State Constitutional Law Processes

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STATE CONSTITUTIONAL LAW PROCESSES

I. INTRODUCTION

We are experiencing a new “Constitutional Revolution”1 in the judicial interpretation of state constitutions. The era of major state constitutional innovation prior to the turn of the century2 was concerned primarily with changes in constitutional texts.3 Similarly, the wave of state constitutional revision taking place since about 1950 has dealt with revisions and modernization of constitutions themselves.4 The rediscovery of state constitutional rights in the past decade, however, involves judicial interpretation of state constitutions.5

Although state constitutional interpretation always has been important in areas of civil litigation such as state taxation and eminent domain, and in areas of criminal procedure such as bail rights, a broader spectrum of the private bar and a growing number of law professors now are discovering state constitutional law for the first time. This is attributable directly to the many “evasion cases”6 of the past decade in which state supreme courts have relied on their own constitutions to provide greater protections for their citizens than are required by the United States Supreme

1. This may be contrasted with what Professor Howard refers to as the “so-called ‘Constitutional Revolution’ of the 1930’s.” Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873, 880 (1976). Professor Swindler asked whether the 1970’s would see state courts “make a massive intellectual reversal of poles analogous to the reversal in federal constitutional law after 1937.” Swindler, State Constitutions for the 20th Century, 50 Neb. L. Rev. 577, 596 (1971). We do not have the data to know generally, but certainly massive change has occurred in the area of state constitutional protections of individual liberties.

2. See generally Swindler, supra note 1, at 583-85.

3. Much of that movement and the legislative change accompanying it was frustrated by the United States Supreme Court. Id. at 585-86.


5. This “new” use of state constitutions has been detailed elsewhere. See Developments in the Law: The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982) [hereinafter cited as Developments]. See also Special Section, The Connecticut Constitution, 15 Conn. L. Rev. 7 (1982).

Court and to insulate their decisions from Supreme Court review.\(^7\)

These events have captured the attention of the legal community in a way that a state constitutional convention's increase in gubernatorial powers or modernization of fiscal and budgetary provisions never could. Such structural or political reforms were relegated to the domain of political scientists.\(^8\) Their interests include the structure and power allocations of state and local government, as well as the ways in which such powers actually are exercised. Lawyers and law teachers, by contrast, tend to be concerned with the extent and limit of governmental powers and with the interpretation of constitutional provisions in litigation. It is no surprise, therefore, that the state bill of rights "explosion" has captured the attention of lawyers and legal scholars. This new attention, however, has been limited to state constitutional protection of individual liberties as an alternative to federal constitutional protections.

The field of state constitutional law, like federal constitutional law, is by no means limited to cases involving individual rights. Numerous other areas of law involve the application of state constitutions. The structure and power of state and local governments, the state judicial system, taxation and public finance, and public education all are affected by the state constitution and its interpretation. Furthermore, state constitutions do not differ significantly from one another.\(^9\) State constitutional law generally is not treated

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7. Thus there are both substantive and procedural aspects to this rediscovery of state bills of rights. See infra notes 107-12 and accompanying text.

8. Political scientists have done a great deal of the work on state constitutional law. See McClain, Forward, 27 WASH. U.L.Q. 309, 311 (1942). Between the 1920's and the late 1940's, the American Political Science Review published annually an article on state constitutional law. See, e.g., Tenbroek & Graham, State Constitutional Law in 1945-1946, 40 AM. POL. SCI. REV. 703 (1946). See also Swindler, supra note 1, at 587 n.54 ("[T]his excellent twenty-year series of annual surveys was discontinued in 1949. The present writer has hopes of seeing the series revived in the near future."). Unfortunately, to date, Professor Swindler's hopes have not been fulfilled.


9. Professor Frank Grad noted: "In spite of their enormous diversity, it is probably safe
as a matter of legal theory or as a subject for comparative treatment; rather, it usually is thought of as a parochial matter. The recurring themes and issues throughout state constitutional law, however, make it susceptible to treatment on a comparative or "all states" basis. This Article will discuss the role and function of state constitutions in our legal system, and then will survey a number of common issues likely to arise under any state's constitution.

II. THE THEORY OF STATES AND THEIR CONSTITUTIONS

At the time of the American Revolution, the Continental Congress declined to recommend a single, uniform constitutional format for the colonies to adopt. Congress did not even require

to say that the similarities between governmental structure in different states are considerably greater than their differences . . . ." Grad, The State Constitution: Its Function and Form for Our Time, 54 Va. L. Rev. 928, 941 (1968). This similarity was present from the beginning:

The general similarity of all these early state constitutions is another circumstance worthy of remark. The ready acceptance of closely parallel institutions, formulas, and political ideas, by communities so unlike each other in the life and habits of their people and in their industrial and commercial interests, was beyond the expectation of some of the best minds of the day.


Commentators have attempted to categorize state constitutions:

1) "[New England states' constitutions are] old fashioned in type . . . based on the outgrown system of town government, and . . . so difficult of amendment that they retain many obsolete features . . . ."

2) "[Seven constitutions written between 1840 and 1865 are] democratic in principle and excellent in tone, but do not include the experience of later years . . . ."

3) The third category of constitutions incorporates "provisions emphasized as the result of reconstruction in the south, and adaptation to economic changes north and south . . . ."

4) The fourth category of constitutions belongs to "new mining and agricultural states of the far west, and . . . states that felt compelled to readjust their governmental systems to changed social, economic and political conditions resulting from war and national growth."


states to have a constitution. As sovereign entities, each state embarked on the first experiment in drafting constitutions\(^1\) on its own, well before the adoption of the Federal Constitution. The early state constitutions provided a conduit for translating the "rights of Englishmen"\(^2\) and American notions of governmental structure into positive law. Those attempts at constitution writing, with their sometimes questioned legitimacy,\(^3\) form the basis for modern American constitutional law.\(^4\)

Maintenance of the states' residual sovereignty became the "means and price of the formation of the Union"\(^5\) when the states later adopted the Federal Constitution. This reminder to the modern generation of the historic place of the states, their changing role over time,\(^6\) and the importance of their independence in the evolution of our federal system provides a predicate for a study of current federalism issues.\(^7\)

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13. W. Adams, supra note 10, at 63-64. "Most of the bodies that framed constitutions in this formative period had not originally been elected to do any such job, nor had they been given any specific mandate for it. Most of them did not submit to popular ratification of the constitutions that they drew." J. Hurst, The Growth of American Law: The Lawmakers 202 (1950).
14. States admitted to the Union in the nineteenth century trace many of their constitutional provisions to the original colonies. See, e.g., People v. Anderson, 6 Cal. 3d 628, 635, 493 P.2d 880, 884, 100 Cal. Rptr. 152, 156 (1972) ("The delegates were advised when the Declaration of Rights was first proposed that the first eight sections had been taken from the Constitution of New York and that all others were from the Constitution of Iowa."); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123, 128 (1981) ("Provisions like these have antecedents as early as New Hampshire's 1783 constitution, coming to Oregon by way of Ohio and Indiana."); Palmer, The Sources of the Oregon Constitution, 5 OR. L. REV. 200 (1926). See also L. Friedman, A History of American Law 108 (1973) ("Among the states, there was a great deal of copying, of constitutional stare decisis."); Swindler, State Constitutional Law: Some Representative Decisions, 9 WM. & MARY L. REV. 166, 173 (1967) ("Historically, new states in the westward movement of the nation borrowed in whole or in part from the constitutions of older states in preparing their first constitutions.").
17. These issues arise throughout the law, and a study of states as entities and as integral
Tracing the westward movement of constitutional concepts in the original state constitutions as they were copied and modified by newly admitted states can be an important component of interpreting present day constitutions.18 States seeking admission to the Union after it was formed had to be approved by Congress.19 Congressional review of the prospective state’s constitution was an integral part of the approval process and Congress sometimes demanded changes.20

A. State Constitutional Law as a Process of Lawmaking

Are state constitutions neutral expressions of what is thought to be the best structure of government and statement of people’s rights? Or are state constitutions instruments of lawmaking through which interest groups or segments of society seek the grand prize of lawmaking, striving to achieve constitutional status for the policy they advocate?

The two factors, of permanence and a new avenue to change, were closely related in the use of state constitutions for the enactment of particular policies. Men felt that legislation in constitutional form would be harder to upset, because the procedure for amending a constitution was more involved than passing a statute . . . . [B]ecause of its independence from the everyday parts of a federation can provide perspective in evaluating such issues.

The myth of federalism should not be confused with the reality of federalism, which is the ever-evolving compromise between those who argue for tilting the balance of functions and powers in favor of either national or state government based on what they perceive as the advantages that flow from either form.


A focus on federalism may also generate interest in a comparative study of other federal constitutional systems. See generally W. Murphy & J. Tanenhaus, COMPARATIVE CONSTITUTIONAL LAW (1977); Symposium, State Constitutional Design in the United States and Other Federal Systems, 12 PUBLIUS 1 (1982).

19. U.S. CONST. art. IV, § 3.
institutions of government, the constitution-making process might offer opportunities for changes that could not be had through other channels. This independence might not only facilitate certain changes, but also insure that, once made, they would stay.21

This conception of the state constitution as a vehicle for "constitutional legislation" is very different from the way we view the Federal Constitution, at least since its original adoption.22

Referring to "constitutional legislation in state constitutions," a noted commentator stated: "In most cases such specific enactments of policy did not direct, but merely recorded, the currents of social change."23 Recent events indicate, however, that proposed amendments to state constitutions sometimes provide a forum for resolving major societal conflicts. Such issues include state and local taxing and spending,24 casino gambling, progressive income taxes,25 school busing,26 and environmental protection. These are certainly contested cases in which societal conflicts are decided directly. Furthermore, we now are seeing more innovative judicial interpretations of state constitutions — the other component of the ongoing constitutional process.27


24. See infra notes 161 & 162 and accompanying text.

25. See infra note 221.

26. See infra notes 97-99 and accompanying text.

27. Horack, Cooperative Action for Improved Statutory Interpretation, 3 VAND. L. REV. 382, 384 (1950) ("Indirectly, the executive, the legislatures, and the courts are, through the exercise of their respective functions, interpreting and, to the extent that their interpretations achieve results which previously had not obtained, amending the constitution."); See also Dodd, The Problem of State Constitutional Construction, 20 COLUM. L. REV. 635, 637 (1920) ("Inasmuch as the constitution is a briefer and more general document than a statute, the share of the court in moulding the constitution by interpretation is proportionately greater."); Note, State Constitutional Change: The Constitutional Convention, 54 VA. L.
If state constitutional amendments reflect a process of purposive lawmaking — an alternative to the well-known techniques of legislative or judicial changes in the law — what are the implications of using this lawmaking method? Do objective standards exist to determine the propriety of "constitutional legislation?" A review of state constitutional provisions, particularly the doctrine of "negative implication" in "grants" of power to state legislatures, reveals the potential rigidity that can result from legislating through the constitution. Interestingly, most problems resulting from constitutional rigidity are unintentional, revealing the need for a kind of predictive thinking not usually required in the training of lawyers.


