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Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling

William F. Swindler

William & Mary Law School

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MINIMUM STANDARDS OF CONSTITUTIONAL JUSTICE: FEDERAL FLOOR AND STATE CEILING

WILLIAM F. SWINDLER*

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I. INTRODUCTION

The two-hundred years of American constitutional history since 1776, when the first state constitutions were adopted, have been marked by a series of pendulum swings. Trial and error characterized the first quarter-century; before 1800, sixteen states adopted a total of twenty-two constitutions, and the fledgling nation adopted two.¹ Then came the age of judicial federalism, with the Supreme Court of the United States, under John Marshall, enunciating principles which still define national legal thought. The succeeding Chief Justiceship of Roger Taney filled in details between the broad strokes of Mar-

* John Marshall Professor of Law Emeritus, College of William and Mary; Ph.D., University of Missouri, 1942; LL.B., University of Nebraska, 1958. The author served as general counsel to the Virginia Commission on Constitutional Revision from 1969-70.

1. The states adopting or revising constitutions during this period included: South Carolina, Virginia, New Jersey, Maryland, Delaware, Pennsylvania, North Carolina (1776); Georgia, New York (1777); South Carolina (second) (1778); Massachusetts; Articles of Confederation (1781); Federal Constitution (implemented), Georgia (second) (1789); South Carolina (third) (1790); Vermont (1791); Kentucky, Delaware (second) (1792); Tennessee, Vermont (revision) (1796); and Georgia (third), Kentucky (second) (1798). See 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 7-8 (W. Swindler 2d ser. 1982) [hereinafter cited as W. SWINDLER].

shall's brush.²

Throughout much of the nineteenth century, however, state constitutions remained the seedbed for new ideas seeking to deal with changing national life—often providing object-lessons of sad experience. In the new states of the westward-moving frontier, wildcat state banks and overblown dreams of canal-building led first to an era of constitutional permissiveness, followed by amendatory efforts to control entrepreneurial adventurism.³ The mid-century marked the beginning of state commitments to public education (interestingly enough, appearing in some of the antebellum constitutions of the South and continuing in the Reconstruction charters).⁴ Post-war initiatives in state charters proliferated: the "Granger" amendment to the Illinois Constitution of 1870, affirming state power to regulate grain elevators and stockyards, helped lay the foundation for the administrative regulatory process;⁵ the home rule provision of the Missouri Constitution of 1875 was a high point in efforts to deal with the qualitative decline and outright corruption of the lawmaking process, both in state legislatures and Congress.⁶ Women's suffrage became a reality with the Wyoming Constitution of 1889,⁷ and the twentieth century was ushered in with a succession of experiments advocated by the Progressive Movement.⁸

The Reconstruction Era amendments to the national Constitution—particularly the fourteenth amendment—planted the seeds for a future federalism which would be found necessary to cope with the changing social and economic character of the nation. The germinating of this new federal power, as well as the continued expansion of state constitutional jurisdiction, met with stubborn resistance, however, in the age of *laissez-faire*.⁹ The influential writing of men like Thomas M. Cooley of Michigan, Christopher

2. See generally G. HASKINS, II HISTORY OF THE SUPREME COURT OF THE UNITED STATES 312-65 (1981); C. SWISHER, V HISTORY OF THE SUPREME COURT OF THE UNITED STATES *passim* (1974).

3. Indiana is a case in point. In the frenzy of canal building—part of Henry Clay's vaunted "American system" of internal improvements—the state made lavish subventions to the Wabash and Erie Canal over a ten-year period. By 1839, these expenditures had brought the state to virtual bankruptcy. Nevertheless, additional appropriations were made over the next decade until the system was completed in 1853. It was abandoned 17 years later, and an 1873 amendment to the state constitution repudiated the state debt. See 3 W. SWINDLER, *supra* note 1, at 378, 389, 393 (1st ser. 1974).

4. See LA. CONST. art. VII (1845), reprinted in 4a W. SWINDLER, *supra* note 1, at 485 (1st ser. 1975); MO. CONST. art. VI (1820); reprinted in 5a W. SWINDLER, *supra* note 1, at 105 (1st ser. 1975).

