of mandamus on the grounds that relief should be sought in circuit court). Similarly, Georgia's governor sued in state court to compel the state's attorney general to dismiss an appeal to the U.S. Supreme Court, alleging violation of the separation of powers. *Perdue v. Baker*, 586 S.E.2d 606, 607 (Ga. 2003) (denying relief on the merits despite apparent mootness).

16. See, e.g., John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMPLE L. REV. 1205, 1240 (1993) (noting that some state constitutions were written to strengthen the legislature and weaken the executive branch).

from differing sources.¹⁷ These officials sometimes litigate the disputed issue among themselves. In short, how judges approach intra-governmental disputes in the unitary national executive cannot be lifted intact to the states.¹⁸

State legislatures lack the well-developed capacity of Congress to conduct their own investigations by means of committees with investigatory staffs and subpoena power. If a state legislature assigns these powers to a specialized investigative officer with authority to seek judicial enforcement, few state courts would dismiss such a suit for lack of personal standing, as the federal district court did in the comptroller general's suit to obtain information from Vice President Cheney.¹⁹ In the setting of state government, doubts whether a chief executive, simply by virtue of that office, is immune from suit or subpoena seem anomalous.

Another difference demands easier access to judicial review in state courts. States and their subdivisions cannot function unless they are assured of the money to pay their debts. Tax measures may be vulnerable to public elections, contests, and lawsuits. For example, San Francisco sued its own controller,²⁰ and ten local assessors in Washington sued the state comptroller to secure a judicial decision.²¹ Sometimes legislatures will add special provisions for an expedited adjudication in the state's highest court.²² If the Nevada legislature had relied only on the advice of legislative

17. One dramatic example is the conflicting advice given to Florida county officials in the 2000 election by the elected secretary of state and the elected attorney general, neither of whom was subject to the direction of the governor. See BROOKINGS INSTITUTION, *BUSH V. GORE, THE COURT CASES AND THE COMMENTARY* 9-18 (E.J. Dionne Jr. & William Kristol eds., 2001). A later example is the insistence of local officials in San Francisco and elsewhere on marrying same-sex couples on grounds that state laws to the contrary are unconstitutional. See *Lockyer v. City & County of S.F.*, 95 P.3d 459, 473 (Cal. 2004).

Lacking another central deciding authority, litigation between state agencies and cities, school districts, and other local authorities is commonplace. See, e.g., *Ind. Dep't of Natural Res. v. Newton County*, 802 N.E.2d 430 (Ind. 2004); *City of Crown Point v. Lake County*, 510 N.E.2d 684 (Ind. 1987).

18. Why federal doctrines often do not fit state governance is further described in Hans A. Linde, *Structures and Terms of Consent: Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability?*, 20 CARDOZO L. REV. 823 (1999).

19. *Walker v. Cheney*, 230 F. Supp. 2d 51, 52 (D.D.C. 2002).

20. *City & County of S.F. v. Farrell*, 648 P.2d 935 (Cal. 1982).

21. *Belas v. Kiga*, 959 P.2d 1037 (Wash. 1998).

22. See *Hart v. Paulus*, 676 P.2d 1384, 1386 (Or. 1984).

counsel or the attorney general to raise school taxes by a majority instead of a two-thirds vote, neither teachers nor outside suppliers would have placed much faith in that action.²³ Nor might some industries that states want to attract with large but constitutionally questionable subsidies.²⁴ The authority of state and local officials to incur debts is hedged in by many statutory and constitutional constraints. Banks and bond houses are unlikely to lend money if there is any doubt whether these constraints have been observed. Declarations by the state's attorney general or local counsel on behalf of the borrower may not suffice. Some statutes allow local entities to pursue the needed adjudication by suing essentially all eligible objectors at large, without having to find a friendly taxpayer to bring such a suit.²⁵

B. Historic Tasks of State Judges

Much of this litigation contradicts the dogma that judges should keep out of disputes about governance until a party asserts an injury to its own interest. Are these divergences by state courts and legislators at worst unwise, or do they contradict basic principles about judicial power that are common to the state and federal constitutions? Recent studies by Professor Helen Hershkoff and others contradict the assumption that state courts are cut on the same pattern as the courts authorized by Article III of the United States Constitution.²⁶ Historically, of course, state courts existed before 1789, although the original states later adopted new constitutions. Early state, not federal, judiciaries in turn served as models for later states.