We should not overemphasize the importance of constitutional change by interpretation at the state level, however. Because of the detailed language of most state constitutions, conservative legislatures and judges have been inclined to follow a rather strict construction. There has been far less interpretative constitutional development at the state than at the national level. As a method of constitutional change, it is probably true that interpretation has been less important than the more formal processes of amendment and revision.

Id.

The constitutional process continues when proposed constitutional amendments seek to "overrule" judicial interpretations of constitutions. See infra notes 36 & 97-100 and accompanying text.


29. Grad, supra note 9, at 966. See also infra notes 148 & 149 and accompanying text.


The student has bent his efforts to constructing legal rules out of case-book cases by inductive reasoning. That is essentially an analytical job. He has used his imagination in extrapolating cases to cover hypothetical situations suggested by his teachers, but he has seldom invented such situations. The draftman's job, on the other hand, is imaginative and synthetic. He must envisage the controversies of the future, and organize opposed social forces into harmony for the resolution of these controversies.

Id. See generally Goldstein, The Unfulfilled Promise of Legal Education, in LAW IN A CHANGING AMERICA 157, 160 (G. Hazard ed. 1968) (Case method "makes the lawyer especially skilled in showing the limits and inadequacies of what is proffered by others.").
B. State Constitutions as Documents of Limitation

State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power. When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures. This power was limited only to the extent that the states granted powers to the federal government, agreed to restrictions on state power in the Federal Constitution, or imposed limitations on themselves in their own constitutions. According to the Supreme Court of Kansas: "It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby."

The primary focus on the extent of legislative powers one encounters in federal constitutional law other than civil liberties, is not as prevalent in state constitutional law, which tends to focus on limits on legislative power. Accordingly, the most important products of judicial interpretation of the Federal Constitution are implied powers, while at the state level implied limitations are most important.

The general characterization of state constitutions as documents of limitation is correct but oversimplified. Many provisions in modern state constitutions were adopted to overcome earlier judicial interpretations of the constitution prohibiting the exercise of power in question. Such provisions are grants of power, or at
least the removal of limitations. States also may adopt grants of power to remove constitutional doubt or to ratify preexisting practices.

If a state constitution usually limits legislative power, what is its function with reference to executive and judicial power? This question will be explored in the coverage of constitutional issues surrounding those branches.

III. State Constitutions in the Federal System

The question of the relation of the States to the federal government is the cardinal question of our constitutional system

Woodrow Wilson

The relationship of state constitutions — the supreme law of a state — to federal law under the supremacy clause is an important concept. A state constitutional provision may be unconstitutional if it conflicts with the Federal Constitution, federal common law, or validly enacted federal statutes, treaties, or administrative regulations. Interstate compacts may override state constitutions under certain circumstances.

the effect of broad constitutional guaranties as interpreted by the courts. Many of the later constitutional provisions which in legal theory do not broaden such power are justified, therefore, because in legal fact they do broaden such power. To some extent at least state constitutions are becoming a grant rather than a limitation of power.

Id. As to the techniques of judicial interpretation which, through “negative implication,” turn these grants of power into limitations, see Grad, supra note 9, at 966.

37. J. Hurst, supra note 13, at 245.


39. Article VI of the United States Constitution specifically provides that federal law is supreme, “any thing in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI. (emphasis added).

28 U.S.C. § 1257(2) (1976) provides for an appeal to the United States Supreme Court when the highest court of a state upholds a state statute in the face of a federal constitutional challenge. “It has long been established that a state constitutional provision is a ‘statute’ within the meaning of § 1257(2).” Pruneyard Shopping Center v. Robins, 447 U.S. 74, 79 (1980).

For a listing of state constitutional provisions declared unconstitutional by the United States Supreme Court, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 1623 passim (1973).


41. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951); Zimmerman & Wendell, The
Utilizing the state constitution as a vehicle for lawmaking can influence the outcome of a federal constitutional challenge. For example, in *Reitman v. Mulkey*, the "repeal" of state open-housing statutes was accomplished through constitutional amendment rather than legislative repeal. The United States Supreme Court noted:

Private discriminations in housing were now not only free from [the statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

The Court's survey of the effects of constitutional legislation reveals exactly why this technique was utilized. Moreover, this

*Interstate Compact and Dyer v. Sims, 51 Colum. L. Rev. 931 (1951). See also, Grad, Federal-State Compact: A New Experiment in Co-operative Federalism, 63 Colum. L. Rev. 825 (1963).*

42. 387 U.S. 369 (1967).

43. Id. at 377. The choice of the constitution, rather than other lawmaking methods, for enactment of law also can influence other kinds of judicial decisions. For example, in conflict of laws, a court's evaluation of local public policy in relation to the law of another jurisdiction may be influenced by the fact that such public policy is expressed in the constitution. *See, e.g., Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S. 133 (1961).*

44. A review of all the cases in which the United States Supreme Court has invalidated provisions of state constitutions, see supra note 39, indicates that it rarely makes a difference that it is a constitutional provision rather than a statute under review. *See, e.g., Railway Employees' Dep't, AFL v. Hanson, 351 U.S. 225, 232 (1956); Fisk v. Jefferson Police Jury, 116 U.S. 131, 135 (1885) ("It is well settled that a provision of a State Constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute."). But see Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.) (invalidating amendment to Alabama Constitution as excluding voters on the basis of race), aff'd per curiam, 336 U.S. 933 (1949) ("Mr. Justice Reed, in view of the fact that a constitutional provision of a state is involved . . . is of the opinion that probable jurisdiction should be noted and the case set down for argument.").

Thus, the emphasis on the state constitution in *Reitman* appears to be unique. *But see Widmar v. Vincent, 50 U.S.L.W. 4062, 4066 (1981) ("It is also unnecessary for us to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment.") (emphasis added, footnote omitted).*
technique bypassed the legislature. The fact that the legislature was bypassed, however, influenced later federal constitutional analysis by the United States Supreme Court.45

The reapportionment battles culminated in judicial invalidation of many state constitutional provisions.46 More contemporary examples of conflicts between the state and federal constitutions arose from attempts to ratify the Equal Rights Amendment (ERA). For example, Florida's constitution prohibited the legislature from considering any federal constitutional amendment unless "a majority of the members [of the legislature] have been elected after the proposed amendment has been submitted for ratification."47 When Congress submitted the ERA to the states in 1972, the amendment was considered immediately and passed overwhelmingly by the Florida House of Representatives.48 The presiding officer of the Florida Senate blocked consideration, however, because no intervening election had occurred. ERA supporters in the Florida Senate argued that the Florida requirement conflicted with article V of the United States Constitution, which exclusively controlled ratification of federal constitutional amendments. Failing in the political forum, the supporters repaired to federal district court but were unable to obtain a preliminary injunction prior to the end of the legislative session.49 By the time the court invalidated Florida's impediment,50 the political tide had changed. Flor-

45. See infra notes 97-99 and accompanying text.
46. See, e.g., Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713 (1964). This case illustrates that state courts may declare provisions in their own constitutions unconstitutional on federal grounds. In Reynolds v. Sims, 377 U.S. 533 (1964), the Court said: "[W]ith respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions." Id. at 584. For an interesting proposal to reform the reapportionment process, see Adams, A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 HARV. J. ON LEGIS. 825 (1979).
ida never ratified the ERA.

A similar series of events took place in Illinois, another of the major states that failed to ratify the ERA. Apparently, but for an Illinois constitutional impediment requiring a three-fifths vote to approve federal constitutional amendments, the ERA might have been ratified in Illinois.51

Under the supremacy clause, state constitutional provisions are vulnerable to conflicts with federal statutes as well as with the Federal Constitution. Such federal statutes, however, must be “made in pursuance” of the Federal Constitution.52 These statutes must be traced to Congress’ lawmaking powers. But the extent of Congress’ power is different under, for example, the spending power than under the commerce power. In exercising its commerce power, Congress may preempt, or directly override state constitutions. The developing law based on the Supreme Court’s decision in National League of Cities v. Usery,53 limiting Congress’ use of its power under the commerce clause, provides the only limit on the use of this power.54

Interestingly, Congress recently used the commerce power to preempt a state constitutional provision at the request of the Ar-


52. U.S. CONST. art. VI.


kansas congressional delegation,\textsuperscript{55} thus overriding Arkansas' constitutional ten percent usury limit.\textsuperscript{56} The Arkansas Supreme Court initially declared this congressional "amendment" to the Arkansas Constitution unconstitutional as outside Congress' commerce power,\textsuperscript{57} but the court later reversed itself.\textsuperscript{58}

Although Congress, through the spending power, may reach many subjects normally reserved to the states,\textsuperscript{59} it may not do so directly. Congress must accomplish its aims indirectly through conditions attached to federal spending programs or grants. State constitutions may make state compliance with such conditions difficult. For example, Congress required that states enact "certificate of need" legislation as a condition for the receipt of federal health planning funds. Prior to this requirement, the North Carolina Supreme Court had ruled that state "certificate of need" legislation was unconstitutional as granting special privileges and monopolies in violation of the North Carolina Constitution.\textsuperscript{60} North Carolina, therefore, argued that the congressional requirement was an interference with its state sovereignty. A federal district court held:

It must be remembered that this Act is not compulsory on the State . . . . [I]t does not impose a mandatory requirement to enact legislation on the State; it gives to the states an option to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not "coer-

\textsuperscript{55} 125 CONG. REC. H993 (daily ed. Feb. 28, 1979) (remarks of Rep. Anthony). "We are asking this Congress to give . . . temporary relief until once again, in a Constitutional Convention, the people of our State can decide what is and what is not usury." Id.

\textsuperscript{56} P.L. 96-104 § 301 provided: "This Act shall apply only in those States having a constitutional provision which provides that all contracts for a greater rate of interest than 10 per centum per annum shall be void, as to principle and interest." This provision applied only to Arkansas. See Long, Trends in Usury Legislation—Current Interest Overdue, 34 U. MIAMI L. REV. 325, 328-30 (1980); Note, Usury Legislation—Its Effects on the Economy and a Proposal for Reform, 33 VAND. L. REV. 199, 204-05 (1980).


This decision left North Carolina with the choice of foregoing the federal funds, amending its constitution, or seeking a different interpretation from its supreme court.62

Congress may choose not to impose conditions in federal grant programs that require a state to do something that its constitution prohibits. Title I of the Elementary and Secondary Education Act of 1965 provided federal funds to assist disadvantaged children in both public and private schools.63 The legislative history indicated that members of Congress knew of state constitutional provisions restricting state involvement in private, and particularly religious, education. Congress clearly expressed its intent to defer to such restrictions.64 Under such circumstances, the United States Supreme Court held: "The correct rule is that the 'federal law' under Title I is to the effect that state law should not be disturbed."65 The issue was not the extent of Congress' power, but rather, how Congress actually exercised that power. "The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence


64. Wheeler v. Barrera, 417 U.S. 402, 416-19 (1974) ("Whatever the case might be if there were no expression of specific congressional intent, Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting federal funds."). See also Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963).