5. See ILL. CONST. art. XIII (1870), reprinted in 3 W. SWINDLER, *supra* note 1, at 306 (1st ser. 1973).

6. See Swindler, *Missouri Constitutions: History, Theory and Practice* (pt. 1), 23 MO. L. REV. 32, 55 (1958).

7. "The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged because of sex." WYO. CONST. art. VI, § 1 (1889), reprinted in 10 W. SWINDLER, *supra* note 1, at 483 (1st ser. 1979).

8. Minnesota added a railroad tax power provision to its constitution in 1881, and an antitrust provision in 1896. See 5 W. SWINDLER, *supra* note 1, at 288 (1st ser. 1975).

9. See generally W. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY, 1889-1932, at ch. 3 (1969).

Tiedeman of Missouri, and John Dillon of Iowa¹⁰ amounted to a gospel of unregulated free enterprise, which would hold back the future for three generations, until the catastrophe of the Great Depression and the constitutional crisis of the first New Deal made inevitable the development of a new, pervasive national authority on the eve of the Second World War.¹¹

The resistance of a laissez-faire constitutional doctrine to state experimentalism in the first quarter of the twentieth century spelled the end of the vigorous tradition of state constitutionalism. The Supreme Court, from the 1890's to the eve of the Great Depression, consistently negated state regulatory legislation on the ground that these statutes conflicted with the laissez-faire construction of the Constitution.¹² Thus, the initiative of the states under their own constitutions was substantially nullified. After the notable efforts of the New York Constitutional Convention Committee of 1915¹³ and the projected Illinois Constitution of 1919-20,¹⁴ the next fifty years became an era of growing federal authority.

II. RETROSPECT: JUDICIAL FEDERALISM, 1937-1969

It is worth noting that Cooley's *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*¹⁵ appeared in its first edition in 1868, the year of the ratification of the fourteenth amendment, and its last revision came in 1927, as the era of laissez-faire approached its end. The crisis of the Great Depression demonstrated the sterile character of Cooley's constitutional doctrine. This compelled the Congress and the Court to search for a new, relevant application of the Marshall-Story concept of judicial federalism. The due process and equal protection clauses of the fourteenth amendment provided the means, but it would require another thirty years or more, from the Roosevelt-Hughes confrontation at the turning point of the New Deal to the end of the Warren Court, to bring this reorientation of constitutional thought into full effect.¹⁶ The constitutional Rubicon was crossed in 1937, with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*¹⁷ (the Wagner Act decision). Federal constitutional doctrine since the Warren years has tended to define jurisdictional limitations

10. The best comparison of the times and theories of these three influential writers is found in A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1969).

11. See W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY, 1932-1968*, at chs. 3, 5 (1970).

12. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). For an allegation that the present Court is tending to restrict state legislative activities through a laissez faire application of federal standards, see Collins, *'O'Connor Court' Attempts to Stifle States Justices' Brand of Innovation*, Nat'l L.J., Mar. 28, 1983, at 16.

13. See generally 17 *NEW YORK STATE CONSTITUTIONAL CONVENTION REPORTS* (1915).

14. See Dodd, *Preparation for the Constitutional Convention*, 14 *ILL. L. REV.* 266 (1919); Wigmore, *The Draft Constitution, Fifty Years of Progress*, 17 *ILL. L. REV.* 293 (1922).

15. (Boston 1868).

16. See A. COX, *THE WARREN COURT* 3-5 (1968).

17. 301 U.S. 1 (1937).

rather than to revive the restrictive theories of the Cooley era.¹⁸

The constitutional doctrine as developed by the Court from 1937 to the coming of the Warren Court in 1953 was characterized by the Hughes-Stone-Vinson rule that legislative authority was to be broadly construed. Essentially, this was the fundamental principle advanced by Justice Frankfurter, and it laid the foundation for the future school of "judicial restraint." Under this principle, the authority of Congress was extensive within the subject areas set out in, for example, article I, section 8—a 180-degree turn from Cooley's theory—but by definition Congress retained the sole initiative for exercising its authority.¹⁹ The Warren Court was characterized by the Black-Douglas concept of "judicial activism," under which express constitutional guarantees are virtually self-executing.²⁰