23. See *supra* text accompanying note 3.

24. See, e.g., *In re Interrogatory Propounded by Governor Ray Romer on House Bill 91S-1005*, 814 P.2d 875 (Colo. 1991) (issuing an advisory opinion requested by the governor after obtaining the attorney general's opinion on a scheme to attract a large United Airlines facility to Denver, which was approved by a divided vote of the justices).

25. See, e.g., OR. REV. STAT. §§ 33.710, 33.720 (2001) (providing that a municipal corporation's governing body may proceed *in rem* against the municipal corporation and its electors, taxpayers, and other unnamed interested persons, after giving notice by publication).

26. See Hershkoff, *supra* note 7, at 1836 ("State courts, however, are not bound by Article III, and judicial practice differs in some states—and differs radically—from the federal model.").

Institutionally, the position of state judges and legislators contrasts with those of their federal counterparts. Early judges often were the only full-time state officials besides the governor and a few other elected officials, and the only professionals; part-time legislators assembled only for relatively short sessions. The states did not need statutes for most law or judicial remedies; with exceptions such as inheritance and, after independence, criminal laws, legislatures could rely on judges to apply common law or equity to resolve most disputes and could concentrate on addressing particular economic needs of their various communities. Unlike federal judges, state courts long have administered estates outside any adversary litigation. They make rules of conduct for lawyers (including disposition of their trust accounts), for other judges, and for candidates who aspire to become judges. Sometimes, at the request of the bar, they claim a monopoly against legislators over making rules for lawyers and even for non-lawyers.²⁷ County judges combine judicial functions with chairing county commissions.²⁸ Nonetheless, state courts often recite the federal requisites for adjudicating disputes, and the defending counsel will invoke these requisites unless their client actually wants a decision.

C. Compatibility with Federal Law

It surely raises no federal concern if a state court decides a legal dispute that a federal court would not entertain, when the decision rests on state law. What if the dispute involves an issue of federal law? Many state and local programs depend on satisfying conditions attached to federal financial support just as much as on satisfying state law. They must comply with environmental and other laws; they must avoid unlawful interference with interstate commerce; they must thread their way between the free exercise of religion and its official establishment. When state procedures allow a court

27. See WILLIAMS, *supra* note 5, at 702-32 (including several supporting cases).

28. Hershkoff, *supra* note 7, at 1871 (citing Hendrik Hartog, *The Public Law of a County Court, Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 282 (1976) and Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207-08 (1983), on the nonadjudicatory functions of state courts).

to resolve such disputes about the state's law, there is no apparent reason why the court should not also dispose of the federal issues.

Law school courses largely confine constitutional law to judicial decisions by the United States Supreme Court, but sometimes a state court must decide a question of federal law for its state that cannot be further appealed to the Supreme Court. When the New Jersey Supreme Court decided, in a taxpayer's action, that a law requiring Bible reading in public schools did not violate the First Amendment, the United States Supreme Court allowed that a state court might render such an opinion, though the taxpayer's interest was insufficient in a federal court.²⁹ In principle, even before *Baker v. Carr*,³⁰ a state court could decide that the Fourteenth Amendment bound the states in drawing election districts with or without review by the Supreme Court, though in practice, when that court will not enforce a law, others often will not treat it as law at all.³¹ Similarly, the Supremacy Clause binds state judges to uphold a state's unquestioned duty to maintain republican forms of government, when that issue is properly before them. The Kansas Supreme Court in 1973, in a suit by the state treasurer against the secretary of state, decided that letting a governor reorganize executive departments subject to legislative disapproval did not violate the Republican Form Clause.³² State judges have reviewed similar disputes about governance in advisory opinions.³³ In another case, the Colorado Supreme Court found a term limits initiative to be non-republican, though the court based its decision on a second ground.³⁴

29. *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433-34 (1952) (dismissing taxpayers' appeal despite their standing in state court).

30. 369 U.S. 186 (1962). The Oregon Supreme Court was authorized to review legislative districts in 1952. OR. CONST. art. IV, § 6 (1953).