65. 417 U.S. at 419.
of the states and their political power to influence the action of the national authority." In the Title I example, federal legislators ensured that prevailing state notions concerning spending for education, reflected in state constitutions, would not be disturbed, not because the federal legislators lacked power, but because politically they did not want to exercise that power to upset deeply held state values.

IV. THE REDISCOVERY OF STATE DECLARATIONS OF RIGHTS

The state bill of rights "explosion," although not the main theme of this Article, presents important substantive and procedural lessons about state constitutional law. Observations such as the following by the Alaska Supreme Court still may startle some lawyers and judges:

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution . . . . We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land.

The power of state supreme courts to reject decisions of the United States Supreme Court seems to contradict our fundamental understanding of constitutional law. Unraveling this apparent contradiction provides a number of lessons:

1) Most of the protections of the Bill of Rights were "selectively incorporated" into the due process clause of the fourteenth amendment so as to make them applicable to the states — a relatively recent development. This observation emphasizes that concepts

67. There was an argument that first amendment issues would arise if Congress sought to mandate provision of federal resources to religious schools. The Court did not reach this question. 417 U.S. at 421-22.

Monrad Paulsen observed in 1951: "If our liberties are not protected in Des Moines the
of constitutional protections predated the Federal Constitution.  

2) Identical state and federal constitutional language can have different interpretations.  

3) Notions of federalism can constrain the United States Supreme Court in interpreting the fourteenth amendment in ways that do not affect state supreme courts. For example, when the Supreme Court declined to invalidate Texas' school finance law in San Antonio Independent School District v. Rodriguez, the Court revealed its concerns about federalism. Several state supreme courts, striking down school financing schemes despite Rodriguez, indicated their own lack of concern for the federalism issue. Of course, questions regarding the judicial function remain, but they are horizontal, intrastate matters without the additional vertical, federalism concerns.

only hope is in Washington." Paulsen, State Constitutions, State Courts and First Amendment Freedoms, 4 VAND. L. REV. 620, 642 (1951).

70. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon corresponding provisions of the first state constitutions, rather than the reverse. People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975). See also Bravenec, The New Hampshire Bill of Rights in the Constitution of 1784 and the Treatment of Dissenters During the American Revolution, 8 N.H.B.J. 244 (1966).


71. See, e.g., State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974); Brennan, supra note 69, at 500.


It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

Id. at 44. See generally Maltz, Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust, 42 OHIO ST. L.J. 209 (1981).

4) The language of state constitutional provisions often is more detailed than that contained in the Federal Bill of Rights or the fourteenth amendment.\textsuperscript{74} Such detail focuses attention on the text of the provision at issue and related provisions of the state constitution.

5) State supreme courts may reject the United States Supreme Court's technique of analysis. For example, state courts may replace the suspect class and fundamental rights approach for equal protection and due process issues with a "rational basis with teeth" test.\textsuperscript{75} Counsel may argue that a court should adopt these different techniques of analysis, or discover that the state court already has indicated a new approach. Thus, not just the result may be different; the underlying judicial approach to constitutional analysis also may diverge from the more familiar federal constitutional doctrine.

6) The familiar fourteenth amendment requirement of state action\textsuperscript{76} may not be present in state constitutional protections.\textsuperscript{77}


For a survey of all state constitutional protections, see Sachs, \textit{Fundamental Liberties and Rights: A 50-State Index, Constitutions of the United States: National and State} (Legislative Drafting Research Fund of Columbia University 1980).

\textsuperscript{75} See, e.g., Robinson v. Cahill, 62 N.J. 473, 491, 303 A.2d 273, 282, cert. denied, 414 U.S. 976 (1973) ("But we have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose. . . . Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary."); Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1194, 424 N.Y.S.2d 168, 175, (1979) ("So one-sided a concept of [federal] due process we regard as unacceptable. In our view what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement."). \textit{But see} Linde, \textit{Due Process of Lawmaking}, 55 Neb. L. Rev. 197 (1976).

A rejection of a technique of analysis also led the California Supreme Court to require busing absent a finding of intentional discrimination. \textit{See infra} notes 98 & 99 and accompanying text. As to the technique used by the California Supreme Court in invalidating restrictions on Medicaid financing for abortion, see Note, Committee to Defend Reproductive Rights v. Myers: \textit{Abortion Funding Restrictions as an Unconstitutional Condition}, 70 Calif. L. Rev. 978 (1982).


Many state constitutional provisions, like many statutes, grant positive rights in specific terms and therefore may apply to non-governmental action.78

7) Constitutional doctrines long ago repudiated by the United States Supreme Court may still be viable as matters of state constitutional law. The most important examples are "substantive due process" in the field of economic regulation,79 which many states still utilize,80 and the doctrine of nondelegation of legislative authority.81

8) State constitutions may contain individual constitutional rights having no analogue in the Federal Constitution. For example, equal rights provisions,82 requirements of open access to courts for redress of injuries,83 rights to privacy,84 and specific protections


81. "State courts have exhibited an inclination significantly greater than that of the federal courts to hold invalid delegations of power which vest an agency with untrammeled and uncontrolled discretionary power." 1 COOPER, STATE ADMINISTRATIVE LAW 31 (1965). See also Martin, Legislative Delegations of Power and Judicial Review—Preventing Judicial Impotence, 8 FLA. ST. U.L. REV. 43 (1980); Note, Florida's Adherence to the Doctrine of Nondelegation of Legislative Power, 7 FLA. ST. U.L. REV. 541 (1979).


83. See generally Kluger v. White, 281 So. 2d 1 (Fla. 1973); Saylor v. Hall, 497 S.W.2d
for the incarcerated\textsuperscript{85} may be found in state constitutions. Lawyers therefore often have wide-ranging opportunities under state constitutions for formulating arguments.\textsuperscript{86}

Because of the absence of federal analogues, state courts necessarily have interpreted these constitutional provisions independently of United States Supreme Court cases. Therefore, the state courts have developed a truly independent constitutional jurisprudence under some of these provisions. This body of law can provide an approach for state courts to emulate when they seek to develop an independent interpretation of state constitutional provisions that have federal analogues.\textsuperscript{87}

The rediscovery of state bills of rights is criticized as being reactionary.\textsuperscript{88} In other words, state courts simply disagree with Supreme Court interpretations of cognate federal constitutional provisions. They therefore analyze the state constitutional problem in the same modes as the federal issue and, after drawing heavily on

\begin{footnotesize}
\begin{enumerate}
\item 86. For example, due process and equal protection notions can be argued, in different form, under prohibitions on special privileges, monopolies, and special laws.
\item 88. See Collins, Reliance on State Constitutions—Away From a Reactionary Approach, 9 HASTINGS CONST. L.Q. 1 (1981). See also Bator, The State Courts and Federal Constitutional Litigation, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) ("I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory."); Deukmejian & Thompson, All Sail and No Anchor—Judicial Review Under the California Constitution, 6 HASTINGS CONST. L.Q. 975 (1979).
\end{enumerate}
\end{footnotesize}
dissenting justices' opinions, reach a different result. A better alternative is for state courts to develop truly independent state constitutional jurisprudence — to create rather than just react. A fuller understanding of all aspects of state constitutionalism is necessary before this process can begin.

9) Even if a state supreme court is convinced that its constitution provides more extensive rights than the Federal Constitution, the state court must consider carefully whether these greater rights for one litigant would interfere with the state or federal constitutional rights of other litigants. Going beyond the federal minimum guarantees for one party may deprive the losing party of other state or federal minimum guarantees. Such deprivations usually would occur, however, only if the party against whom the state constitutional right was asserted was a private, rather than governmental, entity.

10) State constitutions themselves can address the question of whether they should be interpreted to provide greater protections than the Federal Constitution. In 1974, the voters in California adopted a constitutional provision distinguishing the coverage of the state and federal constitutions: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." The next year, the California Supreme Court observed: "Of course this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing

89. Recent dissenting opinions in the United States Supreme Court seem to be attempting to convince state supreme court justices that the opinion of the Court is neither binding nor persuasive. But see Bator, supra note 88, at 606 n.1 ("I regard it as inappropriate for Supreme Court Justices themselves to campaign to enact into unreviewable state constitutional law dissenting views about federal constitutional law which have been duly rejected by the United States Supreme Court.").

90. See generally Commonwealth v. Tate, 495 Pa. 158, 171-73, 432 A.2d 1382, 1388-90 (1981); Collins, supra note 88.


92. Developments, supra note 5, at 1335 n.21.

law.” A recent attempt in Florida to adopt a similar constitutional provision failed with the rejection of the entire package of proposals by the 1977-1978 Constitution Revision Commission.

Interpretations of the state constitution that expand constitutional protections, therefore, are not governed solely by the attitude of state courts. Textual changes to the constitution as in California also can influence courts’ decisions. This aspect of the process of state constitutional lawmaking — textual change — can be a two-way street. In 1979, just five years after approving article I, section 24, the California voters approved Proposition 1, amending article I, section 7. The amendment prohibited California courts from going beyond the requirements of the equal protection clause of the fourteenth amendment in the use of pupil assignment and school busing remedies. The amendment was intended to overrule a long series of California decisions ordering such remedies in the absence of intentional segregation, a prerequisite under

94. People v. Brisendine, 13 Cal. 3d 528, 551, 531 P.2d 1099, 1114, 119 Cal. Rptr. 315, 330 (1975). See also People v. Norman, 14 Cal. 3d 929, 939 n.10, 538 P.2d 237, 245 n.10, 123 Cal. Rptr. 109, 117 n.10 (1975); Note, The New Federalism: Toward a Principled Interpretation of the State Constitution, 29 STAN. L. REV. 297, 312 n.110 (1977) (“Perhaps the most that can be said is that the amendment represents a public ratification of the court’s past decisions that interpret independently the California Constitution.”).

95. See D’Alemberte, Constitutional Revision Symposium: Introduction, 5 FLA. ST. U.L. REV. 565, 567 (1977); Dore, Of Rights Lost and Gained, 6 FLA. ST. U.L. REV. 610, 612 (1978) (“The purpose of this beguilingly simple proposal was to breathe new life into the declaration of rights of the Florida Constitution. It was to remind the bench and the bar that federal constitutional rights are only minimum guarantees. They do not exhaust the possibilities for human freedom.”).

96. See infra note 270 and accompanying text.

97. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California . . . any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California . . . any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation . . . .

CAL. CONST. art. I, § 7 (emphasis added) See infra note 112 and accompanying text.
The United States Supreme Court recently upheld Proposition 1 against a federal constitutional challenge, illustrating once again the ever present possibility of using amendments to the constitutional text either to stimulate or overrule independent state constitutional interpretations.  

11) Judicial interpretation of state constitutions or amendment of the texts is not the only means by which states may provide greater protection to their citizens than is required by the Federal Constitution. Often overlooked means of expanding such protection are by statute, common law, or administrative regulation. The New York Court of Appeals noted that the Federal Constitution "leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rulemaking authority." One familiar example of expanded protection is the passage of state "press shield laws" after the Supreme Court ruled in *Branzburg v. Hayes* that reporters had no first amendment privilege to refuse to appear before grand juries or refuse to answer grand jury questions. Another example is the continuation of Medicaid funding for abortions by at least nine states after the Supreme Court's decision in *Harris v. McRae*.  

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100. See Wilkes, The New Federalism in Criminal Procedure Revisited, 64 Ky. L.J. 729, 751 (1976). The possibility of amendment, also illustrated by the death penalty experience in California, *infra* note 133, leads some observers to caution state courts not to rely on state constitutions because of the risk of voter "backlash." See Welsh & Collins, Taking State Constitutions Seriously, XIV THE CENTER MAG. 6, 24-31 (Sept./Oct. 1981). Examples of such state constitutional "backlash" are not limited to California. For example, a constitutional amendment in Florida recently "overruled" State v. Sarmiento, 397 So. 2d 643 (Fla. 1981), in which the state constitution was interpreted as providing greater protection against the electronic interception of private conversations than does the Federal Constitution. See FLA. CONST. art. I, § 12 (1982).  
103. The Court had noted that states might provide this protection if they so chose. *Id.* at 706.  
104. 448 U.S. 297 (1980). See New York Times, Feb. 8, 1982, at 2, col. 6. The decision in *Harris v. McRae* has been rejected uniformly by state courts considering restrictions on Medicaid funding for abortion. See e.g., Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981); Moe v. Secretary of Admin. and
Thus, if an attempt to establish a right fails at the federal level, the right may be pursued in state courts, legislatures, and administrative agencies. Moreover, lawyers and courts should be aware that state laws, other than the state constitution, offer many protections beyond those required by the Federal Constitution.

12) As a procedural matter, a final decision of a state court is insulated from review by the United States Supreme Court if the decision is based on an adequate and independent state ground. Insulation results even if the case also decides a federal constitutional issue. State court decisions relying on both state and federal grounds have been criticized because the state ground insulates the decision from vertical judicial review by the United States Supreme Court, and the federal ground insulates the decision from horizontal political review through amendment to the state constitution.


105. State court advocacy may focus on either adjudication or rulemaking. See infra note 184 and accompanying text.


Eager legal aid lawyers once came to our court trying to fit a woman’s right to operate a day care center within the due process analysis of Goldberg v. Kelly. Only after the argument did our own examination show that she was entitled to prevail under the state administrative procedure act, which counsel apparently had not read.

Id. at 390 (footnotes omitted). See also Hancock, State Court Activism and Searches Incident to Arrest, 68 VA. L. REV. 1085, 1117-21 (1982).


108. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

In 1979 in *Delaware v. Prouse*, the Supreme Court held that a state court interpretation of its constitution was not an adequate and independent state ground precluding review if "the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments." Since the adoption of Proposition 1 in California, state constitutional holdings in cases involving busing and pupil assignment apparently will have to depend on the California court's interpretation of federal equal protection doctrine.

Whether a state court should reject a United States Supreme Court interpretation of a cognate constitutional provision is a difficult question. Until now, most scholars have focused on courts that have done so. How can courts make this decision and how can counsel develop meaningful arguments addressing this question? Should a state court resolve state constitutional issues before it resolves federal issues? What is the value of a uniform, nationwide...
rule.\textsuperscript{114} Scholarly writings develop some preliminary guidelines,\textsuperscript{115} but much more thought and study are needed.

V. INTERPRETING STATE CONSTITUTIONS

When the interpretation of a state constitution is at issue, should the courts heed Justice Marshall's admonition: "[W]e must never forget that it is a constitution we are expounding"?\textsuperscript{116} Is the interpretation function different at the state level?\textsuperscript{117}

Questions of state constitutional interpretation depend partly on the function of the provision at issue. Did the state adopt the provision to overcome a judicial decision, thus constituting a grant of power? Is the provision, on the other hand, a traditional limitation on otherwise plenary state power? Judicial interpretation is aided by remembering that state constitutions reflect an ongoing process of lawmaking, and each constitutional provision is intended to

the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the Supreme Court and commentators. In a community that perceives the Supreme Court to be the primary interpreter of constitutional rights, reliance on Supreme Court reasoning can help to legitimate state constitutional decisions that build on the federal base. When a state court diverges from the federal view, a reasoned explanation of the divergence may be necessary if the decision is to command respect.

For state constitutional law to assume a realistic role, state courts must acknowledge the dominance of federal law and focus directly on the gap-filling potential of state constitutions.

\textit{Id.} (footnotes omitted).


\textsuperscript{115} \textit{See generally} Hancock, supra note 106, at 1132-36; Howard, supra note 1, at 934-44 ("Finding instances of state courts' use of state constitutions independently of the Federal Constitution is easier than articulating a principled theory of when courts should in fact use the power they have to chart their own course."); Sundquist, \textit{Construction of the Wisconsin Constitution —Recurrence to Fundamental Principles}, 62 Marq. L. Rev. 531 (1979); Note, \textit{supra} note 74, at 316-19; Comment, \textit{The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions}, 32 Case W. Res. 158 (1981).


\textsuperscript{117} Cooley's \textit{Constitutional Limitations} no longer is the authoritative guide. Swindler, \textit{supra} note 14, at 166; Powell, Book Review, 41 Harv. L. Rev. 272 (1927).
serve some purpose or to accomplish some goal. Additionally, not all constitutional provisions are equally specific.\textsuperscript{118} Finally, state constitutions are interpreted not only by courts, but also by legislators, executive officers, local governments, school district officials, and lawyers.\textsuperscript{119}

As a legislative document,\textsuperscript{120} a state constitution has an "official, unvarying text."\textsuperscript{121} This observation brings to mind Justice Frankfurter's rule for students of statutes: "read the statute; Read the Statute; READ THE STATUTE."\textsuperscript{122} The same rule applies to constitutions, and especially to state constitutions where mere reliance on judicial exposition can be very short-sighted. Significantly, some state constitutions contain provisions specifically addressing their interpretation.\textsuperscript{123}

The texts of state constitutions are much more volatile than their federal counterpart because they are subject to change from a number of different sources, including legislative proposals, initiative amendments, and proposals submitted to the voters by constitutional conventions. Tracing the "genealogy" of the text under scrutiny may reveal a number of changes in the language of the provision. Analyzing the changes leading up to the current text may support a specific interpretation. Such changes in the underlying text rarely are present in federal constitutional law.\textsuperscript{124}

The state constitutional adoption process, by its very nature, complicates questions surrounding the intent of the framers of state constitutional provisions, even if the provision was recently adopted. The people, not the framers, actually enact constitutional amendments. What impact should this fact have on future judicial

\textsuperscript{118} Vreeland v. Byrne, 72 N.J. 292, 304, 370 A.2d 825, 831 (1977) ("Not all constitutional provisions are of equal majesty."); J. Hurst, supra note 32, at 81-83.

\textsuperscript{119} Horack, supra note 27, at 384; Levinson, Interpreting State Constitutions By Resort to the Record, 6 Fla. St. U. L. Rev. 567, 568 (1978).

\textsuperscript{120} Horack, supra note 27, at 384.

\textsuperscript{121} Kernochan, Statutory Interpretation: An Outline of Method, 3 Dalhousie L.J. 333 (1976).

\textsuperscript{122} Id. at 338.

\textsuperscript{123} See, e.g., N.J. Const. art. 4, § 7, ¶ 11 (liberal construction of municipal powers); S.C. Const. art. I, § 23 (all provisions mandatory and prohibitory).

\textsuperscript{124} See Sedler, Constitutional Law Casebooks: A View From the Podium, 79 Mich. L. Rev. 1020, 1021 (1981) ("decisions of the United States Supreme Court are the 'stuff' of constitutional law").
interpretation of provisions adopted in this manner? In the words of the New York Court of Appeals:

We may not . . . construe the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers, or even a statute enacted by the Legislature. It is the approval of the People of the State which gives force to a provision of the Constitution . . . and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter. 125

Attempting to ascertain the intent of the people can be difficult and highly speculative; thus, sometimes "the people's intent is sought in such materials as newspaper commentaries or summaries appearing on the ballot." 126 These notions can appear to lend credence to the "plain meaning rule" in state constitutional construction: 127 "If the language of the constitutional text is clear on its face, this plain language is deemed to have been understood by the people, and their intent is deemed to coincide with that plain meaning." 128 Evaluation of the wisdom of this approach provides valuable lessons in distinguishing between the objective meaning of words and the meaning intended by those who use the words. 129


127. "It is a familiar rule of construction that where phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself, and where found in our State Constitution the language is the voice of the people." Vreeland v. Byrne, 72 N.J. 292, 302, 370 A.2d 825, 830 (1977). See also Gangemi v. Berry, 25 N.J. 1, 9, 134 A.2d 1, 6 (1957). The plain meaning rule has been discredited generally in statutory interpretation. See generally Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes, 25 Wash. U.L.Q. 2 (1939); Kernochan, supra note 121; Murphy, Old Maxims Never Die: The "Plain Meaning Rule," and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975).

128. Levinson, supra note 119, at 569.

129. See, e.g., Chicago & Northwest Ry. Co. v. State, 128 Wis. 553, 587-88, 108 N.W. 557,
Courts, therefore, should not be content to rely only on indications of the framers' intent.

Placed in this context, the legislative history of state constitutional provisions is relevant. Records of constitutional convention deliberations and legislative debates on proposed constitutional amendments can shed light on the purpose and intent of state constitutional provisions. Such records, however, may not be readily accessible. For example, a 1970 Florida decision relied on constitutional convention records in a "special file in [the] Supreme Court Library . . . ." State constitutions are much more easily and frequently amended than is the Federal Constitution. Should the ease and frequency with which constitutions are amended influence the way courts interpret them? One commentator contends that "[s]tate judges, by contrast [to Supreme Court Justices], though they should not innovate lightly, should recall that state constitutions are less immutable." Another commentator argues, however,

561 (1906).

130. See generally, Levinson, supra note 119. But see Lousin, Constitutional Intent: The Illinois Supreme Court's Use of The Record in Interpreting the 1970 Constitution, 8 J. MAR. J. PRAC. & PROC. 189, 191 (1975) ("the record is seldom perfectly clear about anything more important than the time at which the delegates recessed for lunch — and sometimes even that point is unclear"); Pound, Procedure Under Rules of Court in New Jersey, 66 Harv. L. Rev. 28, 42 (1952) ("legislative history itself often needs interpretation").