In retrospect, the years from 1953 to 1969 may be described as a period of "nationalizing" constitutional rights and duties through "incorporation" of standards expressed in the Bill of Rights into the fourteenth amendment.²¹ It would be neither an oversimplification nor an overstatement to say that the constitutional revolution from 1937 to 1953 consisted of dismantling the restrictive construction of the Cooley era in favor of broad construction under article I, section 8 and amendment XIV, section 1, clause 1.²² It then follows that national constitutional theory since 1953 (or, specifically, since *Brown v. Board of Education*²³ in 1954) to 1969 has been expressed largely in terms of amendment XIV, section 1, clause 2.²⁴

There was a time when it was fashionable in constitutional scholarship to refer to a "conspiracy theory" of construction of the fourteenth amendment, which made possible the laissez-faire premise and "substantive due process" of

18. See Swindler, *The Burger Court, 1969-1979: Continuity and Contrast*, 28 U. KAN. L. REV. 99 (1979).

19. The identification of the Frankfurter/Douglas-Black dichotomy in constitutional philosophy was first analyzed in detail in W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT ON THE COURT* (1961).

20. See W. SWINDLER, *supra* note 11, chs. 13-15.

21. See Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 23 VAND. L. REV. 205, 232-34 (1970).

22. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1, cl. 1. This clause specifically confirmed the duality of citizenship of American nationals, a situation which the Supreme Court complicated when it declared that "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873).

23. 349 U.S. 294 (1955).

24. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In the famous *Southern Pacific* tax cases, the Court accepted, virtually *sub silentio*, that the word "person" in this clause included "legal persons" (corporations) as well as natural persons—thus distinguishing the definition of the same word in the first clause of this same section. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1885); *San Mateo County v. Southern Pac. R.R.*, 116 U.S. 138 (1885); W. SWINDLER, *supra* note 9, at 363.

the Cooley era.²⁵ In a similar vein, alarmists cried "conspiracy" in attacking the bold doctrines of the Warren years (as the Jeffersonians, nearly a century and a half earlier, had decried the nationalism of the Marshall Court²⁶). It may now be suggested, from the perspective of the succeeding Burger Court, that each of these three major historical periods in constitutional history was a response—more for better than for worse—to the times. The growing nation of Marshall's day demanded a viable theory of federalism; the economic ferment which began after the Civil War bred the individualistic free enterprise jurisprudence of laissez-faire; the "nationalization" of the Warren era was a response to the worldwide politico-economic environment which grew out of the Second World War.²⁷

The social upheavals of the fifties and sixties, to which the Warren Court responded, were domestic counterparts of the international collectivist trends of the post-war period. After a brief effort to revive a kind of latter-day isolationism in the Bricker Amendment,²⁸ the United States faced the reality of the situation, and the constitutional jurisprudence of the sixties and after was an acceptance of this reality in terms of domestic law. The *sui generis* law emanating from the European Convention on Human Rights²⁹ and the supranational European Economic Community³⁰ had its effect on American constitutional thought including, as will be suggested, state constitutionalism.³¹

The nationalism of the early nineteenth century was confirmed by a Marshall-Taney continuum, for which Joseph Story's two editions of his *Commentaries on the Constitution* provided the *lex scripta*.³² There has been an analogous succession in the Chief Justiceships of Earl Warren and Warren Burger; the consensus of ten-year surveys of the Burger Court's jurisprudence was that the parameters of the constitutional advances of the sixties had been more particularly defined rather than drawn back.³³ The Supreme Court has been perceived in the post-1969 years as accepting the basic doctrines of the Warren era as the uniform, minimum standards of constitutional justice.

This was not simply the product of the Black-Douglas activism; the worldwide consciousness of minimum rights of all individuals, collectively pro-

25. See generally B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

26. See generally G. HASKINS, *supra* note 2, chs. 5, 10.

27. For a persuasive essay on the divisions of constitutional history related to political and economic change, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 2-10 (1978).

28. See generally F. HOLMAN, *STORY OF THE "BRICKER" AMENDMENT* (1954); Richberg, *The Bricker Amendment and the Treaty Power*, 39 VA. L. REV. 753 (1953).