31. See Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 466 (1976); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

32. *VanSickle v. Shanahan*, 511 P.2d 223, 242 (Kan. 1973).

33. See *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316-17 (Colo. 1975) (finding that judicial participation in a redistricting decision is not inconsistent with republican government); *In re Advisory Opinion to the Governor*, 612 A.2d 1, 15-16 (R.I. 1992) (allowing legislators to manage the state lottery commission).

34. See *Morrissey v. State*, 951 P.2d 911, 916 (Colo. 1998) (holding that coercing legislators' support for a term limits amendment is inconsistent with republican

No law keeps state courts from safeguarding republican government in their states if the issue properly comes before them. Most would do so, as the Delaware court did in 1847, if the requirement were expressed in the state constitutions.³⁵ Others may be reluctant to decide a federal issue that the Supreme Court will not review, especially when the claim is coupled with more familiar arguments that will have the same result. In *Evans v. Romer*,³⁶ the Colorado court passed over a plausible argument of non-republican process to decide the case on more familiar equal protection grounds, although ordinarily issues of unlawful procedure come before substantive claims.³⁷ Yet the Colorado justices apparently would have responded to a request for an advisory opinion on the issue of republican governance, and indeed cited that clause as one basis for invalidating a term limits initiative.³⁸

What is anomalous about state courts applying federal law, as the Supremacy Clause requires, regardless of whether a federal court would decide the dispute? Nothing. As the Chief Justice and Justice Scalia wrote in *Asarco, Inc. v. Kadish*,³⁹ it is "a rather unremarkable proposition" that state courts apply federal law to issues of state governance in advisory opinions or other proceedings that are not reviewable in any federal court.⁴⁰ On the contrary, easier access to the state's own courts secures wider compliance

government).

35. *Rice v. Foster*, 4 Del. (4 Harr.) 479, 499 (1847) (holding the Act of 1847, which authorized Delaware voters to determine whether alcohol would be sold in the state, an unconstitutional departure from a republican form of government); U.S. CONST. art. IV, § 3; U.S. CONST. art. VI, cl. 3. Beyond dispute, "[t]he guaranty necessarily implies a duty on the part of the States themselves to provide [republican] government." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175 (1874).

36. 854 P.2d 1270 (Colo. 1993), *aff'd*, *Romer v. Evans*, 517 U.S. 620 (1996).

37. *Id.* at 1273 (invalidating a constitutional amendment as denying equal protection for the homosexual minority). The same argument might have been made in *Mulkey v. Reitman*, 413 P.2d 825, 836 (Cal. 1966) (invalidating an amendment barring open housing laws), *aff'd*, *Reitman v. Mulkey*, 387 U.S. 369 (1967). See generally Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (discussing the relationship between the constitutional guarantee of a republican form of government and plebiscite initiatives).

38. See *Morrissey*, 951 P.2d at 916.

39. 490 U.S. 605 (1989).

40. *Id.* at 636 (Rehnquist, C.J., & Scalia, J., concurring in part and dissenting in part) (reviewing a state court judgment at the request of defendants, though federal courts would deny the plaintiffs standing).

with constitutional norms in time to prevent actual harm. If a state court were to misapply the Republican Form Clause to the prejudice of someone's legal interest, the Supreme Court could, of course, reexamine its ill-considered and overly broad self-denial in Chief Justice White's old *Pacific Telephone Co.* opinion.⁴¹

III. JUDICIAL RESTRAINT AND LEGISLATIVE POWER

A. *The Straw Man of Justiciability*

Let me dispel any impression that I would discard all prerequisites for deciding legal disputes at the request of litigants. To the contrary: On the Oregon Supreme Court, we often denied taxpayer standing, dismissed moot cases regardless of their importance, and avoided constitutional holdings whenever a lower level analysis sufficed.⁴² We might well have decided many of the cited recent examples differently. But we took care to base these decisions on the laws governing remedies, not on large general principles. Sometimes, however, legislatures direct the state supreme court to decide the validity of a statute in a special suit brought for that purpose.

In the one decision that was based on constitutional grounds, we dismissed such a suit as a request for an advisory opinion rather than an adjudication, because the named parties on both sides favored sustaining the statute.⁴³ It is quite another thing to say that a statute could not direct courts to decide a legal dispute between

41. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (denying Supreme Court jurisdiction to review Oregon Supreme Court's decision sustaining an initiated tax).