133. Howard, supra note 1, at 939. Justice Hennessey of the Supreme Judicial Court of Massachusetts, concurring in that court's invalidation of capital punishment under the state constitution, observed that if "the present will of the people of the Commonwealth is that capital punishment should be permitted . . . procedures for amendment of the State Constitution which are relatively speedy, but still require time for reasonable reflection, are available to accomplish that end." Commonwealth v. O'Neal, 369 Mass. 242, 275, 339 N.E.2d 676, 694 (1975). But see State v. Baker, 81 N.J. 99, 115-26, 405 A.2d 368, 375-81 (1979) (Mountain, J., dissenting). Compare People v. Anderson, 8 Cal. 3d 628, 493 P.2d 880, 100
that "[s]tate constitutions are easier to amend and may therefore provide less justification for flexible interpretation." The theoretical and practical ease of amending state constitutions, as well as the territorial limitation of state constitutional interpretations, may have profound implications on our attitudes toward the undemocratic process of judicial review and the doctrine of stare decisis. The legal community, heretofore, has not directly faced such questions although they well deserve the attention of lawyers and legal scholars.

Several specific interpretation issues highlight the theory of state constitutions. For example, is the provision under scrutiny self-executing, or must its application await legislative implementation? The increasing use of the constitution as an alternative vehicle for lawmaking has resulted in an almost de facto presumption that provisions are self-executing. A California Supreme Court justice observed:

Save as to the assurances of individual rights against the government the direct operation of the constitution was upon the government only . . . . Latterly, however, all this has been changed . . . . Now the presumption is the reverse. Recently adopted state constitutions contain extensive codes of law, intended to operate directly upon the people as statutes do. To say that these are not self executing may be to refuse to execute the sovereign will of the people.


Professor Guido Calabresi recently observed:

The statement by a supreme court of a jurisdiction that a law is unconstitutional is and should be more than an invitation to amend the constitution. Indeed, the easier the procedure for amendment, the more must the judicial decrees of unconstitutionality put to the people the seriousness of what an amendment means. Only in this way can constitutional rights be protected from temporary majorities. The use of constitutional adjudication when the object is precisely to see if an old or seemingly anachronistic law still commands popular support cheapens, indeed destroys, the crucial moral force that underlies and protects true constitutional decisions.


134. Levinson, supra note 119, at 568. See also supra note 27.

135. As anyone who has worked with state constitutions knows, they are not "easy" to amend. But compared with amending the Federal Constitution, amendment of state constitutions is simpler and more often successful.

136. Winchester v. Howard, 136 Cal. 432, 439, 69 P. 77, 78-79 (1902); Note, Some Ten-
The courts have developed a general test for determining whether a state constitutional provision is self-executing. The test focuses on whether the provision in question is capable of application or enforcement in the absence of implementing legislation. Presumably this refers to judicial application or enforcement. Of course, when constitutional change is substituted for legislation, questions will arise concerning the relationship of the constitutional change to statutory law and legislative authority on the same subject.

Questions also arise in state constitutional interpretation as to whether provisions are mandatory or directory. Other issues surround the application of maxims of interpretation. Finally, under certain circumstances, courts will defer to legislative interpretation, as reflected in statutes, of constitutional provisions. For example, in Jasper v. Mease Manor, Inc., the Florida Su-

137. The test is whether the provision "supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected . . . without the aid of a legislative enactment." State ex rel. City of Fulton v. Smith, 355 Mo. 27, 32-33, 194 S.W.2d 302, 304 (1946) quoting 11 AM. Jur. Constitutional Law § 74, 691-92. For an interesting modern opinion holding Pennsylvania's environmental provision not to be self-executing, see Commonwealth v. National Gettysburg Battlefield Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1978).


However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right . . . "but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."

Id.


141. See, e.g., FLA. STAT. § 222.19(1) (1977). "It is the declared intention of the Legislature that the purpose of the constitutional exemption of the homestead is to shelter the family and the surviving spouse . . . ." Id.

142. 208 So. 2d 821 (Fla. 1968).
preme Court retreated from its prior judicial definitions of charitable tax exemptions authorized in the constitution and deferred to a legislative definition.\textsuperscript{143}

Overall perspectives on approaches to interpreting state constitutional provisions, such as those briefly discussed above, can significantly benefit lawyers, courts, and legal scholars faced with constitutional interpretation problems.

VI. THE STATE LEGISLATIVE BRANCH

A. \textit{Limitations on Legislative Power}

A commentator observed that "one of the most marked features of all recent State constitutions is the distrust shown of the legislature."\textsuperscript{144} The transition from early state constitutions granting unfettered legislative power to the more recent constitutions restricting legislative power reflects one of the most important themes in state constitutional law.\textsuperscript{145} This transition is evidenced by two

\begin{itemize}
  \item \textsuperscript{143} The court in \textit{Jasper} noted:
    
    The problem therefore differs significantly from that which has been presented in cases requiring judicial definition of the constitutional concepts in the absence of an explicit statute. Application in those cases of a more limited definition of charitable use, in the primary sense of relief for the indigent or helpless, does not require or justify rejection of the current statute on constitutional grounds.


  \item \textsuperscript{144} Eaton, \textit{Recent State Constitutions}, 6 HARV. L. REV. 109 (1892). See also J. Hurst, \textit{supra} note 32, at 5-10; G. Wood, \textit{supra} note 10, at 403 \textit{passim}.

    Chief Justice Warren in 1964 observed:

    State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies.


  \item \textsuperscript{145} One frequently mentioned state constitutional law problem has been the inability of state legislatures to deal decisively with modern problems due to textual and judicially imposed state constitutional restrictions. \textit{See, e.g.}, Grad, \textit{supra} note 9, at 939 ("The least we
characteristics: (1) the insertion of specific “constitutional legislation” into state constitutional texts, thereby supplanting legislative prerogatives and sometimes leading to a limitation of legislative alternatives through judicially discovered “negative implication;” and (2) the insertion into state constitutions of detailed procedural requirements that the legislature must follow in the enactment of statutory law.

1. Negative Implication

As noted earlier, many state constitutions include provisions that could be relegated to statutory law. Particularly when these provisions mandate legislative action or grant authority to a legislature already vested with plenary power, courts can transform

may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents’ real needs and active demands for service."); Swindler, supra note 1, at 593-96; J. Fordham, The State Legislative Institution 26 (1959) (“The only conclusion warranted by the realities of the state constitutional order is that the legislatures are hamstrung by numerous limitations on their powers.”).

Justice Brandeis was referring to state legislatures when he made his famous observation: “It is one of the happy incidents of the federal system that a single, courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Holmes referred to “social experiments . . . in the insulated chambers afforded by the several states . . . .” Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).


146. “Through distrust of legislatures and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character.” McMurray, supra note 22, at 210. See also supra notes 21-26 and accompanying text.


J. Willard Hurst observed:

The persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of “special” and “local” legislation. The related fear, that special favors would be sought undercover, was expressed in requirements that every bill bear a title clearly stating its subject matter, and that every bill deal with but one subject. The same fear was behind insistence upon many requirements, hopefully designed to insure full publicity and open deliberation of the merits of legislation, through three readings, reference to committee, recording the yeas and nays, and the like.

J. Hurst, supra note 13, at 241-42.
these provisions into limitations on legislative power.

It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation.\(^{148}\)

\[\ldots\]

In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions \ldots\ In order to give effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (The expression of one is the exclusion of another).\(^{149}\)

For these reasons, many apparent grants of authority become, through judicial interpretation, limits on legislative power. Courts and lawyers should be aware of this hidden dimension of state constitutional language.

2. Procedural Limitations on the Enactment of Statutes

Most modern state constitutions contain specific procedural requirements for statutory enactment which were not found in early state constitutions. Typical procedural limitations include the following: requirements that titles of legislative acts provide general notice of their contents;\(^{150}\) prohibition of acts containing more than one subject;\(^{151}\) limitations on the method of amending existing

\[\ldots\]

\(^{148}\) Grad, *supra* note 9, at 964-65.


An initial question is whether these types of provisions are judicially enforceable. Some state constitutions address the matter specifically. For example, the Illinois Constitution of 1970 provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." These procedural requirements for enacting statutes provoke criticism on a number of grounds, ranging from the assertion that the requirements "have caused considerable damage through invalidation of noncomplying laws on technical grounds," to the as-


154. See Brown v. Firestone, 382 So. 2d 654 (Fla. 1980); Ruud, supra note 151, at 413; 8 Fla. St. U.L. Rev. 345 (1980).


Even in states where these provisions are not enforceable, however, legislatures sometimes conform. See R. Dickerson, Legislative Drafting 57-59 (1954); Mallison, General Versus Special Statutes in Ohio, 11 Ohio St. L.J. 462, 499 n.21 (1950).

For a judicial imposition of a certain form of enacting clause in the absence of a constitutional requirement, see Joiner v. State, 223 Ga. 367, 155 S.E.2d 8 (1967).


157. Grad, supra note 9, at 963. Conversely, Ruud concluded that the single subject rule's "benefits are obtained at comparatively little cost in negative results." Ruud, supra note 151, at 452. For other criticism of these procedural requirements, see Fordham, supra note 145, at 56; Freund, supra note 23, at 155-57; Nutting, A Classic Revisited: Standards of American Legislation, 51 A.B.A.J. 782, 783 (1965); Sinclair, supra note 150, at 62-63.
assertion "that an argument based on the one subject rule is often the argument of a desperate advocate who lacks a sufficiently sound and persuasive one." 158 Judicial precedents add little certainty to the application of title and single subject requirements. "Flagrant violations of this requirement may, of course, be apparent, but no test of violation is laid down by the provision itself and none has been developed by judicial action." 159 These provisions, however, represent an important limit on legislative authority and illustrate the result of public disillusionment with legislative abuses. On rare occasions, these procedural provisions may invalidate a statute. More importantly, these provisions make the state legislative process significantly different from and more rigidly structured than the federal legislative procedure.

B. Direct Legislation

The initiative and referendum movement around the turn of the century was another indication of public dissatisfaction with state legislatures. Initiatives enabled the public to bypass unresponsive state legislatures, and referendums provided a check on the effect of unpopular statutes. These devices are more sophisticated than the earlier procedural restrictions, most of which reflected disapproval of legislative actions. The initiative allowed the people to take direct action when the legislature refused to act. The referendum enabled the people to target specific enactments rather than depend on the indirect deterrence of procedural restrictions.

The people of South Dakota began the process of taking back, or reserving to themselves, a measure of legislative power in a constitutional amendment approved in 1898.160 During the next twenty years, about a dozen states followed the lead. One observer of that era predicted that "[t]he more direct legislation you have ..."

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158. Ruud, supra note 151, at 447. "To the extent that this argument is considered the hallmark of a weak case, the advocate may consider it wise to use it very sparingly." Id.
159. Dodd, supra note 27, at 640.
161. Fordham & Leach, supra note 160, at 496. Idaho's provision was not self-executing and therefore lay dormant from 1912 until 1933 when it was legislatively implemented. See Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943).
the greater the body of judge-made law.” Another observer said:

Against the theoretical view of direct legislation little can be said. If communities were small and intelligent, and newspapers fair and unprejudiced, direct legislation ought to be a success. As to whether the great mass of voters in a big commonwealth will advise themselves sufficiently so as to be able to act intelligently and will so act, is one of the great questions connected with this form of legislation.

These views raise interesting and complex questions of political philosophy, especially today when many major public issues are resolved at the ballot box. Also, legal questions arise with regard to initiated statutes: (1) Can they be amended or repealed by the legislature? (2) Can such a statute be vetoed by the governor? (3) Would the title and single subject limitations apply? (4) How should courts interpret such statutes?

C. Legislative Veto

State legislatures, as well as Congress, have begun to reassert
authority over administrative agencies by the legislative veto. This mechanism may be either constitutionally or statutorily authorized and permits the legislature to veto agency rules by taking steps short of statutory enactment. A leading state case is State v. A.L.I.V.E. Voluntary, in which the Alaska Supreme Court invalidated that state's veto scheme. This issue requires consideration of the nature of legislative power and of the relationship between the legislature and the executive.

VII. The State Judicial Branch

State supreme courts serve a number of important functions within state government and the legal system. Most familiar is their role in common law development and statutory and constitutional interpretation, functions performed in the context of adjudicating cases. Interestingly, state supreme courts developed the concept of judicial review of the constitutionality of statutes long before Marbury v. Madison. This Article addresses primarily the interpretation of state constitutions by state supreme courts. A
major focus of the study of state constitutional law, however, should be on the nonadjudicatory functions of state supreme courts.

A. Rules of Practice and Procedure

Supreme courts in many states have constitutional authority to promulgate rules of practice and procedure for the courts.\textsuperscript{174} Although this power now is explicitly granted in many constitutions, earlier commentators regarded it as an inherent judicial power.\textsuperscript{175} Exercise of the rulemaking power reaches such crucial areas of lawyers' work as discovery and class actions. This grant of power to the courts serves as a limitation on legislative authority. Therefore, the procedure-substance dichotomy takes on constitutional dimensions, and statutes that invade the procedural realm may be invalidated.

The relationship between statutes and court rules varies from state to state, but common issues arise. For example, in the famous case of \textit{Winberry v. Salisbury},\textsuperscript{176} the New Jersey Supreme Court held that the New Jersey Constitution\textsuperscript{177} prohibited the legislature from statutorily overriding court rules.\textsuperscript{178} Other states resolve this issue by reference to the specific constitutional language involved. For example, Florida's constitution provides: "These rules may be repealed by general law enacted by two-thirds vote of the member-

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Pound}, \textit{The Rulemaking Power of the Courts}, 12 A.B.A.J. 599 (1926); Wigmore, \textit{All Legislative Rules for Judiciary Procedure are Void Constitutionally}, 23 Ill. L. Rev. 276 (1928).
\item 5 N.J. 240, 74 A.2d 406 (1950).
\item The New Jersey Constitution provides: "The Supreme Court shall make rules governing the administration of all courts in the State and subject to law, the practice and procedure in all such courts." N.J. Const. art. 6, § 2, ¶ 3 (emphasis added).
\end{enumerate}
\end{footnotesize}
ship of each house of the legislature."

The distinction between practice and procedure is easier to define than to apply. For example, does the following formulation apply to the law of evidence?: "[S]ubstantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights." When the Florida Legislature passed a comprehensive statutory evidence code, the Florida Supreme Court resolved the potential conflict by adopting the evidence code as a court rule. The Colorado Supreme Court avoided a possible conflict between its rulemaking authority and a rape shield statute by holding that the statute would stand because there was no conflicting court rule on the subject. Taking a different view of its relationship to the legislature, the New Jersey Supreme Court has intimated that because it can make substantive law in common law adjudications, there is no need for the court to limit itself strictly to practice and procedure in its rulemaking capacity. State courts also may use their rulemaking power as an alternate method to provide individuals with greater rights and protections than are available under the Federal Constitution.

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181. See In re Florida Evidence Code, 376 So. 2d 1161 (Fla. 1979); In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979).


The constitutional grant of rulemaking power as to practice and procedure is simply a grant of power; it would be a mistake to find in that grant restrictions upon judicial techniques for the exercise of that power, and still a larger mistake to suppose that the grant of that power impliedly deprives the judiciary of flexibility in the area called "substantive" law.

Id. at 363, 307 A.2d at 577. The difference, of course, between the two "techniques" of exercising judicial power was that the New Jersey Supreme Court had held that the legislature could not overrule court rules, although the legislature could overrule substantive law decisions. See supra notes 176-78 and accompanying text.

B. Regulation of the Practice of Law

Another power initially claimed to be inherent in the judiciary relates to the admission and discipline of attorneys. Many state constitutions now expressly confer this power upon the courts and, again, as a grant of judicial authority, this power serves as a limitation on the legislature. Surprisingly, legislatures may not pass statutes concerning the admission and discipline of lawyers. A series of recent cases in Pennsylvania held that the state ethics act could not be applied to lawyers. "Sunset" legislation applying to statutes regulating professions may not regulate the practice of law.

Through the exercise of their power to regulate the bar, courts have promulgated the modern student practice rules which form the basis for clinical legal education. The New Jersey Supreme Court utilized the power to place limits on attorneys' fees for tort cases, and most courts now are grappling with lawyer advertising and specialization. The Florida Supreme Court used the power to initiate an innovative program that permits lawyers to place funds entrusted to them in interest-bearing accounts and to use the revenues for various public service projects.

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185. See Petition of the Florida State Bar Ass'n, 40 So. 2d 902, 905-06 (Fla. 1949) and cases cited therein. See also Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980).


187. See, e.g., art. XVIII, Integration Rule of the Florida Bar, as amended, cited in Attorney General and Others to Amend Article XVIII of the Integration Rule of the Florida Bar, 339 So. 2d 646 (Fla. 1976).


189. The Virginia Supreme Court's efforts to regulate lawyer advertising led to its being sued for first amendment violations. The United States Supreme Court assessed the court's claimed immunity on the basis of the principles of legislative, rather than judicial, immunity. Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).

190. See generally In re Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981); In re Interest on Trust Accounts, 396 So. 2d 719 (Fla. 1981); In re Interest on Trust Accounts, 372 So. 2d 67 (Fla. 1979); In re Interest on Trust Accounts, 355 So. 2d 799 (Fla. 1978). The program is discussed in Berg, A Significant New Revenue Source for Legal Services Begins:
C. *Inherent Powers of the Courts*

In recent years, particularly with respect to budgetary matters, state courts have been asserting that

the Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent Branch of our Government.¹⁹¹

This claim of inherent judicial powers raises important questions of political theory. "Certainly the political philosophy of 1776 was based very largely on the notion of social compact and did not recognize the existence of inherent governmental power in either legislative, executive or judicial department."¹⁹²

The issue of whether state legislatures exercise delegated or inherent powers is largely academic. Because state constitutions provide that all legislative power resides in the legislature, the important task is to define the legislative power, not to quibble over whether that power is inherent or delegated. State constitutions similarly place the judicial power in the judiciary; consequently, rather than debating whether a court's power is inherent, the inquiry should focus on whether the claimed power is properly a judicial function.

A controversy currently exists in Pennsylvania over the extent to which statutes granting collective bargaining rights cover state court employees. An intermediate appeals court recently ruled that firing a typist employed by a court was a judicial function, and

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therefore the courts need not respond to unfair labor practice charges issued by the state labor board. The court relied on an earlier Pennsylvania Supreme Court case for the proposition that "if results of bargaining pose a genuine threat to the judicial function, nothing . . . precludes the judiciary from taking steps reasonably necessary to assure the independence of the judicial branch." The Pennsylvania Supreme Court also said: "[S]o long as judges retain authority to select, discharge, and supervise court personnel, the independence of the judiciary remains unimpaired." Resolving this question of the employment rights of nonconfidential court employees, in Pennsylvania and elsewhere, will add an important chapter to state constitutional law.

D. Advisory Opinions

Many state constitutions authorize or require state supreme courts to render advisory opinions to various governmental officials. States differ, of course, as to which officers may request opinions and when they may do so. The courts tend to construe strictly their authority and obligations under these provisions. Interesting questions may arise as to the precedential value of advisory opinions. According to the Supreme Judicial Court of Massachusetts:

197. In 1931, the Supreme Court of Colorado noted that such a "constitutional provision is our only authority for answering questions not presented in litigated cases . . . ." In re House Resolution No. 12, 88 Colo. 569, 298 P. 960 (1931).
Advisory opinions that are authorized by state constitutions are different from what Justice Frankfurter was criticizing when he said: "It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay." Frankfurter, A Note on Advisory Opinions, 37 HARV. L. REV. 1002, 1008 (1924). See also Coleman v. Miller, 307 U.S. 433, 462 n.4 (1939).
198. See In re House Resolution No. 12, 88 Colo. 569, 298 P. 960 (1931); In re Opinion of the Justices, 314 Mass. 767, 49 N.E.2d 252 (1943).
It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisors of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis.199

VIII. The State Executive Branch

Public distrust of the executive branch, as reflected in state constitutions, historically has been inversely related to public distrust of the legislative branch. The executive branch began in disfavor200 and has gained more power and authority over the years.

A. Constitutional Duties and Agencies

Although the executive branch's main responsibility is usually thought of as the faithful execution of the laws, state constitutions directly assign numerous functions to governors and executive branch officials and agencies. For example, constitutions often assign the power of executive clemency to the governor, thereby insulating the exercise of that power from legislative201 or judicial202

When the same questions are raised in litigation, the justices then composing the court are bound sedulously to guard against any influence flowing from the previous consideration, to examine the subject anew in the light of arguments presented by parties without reliance upon the views theretofore expressed, and to give the case the most painstaking and impartial study and determination that an adequate appreciation of judicial duty can impel.

Id. The New Hampshire Supreme Court "caution[ed] that the opinion given is not a judicial decision . . . ." In re Opinion of the Justices, 82 N.H. 561, 575, 138 A. 284, 291 (1927). The Florida Constitution provides for "interested persons to be heard on the questions presented." Fla. Const. art. IV, § 1(c).

200. The Americans, in short, made of the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of his regal ancestor. This change in the governor's position meant the effectual elimination of the magistracy's major responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition.