42. See, e.g., *Kay v. David Douglas Sch. Dist.* No. 40, 738 P.2d 1389 (Or. 1987) (rejecting exceptions to mootness); *Gruber v. Lincoln Hosp. Dist.*, 588 P.2d 1281 (Or. 1979) (denying taxpayer standing). Along with limiting constructions of statutes or ordinances, there rarely is any reason to decide on the constitutionality of common law or equitable holdings that rest within the courts' own authority, until lawmakers enact a policy that makes constitutional review unavoidable. Cf. *Lloyd Corp. v. Whiffen*, 773 P.2d 1294 (Or. 1989) (limiting an injunction against political expression on shopping center property). See generally Wallace P. Carson, Jr., "Last Things Last": A Methodological Approach to Legal Argument in State Courts, 19 WILLAMETTE L. REV. 641 (1983) (suggesting ways for practitioners to frame constitutional issues in state courts).

43. *Oregon Med. Ass'n v. Rawls*, 574 P.2d 1103 (Or. 1978) (dismissing a statutory suit as nonadversarial). But cf. *Hart v. Paulus*, 676 P.2d 1384, 1386-87 (Or. 1984) (allowing a similar statutory suit when the opposing positions were "vigorously argued").

genuine adversaries unless the decision would have a present, practical effect on a concrete, personal interest at stake in the dispute—the criteria that are labeled “standing,” “ripeness,” and “mootness.” A case that fails those tests then is said to lack a quality called “justiciability.” Of course, the term states a conclusion, not an explanation. Once on that conceptual escalator, justiciability soon is called “jurisdictional,” with the consequence that judges must raise it on their own motion. This leaves judgments open to future attacks even when standing or mootness went undisputed—those awkward bonds may not have to be paid off after all!—and finally that fatal effect needlessly is attributed to the state constitution.

B. Misreading Constitutional Texts

Yet why? The literal words of the constitutional texts do not compel it. To “vest” the judicial power in the courts says only that courts derive authority to adjudicate from the constitution rather than only from legislation, and that legislation cannot “divest” them of it. This says nothing at all about legislation to entrust judges with functions besides contested adjudications. Nor do laws that direct courts to decide specified types of legal disputes invade the powers of another branch.⁴⁴ “Cases” or “controversies,” the words that are cited as restricting the jurisdiction of federal courts,⁴⁵ do not appear in most state judicial articles. Some states have authorized advisory opinions by statute.⁴⁶ Extensive scholarship shows that, historically, American state courts and their common law and chancery predecessors were not so narrowly confined.⁴⁷

44. Separation of powers clauses characteristically state that persons charged with duties under the legislative, executive, or judicial branch may not exercise a power or function assigned to another branch. See, e.g., CAL. CONST. art. III, § 3 (“Persons charged with the exercise of one power may not exercise either of the others”); N.J. CONST. art. III, § 1 (“No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others”); OR. CONST. art. III, § 1 (“[N]o person charged with official duties under one of these departments, shall exercise any of the functions of another”).

45. U.S. CONST. art. III, § 2.

46. Hershkoff, *supra* note 7, at 1845-46 (listing Alabama, Delaware, and Oklahoma as authorizing advisory opinions by statute).

47. See generally Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional*

C. Broaden Public Interest Standing Rather than Disregard Mootness?

To import federal doctrines while maintaining actual state practice creates needless dilemmas for state courts. For instance, federal courts may consider taxpayer challenges to expenditures unmanageable, no matter how much money is at issue. When a state court allows such a suit, it uses the pretense of a selfish stake in a few dollars to allow a useful public action to test the legality of governmental acts. But constitutions do not demand that a plaintiff's stake in the disputed governmental act must concern money, property, or another self-interest. Consider the writs of habeas corpus, which may challenge the detention of another person who may be unable to petition for it, or of quo warranto to test the exercise of a public office that the petitioner does not claim or want. State and local officials bring legal issues to state courts for reasons unrelated to any practical effect on their own private interests. When laws authorize these officials to sue on behalf of others, why may not legislators equally authorize non-official groups to do the same? Many private persons devote time, money, and dedication to causes that matter as much to them as some material self-interest. Objections to official religious displays and protection of the environment and non-human species are only two examples of contemporary concerns that do not lend themselves to such a self-centered test.