G. Wood, supra note 10, at 136. See also id. at 132-43.

interference.

The people in many states have created executive agencies through "constitutional legislation." The status of such constitutional agencies or offices in relation to the legislature can be very different from statutorily created executive agencies or offices. For example, the Florida Supreme Court invalidated a statute prohibiting hunting on Sundays on the ground that it conflicted with an administrative rule of the constitutionally established Game and Fish Commission. The rule provided for a one-month hunting season which included Sundays.203

B. The Veto Power

Although exercised by the executive, the gubernatorial veto power has been termed a "legislative power."204

[H]istorically what is called the veto power of American executives is derived from the legislative power of the British Crown. Until the fifteenth century, statutes in England were enacted by the king on his own initiative or in response to petitions. From that time parliament presented bills in place of petitions . . . . The king's assent was still necessary; and without his assent a bill was not law.205

. . . .

The opposition to the governor and to the royal veto which had developed during the colonial period was reflected in the early state constitutions. These documents made the legislatures the main authority in state government, and narrowly restricted the powers of the executive. In the case of the veto power the doctrine of the separation of powers was probably another factor in excluding the governor in most states from even a negative voice in legislation. Only three of the thirteen original states made any provision in their first state constitutions for a veto on


204. For a case holding a governor's exercise of the veto power to be subject to the rules of legislative immunity, see Saffioti v. Wilson, 392 F. Supp. 1335 (S.D.N.Y. 1975).

acts of the legislature.\textsuperscript{206}

The governors of all states except North Carolina currently have the power to veto enactments of the legislature, and the governor of New Jersey may even exercise a form of pocket veto.\textsuperscript{207}

The gubernatorial "negative voice" in legislation was even more broadly expanded with the advent, around the turn of the century, of the item veto over specific line items in appropriation bills.\textsuperscript{208} Some states go beyond the item veto and permit governors to reduce such line items without vetoing them.\textsuperscript{209} President Reagan recently suggested that the item veto be authorized at the federal level;\textsuperscript{210} thus, the item veto may become a subject of national debate.

Gubernatorial exercise of the item veto, originally intended to prevent legislative "logrolling," presents several issues. For example, what constitutes an "item" in an appropriations bill?\textsuperscript{211} May a governor veto language or restrictions without vetoing the appropriation itself?\textsuperscript{212} What constitutes an appropriation bill?\textsuperscript{213}

\textsuperscript{206} Id. at 474-75.

\textsuperscript{207} The New Jersey governor's pocket veto power was circumscribed significantly by the adoption of a constitutional amendment at the November 1981 general election.

\textsuperscript{208} See generally Beckman, The Item Veto Power of the Executive, 31 TEMP. L.Q. 27 (1957); Harrington, The Propriety of the Negative — The Governor's Partial Veto Authority, 60 MARQ. L. REV. 865 (1977); Wells, The Item Veto and State Budget Reform, 18 AM. POL. SCI. REV. 782 (1924).

\textsuperscript{209} Interestingly, this notion of gubernatorial reduction of appropriation items, as opposed to absolute veto, seems to stem from Pennsylvania's judicial interpretation in Commonwealth v. Barnett, 199 Pa. 161, 48 A. 976 (1901) of its provision to permit such reductions. Virtually all other courts that have considered the issue have rejected this interpretation. See, e.g., Wood v. State Admin. Bd., 255 Mich. 220, 238 N.W. 16 (1931); Mills v. Porter, 69 Mont. 325, 222 P. 428 (1924). A number of states, however, have amended their constitutions to authorize gubernatorial reduction. See generally Note, Item Veto, Reduction of Items, Elimination of Items Included in a General Sum, 12 S. CAL. L. REV. 321 (1939).


\textsuperscript{211} See Brown v. Firestone, 382 So. 2d 654 (Fla. 1980); State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); 8 FLA. ST. U.L. REV. 345 (1980).

\textsuperscript{212} See supra note 211. See also Givens, The Validity of a Separate Veto of Nongermane Riders to Legislation, 39 TEMP. L.Q. 60 (1965); Note, The Legislative Rider and the
C. Executive Orders

A recent series of cases concerning ethics and conflicts of interest addressed the extent of gubernatorial authority to make policy through executive orders. Several governors promulgated financial disclosure requirements and conflict of interest guidelines by executive order which, in the absence of legislative authority, were challenged as beyond the executive power. In the leading case, *Rapp v. Carey*, the New York Court of Appeals invalidated the order:

The crux of the case is the principle that the Governor has only those powers delegated to him by the constitution and the statutes . . . . .

Under our system of distribution of power with checks and balances, the purposes of the executive order however desirable, may be achieved only through proper means.

Based on the proposition that the executive branch may exercise only those powers delegated to it by the constitution or statute, the question of implied powers is often crucial. This consideration may be contrasted with the importance of implied limitations on the legislative branch.

IX. Taxing and Spending

The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government. In republics it is vested in the legislature, and in

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216. *See supra* note 34 and accompanying text.
the absence of any constitutional restrictions, may be exercised by them, both as to objects and modes, to any extent which they may deem proper.217

The efforts of state and local governments to raise revenue through taxation and borrowing, and the expenditure of such funds, historically were characterized by favoritism, inequality, and numerous abuses. In what now is a recurring pattern in state constitutional law, many of these inequities or abuses, particularly those perpetrated by the state and local legislative branch, precipitated the imposition of constitutional limitations on otherwise plenary legislative power. In the field of taxing and spending, such restrictions are among the most detailed. The following observation about state constitutions is particularly relevant in this area:

We have found our servants dishonest; we won't discharge them and try to get honest and competent ones. No, we will continue to employ those who have been proved to be bad, but we will take good care to tie their hands securely so that they can neither steal nor work.218

A. Taxation

Many state constitutions contain a taxation uniformity clause219 requiring all property to be assessed at the same percentage of value and then taxed at the same rate.220 Originally adopted to eliminate abuses, modern uniformity provisions can stand in the way of a progressive income tax structure or a flat-rate income tax structure with exemptions or deductions for business expenses.221

218. McMurray, supra note 22, at 213.
Uniformity clauses also necessitate specific constitutional amendments to authorize differential taxation of agricultural land, open space, or areas of urban redevelopment.\textsuperscript{222} Finally, many state constitutions allocate the power to use certain tax sources between state and local government.\textsuperscript{223} For example, most state governments do not have the power to levy a general real property tax because the state constitution has assigned that authority to local government. Some state constitutions actually prohibit the use of certain taxes, such as the personal income tax.\textsuperscript{224} Many states have committed the subject of tax exemptions to their constitutions.\textsuperscript{225} Thus, the legislature may only, or in some cases must, grant exemptions for constitutionally authorized purposes.\textsuperscript{226}

State constitutions may hinder attempts to remedy taxation schemes that violate other provisions of the constitution. In \textit{Buse v. Smith},\textsuperscript{227} the Wisconsin Supreme Court held that reforms in the system of funding public schools from property tax revenues violated a constitutional requirement that local taxes be spent in the

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the Massachusetts Constitution to permit a graduated income tax was the issue that led to First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

Wisconsin's "circuit breaker" property tax relief program escaped invalidation in State ex rel. Harvey v. Morgan, 30 Wis. 2d 1, 139 N.W.2d 585 (1966). The court characterized the program as a social welfare and police power measure rather than as a tax measure.

\textsuperscript{222} \textit{See generally Myers, supra} note 217. The author noted:

\textit{The rigid uniformity provisions were originally designed to prevent legislative abuses of the taxing power . . . . The open space amendments carve out certain exceptions to these rules. At the same time, however, the amendments confirm the continuing viability of the concept of uniformity by allowing specific deviations from operation of the rules.}

\textit{Id. at 838. See also M. BERHARD, CONSTITUTIONS, TAXATION AND LAND POLICY (1979); Massey & Silver, Property Tax Incentives for Implementing Soil Conservation Programs Under Constitutional Taxing Limitations, 59 DENVER L.J. 485 (1982).}

\textsuperscript{223} \textit{See generally Antieau, Municipal Power to Tax — Its Constitutional Limitations, 8 VAND. L. REV. 698 (1955).}


\textsuperscript{226} For an interesting case in which a court retreated from its view of the requirements of the constitutional term "charitable" because the legislature disagreed, see Jasper v. Mease Manor, Inc., 208 So. 2d 821 (Fla. 1968), discussed supra notes 142-43 and accompanying text.

\textsuperscript{227} 74 Wis. 2d 550, 247 N.W.2d 141 (1976).
locality where they are collected.228

The role of state constitutions in the state and local tax area is evidenced by the recent tax revolt. Proposition 13 in California and its progeny in other states used the mechanism of "constitutional legislation" to limit the amount of state and local taxation.229 This recent movement drew on the old device of constitutionally imposed tax limitations.230

B. Borrowing

Debt limits in state constitutions severely constrain the ability of state and local government to borrow money, usually through the sale of bonds, for long-term capital projects.231 These limits resulted directly from the state government abuses leading to the "Panic of 1837" and local government abuses contributing to the 1873-1879 and 1893 depressions.232

In this century, the history of government borrowing, which is necessary to enable state and local government to construct projects such as buildings, roads, water management systems, and housing projects, has been a history of evasion of the constitutional restrictions. Evasion of these restrictions can add significant expense to such borrowing.233 The most recent innovation in this area


230. Gelfand, Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt and Beyond, 63 MINN. L. REV. 545, 551 (1979).


233. See generally Morris, Evading Debt Limitations with Public Building Authorities:
has been the moral obligation bond.\textsuperscript{234} Also, there has been a great resurgence in government assistance to private industrial development through the use of industrial development bonds.\textsuperscript{235} The key to the expansion of bond financing has been the use of revenue bonds, which require lenders to look to pledged revenues from the completed projects rather than to the general taxing authority of the government for repayment of the bonds.

C. \textit{Spending}

Many state constitutions require a balanced state budget.\textsuperscript{236} The executive branch estimates anticipated revenues, and the legislature may not appropriate more than that figure.\textsuperscript{237} The executive branch then may not expend any funds except pursuant to a legislative appropriation.\textsuperscript{238}

X. \textbf{Local Government}

At the time of the Revolution the framers of our state constitutions failed to allocate a basic power in fact acknowledged and practiced, the power of local government. In 1776 the United States enjoyed three levels of successful governmental operation — national, state, and local. Only the first two were given constitutional legitimacy.\textsuperscript{239}
The role of local government in state constitutional law evolved from a position of no constitutional recognition whatsoever and progressed through the home-rule movement. One commentator observed:

[T]here is a very important choice between use of the state constitution as the direct instrument for allocating governmental powers and reliance upon the legislature as a continuing power-distribution organ in the state . . . . The devolution of authority to local units has traditionally been a function of the state legislature under the strongly prevailing doctrine of legislative supremacy over local government. It is here that the basic choice of political method presents great difficulty. What factors militate in favor of modifying legislative supremacy by constitutional amendment?240

Denied constitutional recognition, some local governments initially claimed inherent powers.241 The more widely accepted notion, however, was "Dillon's Rule,"242 which cast local governments as creatures of the state legislature. Local government thus consisted of delegated or enumerated powers.243 Not until the mid-

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242. It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable.
J. Dillon, 1 Municipal Corporations § 55, at 173 (2d ed. 1873), quoted in Herget, supra note 239, at 1009 n.48.
243. Herget, supra note 239, at 1008-11. This fact, however, raised difficult questions about delegation of legislative power. Id. In Barnes v. District of Columbia, 91 U.S. 540 (1875), Justice Hunt, referring to the relationship between a city and the legislature, stated: The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again: it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses or it may itself exercise directly within the locality any or all the powers usually committed to a municipality.
nineteenth century, partly as a reaction against state legislatures, did local government begin to obtain recognition in state constitutions. Such recognition primarily took the form of legislative authorization to delegate power to local government.

The home-rule movement, on the other hand, sought to utilize the constitution itself as the source of local government powers. Under these provisions, the local government enacts a charter which effectively serves as a constitution for the local government. The constitution itself delegates exclusive authority over municipal affairs. Under this scheme, the home-rule charter serves as a grant of power to the local government. The most recent home-rule recommendations, however, suggest "a direct constitutional devolution of substantive home rule powers dependent only upon the adoption of a home rule charter. It does not place any substantive power or function beyond legislative control by general law. Under this approach a home rule charter is an instrument of limitation and not of grant."

Other issues and concepts of local government relevant to state constitutional law include special purpose local governments such as school districts and special districts, a comparison of city and county governments and their powers, and regional go-

Id. at 544.

244. Herget, supra note 239, at 1011-13. The problem of "negative implication" immediately arose from these provisions.


246. Dean Fordham criticized this "state concerns-local affairs dichotomy" because of its "assumption that governmental powers and functions are inherently either general or local in character." Fordham, supra note 240, at 674-75. See generally Sato, "Municipal Affairs" in California, 60 Calif. L. Rev. 1055 (1975).


248. See generally Etter, County Home Rule in Oregon, 46 Or. L. Rev. 251 (1967); Kneier, The Legal Nature and Status of the American County, 14 Minn. L. Rev. 141 (1930); Lowrie, Interpretation of the County Home Rule Amendment by the Ohio Supreme
XI. PUBLIC EDUCATION

The United States Supreme Court has ruled that there is no federal right to education. Many state constitutions, however, provide a specific right to a "thorough and efficient" or a "uniform" education. These provisions may or may not be judicially enforceable. The most familiar role of these provisions is in the school finance decisions of the 1970's beginning with the New Jersey decision in Robinson v. Cahill.

Beyond school finance, however, state constitutional provisions relating to public education can affect such issues as the educa-

Court, 10 U. Cin. L. Rev. 454 (1936).

249. See Rose, Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions, 31 Rutgers L. Rev. 1 (1978); Note, Intergovernmental Cooperation: Does the 1970 Illinois Constitution Give Units of Local Government the Gren Light?, 8 J. Mar. J. Prac. & Proc. 295 (1975). See also Grad, supra note 9, at 960 ("enumerations of city home rule powers are apt to get in the way of metropolitan regional development . . . because home rule municipalities can exercise an effective veto over measures leading to metropolitan combinations").


For an economic analysis of these cases, see Inman & Rubinfield, The Judicial Pursuit of Local Fiscal Equity, 92 Harv. L. Rev. 1662 (1979); Note, Equalization of Municipal Services: The Economics of Serrano and Shaw, 82 Yale L.J. 89 (1972); Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 Yale L.J. 1303 (1972).
tional rights of the mentally handicapped,254 the right to bilingual education,255 and the right to sound educational facilities.256 Also, with reference to higher education, state constitutions often contain specific provisions relating to matters such as independent university governance.257

XII. AMENDMENT AND REVISION OF STATE CONSTITUTIONS

State constitutional law reflects a process of lawmaking, both through judicial interpretation and through changes in the constitutional text. As noted earlier, such changes add a dimension not present in federal constitutional law. Once this distinction is realized, studying and understanding the processes of constitutional change assumes obvious importance.258 Ignoring these processes is


255. See, e.g., N.M. Const. art. XII, §§ 8, 10; Comment, Education and the Spanish-Speaking — An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution, 3 N.M.L. Rev. 364 (1973).


For some excellent studies of the process of constitutional development, revision, and ratification, see E. Cornwell, Jr., J. Goodman & W. Swanson, State Constitutional Conventions: The Politics of the Revision Process in Seven States (1975); F. Green, Constitutional Development in the South Atlantic States, 1776-1860 (1930); R. Peters, Jr., The Massachusetts Convention of 1780: A Social Compact (1978); M. Peterson, Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820's (1966).
comparable to considering only judicial interpretation of statutes without considering the possibility of statutory amendment. As previously discussed, many important issues are resolved in the context of proposed constitutional amendments.

Many early state constitutions contained no amendment provisions, and others specifically forbade certain amendments. For example, the Alabama Constitution of 1901 provided that "[r]epresentation in the legislature shall be based upon population and such basis of representation shall not be changed by Constitutional amendment." Could the legislature propose an amendment eliminating that sentence? In 1955 the Alabama Supreme Court, in an advisory opinion, held:

Surely it is self evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they "shall forever remain inviolate."

Thus, the people of a state apparently cannot bind themselves in the constitution as to the substance of constitutional amendments. May the constitution, however, bind the people as to the procedure for constitutional amendment? In many states, the requirement that a proposed amendment receive a majority of all persons voting in the election, rather than just on the amendment, frustrated constitutional change. This requirement frustrated change because "political experience shows that there is a consistently smaller proportion of the total vote in a general election cast for constitutional proposals than for live candidates for office."

State constitutions contain various technical requirements, such

259. Ala. Const. art. XVIII, § 284 (1901).
262. Swindler, supra note 1, at 596.
as title and single subject requirements, similar to those for the enactment of statutes. Also, different mechanisms may be available for amendments than for revisions.

Finally, most states permit the legislature, by an extraordinary majority, to propose amendments for ratification by the people. Some states permit initiatives to propose amendments. The legislature or, possibly, the people can call constitutional conventions. Is a limited convention permissible at the state level?


264. In Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978), the Supreme Court of California stated: “although the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people.” Id. at 221, 583 P.2d at 1284, 149 Cal. Rptr. at 242. Compare Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) (initiative petition to amend section of constitution held improper where it would affect other sections) with Weber v. Smathers, 338 So. 2d 819, 822-23 (Fla. 1976) (England, J., concurring) (discussing the amendment broadening the initiative provision in response to the earlier Adams decision). See generally Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942); Note, Legislative Efforts to Amend the Florida Constitution: The Implications of Smathers v. Smith, 5 Fla. St. U.L. Rev. 747 (1977).

265. But see Del. Const. art. XVI, § 1 (constitutional amendment by two successive legislatures without vote of the people). In Wess v. Anderson, 312 Minn. 394, 252 N.W.2d 131 (1977), the court held that an act of the legislature did not violate the single subject rule because it contained a proposed constitutional amendment in addition to germane statutory provisions.

266. Proposition 13 in California is the best known recent state constitutional amendment adopted through use of the initiative. It is a technique, however, that is gaining momentum in a number of states. See generally supra note 264.


Florida's constitution of 1968 provides for a unique Constitution Revision Commission which met in 1977-1978 and is to meet every twenty years thereafter. The Commission's recommended constitutional changes go directly on the ballot to be voted on by the people. The people, however, rejected the recommendations of the 1977-1978 Commission.

XIII. Conclusion

As illustrated throughout this Article, state constitutional law encompasses much more than just another level of civil liberties protection. State constitutions are strikingly similar to one another in their language and, more importantly, in the legal and governmental issues that they affect. The practical and theoretical issues discussed in this Article could arise in any state and therefore should no longer be considered of narrow, provincial interest.

The subject of state constitutional law demands the best legal thinking because "what state courts produce is at least partially a function of what commentators and litigants expect them to pro-

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271. This is one of several major unsuccessful attempts at state constitutional revision in recent years. See J. Wheeler, Jr. & M. Kinsey, Magnificent Failure: The Maryland Constitutional Convention of 1967-1968 (1970); McKay, Constitutional Revision in New York State: Disaster in 1967, 19 Syracuse L. Rev. 207 (1967); Pullen, Why the Proposed Maryland Constitution Was Not Approved, 10 WM. & Mary L. Rev. 378 (1968); Swindler, supra note 1, at 590-93.
272. The New York Times recently reported:

duce." The bar, the bench, and legal scholars must give state constitutional law, both comparative and state specific, the attention it merits.


275. Dean Fordham recently observed: "Another aspect of constitutional law to be noted is the slighting of state constitutional law in legal education . . . . [S]tate constitutional law is both a substantial component of the constitutional system and something of very real professional significance to lawyers." Fordham, Some Observations Upon Uneasy American Federalism, 58 N.C.L. Rev. 289, 293 (1980). See also Swindler, supra note 14, at 166 ("the chronically neglected subject of state constitutional law").

In 1917 Ernst Freund complained of "the attitude of indifference and neglect revealed in the teaching and writing of law toward the positive content of American state constitutions . . . . No adequate systematic account of the development of state constitutions with reference to their place in our public law is to be found in any constitutional treatise." E. Freund, supra note 23, at 144-45.

The gap in legal education noted by Dean Fordham has been acknowledged by judges as well as by legal educators. Justice Charles G. Douglas of the Supreme Court of New Hampshire observed: "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." Douglas, State Judicial Activism — The New Role for State Bills of Rights, 12 Suffolk U.L. Rev. 1123, 1147 (1978). Justice Douglas deplored the "lack of . . . textbooks developing the rich diversity of state constitutional law." Id. Justice Hans A. Linde of the Oregon Supreme Court observed:

[T]he law schools have nationalized legal education, and constitutional law books deal exclusively with the opinions of the United States Supreme Court. Perhaps, if we could develop more constitutional law courses that are built around the issues and the choices which exist throughout our fifty-one constitutions and that would treat the opinions of judges as historic but not infallible struggles with those issues and choices, then more new lawyers could live up to Judge Levine's admonition to the new lawyers admitted to the Maryland Bar to give their attention to the Maryland Constitution.

Linde, supra note 106, at 392-93. See also Faville, Dissecting a Constitution, 13 Wayne L. Rev. 549 (1967) (calling for required course in state constitutional law); Mazor, Notes on a Bill of Rights in a State Constitution, 1966 Utah L. Rev. 326, 328 (1966) (no treatise exists on state constitutional law, nor one on the subject of civil liberties under state constitutions); Welsh & Collins, supra note 100, at 39-43.