What is gained by first requiring a public interest group to locate a student or parent who can allege an adverse personal effect, and thereafter to allow the litigation to continue after the loss of that personal self-interest moots the named plaintiff's request for relief? Allowing properly defined interest groups to protect their common interest in court is a more logical solution to recurring problems of mootness than continuing a lawsuit on grounds of public importance after the named plaintiffs no longer have a

Requirement?, 78 YALE L.J. 816 (1969) (arguing that the belief that the Constitution requires injury to a personal interest is historically unfounded); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) (examining the common law "public action" and the development of rules of standing).

personal stake to be remedied by a judgment, or searching for substitute new plaintiffs who can claim such a stake.

A different question arises when a case becomes moot while on appeal. Once, after Oregon's Supreme Court agreed to review a decision invalidating a county ordinance, the county moved to dismiss the review it had sought, provided that the dismissal would not vacate the opinion of the court of appeals.⁴⁸ When we asked the parties to explain this unusual request, we learned that the successful challenger had undertaken to pay the county's litigation expenses if the appellate court opinion was left intact. In other words, the winner paid the county to preserve a favorable judicial precedent.⁴⁹ Nonetheless, the motion to dismiss review on those terms was allowed by a 4-3 vote, leaving the questionable opinion on the books. Such decisions, however, need not be made on purely formal grounds concerning the finality of lower court decisions and appellate court jurisdiction, let alone on constitutional grounds. Surely a court can distinguish between the disposition of moot appeals from an unreported trial court judgment that concerns only the parties and a disputed appellate opinion that restricts the constitutional powers of governments throughout the state.⁵⁰

In fact, state courts have mainly been pragmatic in allowing or dismissing equitable, extraordinary, or declaratory remedies to review governmental acts, as Louis Jaffe found forty years ago.⁵¹

48. *Ackerley Communications, Inc. v. Multnomah County*, 734 P.2d 885, 887 (Or. 1987). As the county requested, the court chose a nonvacating precedent, *Saechao v. Matsakoun*, 727 P.2d 126 (Or. 1986), over a contrary one, *Banister Continental Corp. v. N.W. Pipeline Corp.*, 724 P.2d 288 (Or. 1986).

49. In answering the supreme court's inquiry, the respondent candidly explained: In addition to that Opinion being important to respondent in its dealings with the petitioner, it is important for respondent in its dealings with other governmental entities in this state. Respondent is hopeful it will not be put to the great expense not only of money, but time, of its key employees in relitigating similar issues involving other governmental entities.

Part of the benefit that respondent should receive from its settlement of disputes with Multnomah County is the ability to maintain the Court of Appeals Opinion intact.

Ackerley, 734 P.2d at 887.

50. For a critique of rigid mootness doctrines in federal jurisprudence, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603 (1992).

51. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 103-09 (1965); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 256-58,

Pragmatic reasons also color the courts' use or non-use of the doctrines they profess to share with the federal courts. "Separation of powers" is invoked selectively to protect judicial prerogatives and to allow judges to avoid taking on unwanted tasks. When an occasional state court calls a question "political," it likely means a policy choice unconstrained by law, in Louis Henkin's sense, rather than a bar to intervention in the state's political institutions.⁵²

In other respects, state courts are closer to politics than their federal colleagues, whether the state judges are elected or appointed. I reject the thoughtless notion that a judge on an elective court should approach a legal issue differently from an appointed colleague in a neighboring state. Elective state courts are, however, more likely to have some members with prior legislative experience than the Supreme Court, at least since Harry Truman appointed his congressional friends Fred Vinson, Harold Burton, and Shay Minton to the Court.⁵³ In the smaller state capitals, if not in California or New York, judges and legislators are more likely to meet informally as well as in official collaborations on law reforms.⁵⁴ More important, state courts depend on highly contested

304-05 (1961); see also Hershkoff, *supra* note 7, at 1852-59 (citing useful sources). The old writs of mandamus, prohibition, and quo warranto are means of challenging the legality of officials' actions that once needed the participation or consent of a state's attorney, but in practice private "relators" can now plead such claims to judicial review in the name of the state. Similarly, any person can seek a writ of habeas corpus *ex parte* the person alleged to be unlawfully detained.

52. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976). In view of such decisions as *Powell v. McCormack*, 395 U.S. 486 (1969) (reviewing a refusal to seat an elected U.S. Representative), *United States Senate v. FTC*, 463 U.S. 1216 (1983) (invalidating congressional veto of agency rules), *Clinton v. City of New York*, 524 U.S. 417 (1998) (finding the Line Item Veto Act violates the Presentment Clause), and *Bush v. Gore*, 531 U.S. 98 (2000) (preempting the congressional process for settling a contested presidential election), Supreme Court abstention now appears mainly in the refusal to analyze institutional constraints on executive acts in foreign relations or asserted "national security," as distinct from domestic guarantees of individual rights. Compare *Goldwater v. Carter*, 444 U.S. 996 (1979) (refusing to decide whether a treaty termination needs Senate consent), with *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding congressional assent to settlement of private claims against Iran), and *New York Times v. United States*, 403 U.S. 713 (1971) (denying an injunction against publishing "classified" Pentagon papers).

53. In addition to legislators winning elections to judgeships, it is common for elected judges to move on to other elective offices; for example, North Carolina's U.S. Senator and former justice of the North Carolina Supreme Court Sam Ervin, or Oregon's Governor and former justice of the Oregon Supreme Court Ted Kulongoski.

54. See Hans A. Linde, *Observations of a State Court Judge, in JUDGES AND LEGISLATORS:*

state, and sometimes county, budgets for funding their facilities, operations, and personnel—a fact that does not encourage them to expand legal remedies.⁵⁵ On the other hand, state courts sometimes misapply their final say on the allocation of institutional powers as a weapon to defend their own turf and to fend off unwanted assignments from lawmakers.

Yet such pragmatism is ill-served by formal doctrines of justiciability. Courts do not take doctrines that concern themselves lightly, especially those declared to be “jurisdictional.” Rigid tests of “standing,” “ripeness,” or “mootness” do not lend themselves to ad hoc evaluation. Defendants will invoke them whenever possible to gain a quick dismissal, and judges will feel bound to apply them in all cases. Without recognition of real differences among legal claims, insistence on an immediate personal stake places some threats to individual rights (for instance, some discretionary law enforcement practices) beyond preventive remedies and effectively leaves important issues of lawful governance beyond judicial scrutiny.⁵⁶ In turn, claims deserving decision need not survive individual mootness if qualified organizations can litigate public actions in their own names.

CONCLUSION

In sum, rejecting premature or advisory litigation is good policy, but rigid tests of “justiciability” breed evasions and legal fictions. It is prudent to keep judicial intervention within statutory or

TOWARD INSTITUTIONAL COMITY 117, 119 (Robert A. Katzmann ed., 1988). Oregon’s Chief Justice is by statute a member of the Oregon Law Commission, and judges often participate in work groups on commission projects. OR. REV. STAT. § 173.315 (2001).

55. Concerns for budgetary consequences may have a more significant impact than judicial elections or the personal social views of state judges when choosing to seek costly reforms of state programs in federal rather than in state courts. Cf. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (examining constitutional litigators’ preference for trial in federal courts). These concerns did not, however, deter state courts from supervising decades-long reforms of public school funding in pursuit of educational equality. For a discussion of apprehensions about “docket control” and “floodgates,” see Hershkoff, *supra* note 7, at 1932 nn.513-17.

56. An example of widened standing for a plaintiff who has no reason personally to experience the alleged practice is *Cornelius v. City of Ashland*, 506 P.2d 182 (Or. App. 1973) (issuing a declaratory judgment against an ordinance authorizing police to jail persons who resist questioning).

established equitable and common law remedies. It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests. Requirements that rest only on statutory interpretations can be altered to meet desired ends, but change becomes harder once interpretations are elevated into supposedly essential doctrines of "justiciability." The word itself is superfluous, and the doctrines are unnecessary. Nothing in the typical texts, the history, or the institutions of most state governments calls for reading the formulas used by the United States Supreme Court into a state's constitution.