29. See generally 1969-82 COLLECTION OF DECISIONS OF NATIONAL COURTS RELATING TO THE CONVENTION (Council of Eur. Dir. on Human Rights); 1955-61 Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Comm'n on Human Rights).

30. See generally 1960-83 E. Comm. Ct. J. Rep.

31. Bridge, *American Analogues in the Law of the European Community*, 11 ANGLO-AM. L. REV. 130 (1982).

32. On Story's two editions—the first in 1833 epitomizing Marshall's constitutional doctrines and the second in 1845 addressed to the jurisprudence of the Taney Court—see G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* chs. 24, 31 (1970).

33. See Swindler, *supra* note 18, at 99.

claimed, subtly affected national and domestic (state and local) constitutional premises in the United States.³⁴ It is under these circumstances that a renaissance of state constitutionalism began to manifest itself. So far as this phenomenon was affected by the activism of the Supreme Court of the sixties, it derived from the fact that this dynamic construction of clause 2 in amendment XIV, section 1 raised the consciousness of many who were "citizens of the United States, and of the states wherein they reside." A significant number of new state constitutions were adopted in the years following the Second World War, and a number of constitutional amendments expressing in state instruments these products of the new national and international dynamism were adopted in the sixties and seventies.³⁵

In 1776, George Mason of Virginia wrote that the beginning experiment in self-government required "frequent recurrence to fundamental principles."³⁶ Two hundred years later, these principles are undergoing restatement, and state constitutionalism which began then must make an appropriate response to the present. The umpiring of the federal system will, of course, remain the principal function of the Supreme Court of the United States. To suggest that the renaissance of state constitutional law is a new dominant theme in American life is not to diminish the high federal court's jurisprudential function.³⁷ But dynamism in constitutional thought is presently manifesting a tectonic shift, which Justice William Brennan discerned several years ago:

Of late, . . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.

. . . .

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law, state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from government intrusions on their freedoms.³⁸

34. See Bridge, *supra* note 31, at 132-37.

35. See Sturm & May, *State Constitutions and Constitutional Revision: 1980-81 and the Past 50 Years*, in COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1982-83, at 115.

36. VA. DECL. OF HUMAN RIGHTS § 15, reprinted in 10 W. SWINDLER, *supra* note 1, at 50 (1st ser. 1979); see Swindler, *The Rights of Man: A Bicentennial Perspective*, in ISSUES AND IDEAS IN AMERICA 19 (B. Taylor & T. White ed. 1976).

37. See Bator, *State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

38. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495, 503 (1977).

III. A TALE OF TWO CONSTITUTIONS

State constitution-making and amendment, and judicial construction to a degree, have always been an attempted response to the times.³⁹ How these times were recognized and defined by the states in the period of judicial federalism just reviewed is determined by the innovations in the state instruments adopted or substantially amended during this period.⁴⁰ This section will analyze the changed socio-economic environment as reflected in the Missouri constitution of 1945 (and its substantial amendment in 1972) and the Virginia constitution of 1970—the first instrument responding to the changing America of World War II and the midpoint of the Hughes-Stone-Vinson jurisprudence suggested above,⁴¹ and the second incorporating, at the end of the Warren Court's activism, concepts incorporated into the law of the land under amendment XIV, section 1, clause 2.⁴²

A. *The Missouri Constitution of 1945*

In common with various other state constitutions, the Missouri constitution of 1875 had established a "twenty-year rule," which required the state legislature or the people in referendum to address after every twenty years whether a convention should be called to amend or revise the instrument.⁴³ A convention was called in 1942 after an affirmative electoral vote; the temper of the time was reflected in the election of an anti-New Deal Democrat as president, with a Republican and a "regular" Democrat as the first and second vice-presidents.⁴⁴ If this was intended to counterbalance the political ferment in national affairs—including the massive centripetal forces of government authority in the course of the war⁴⁵—it was far less significant than the fact that the finished document was concerned with numerous accommodations of accepted facts of life as the mid-century drew nearer. Thus, the bill of rights "was adopted to modern conditions" by giving prosecutors authority to take depositions in criminal cases within the state, making women eligible for jury service, defining freedom of expression in terms of all media, and guaranteeing the right of collective bargaining.⁴⁶ Greater flexibility in the powers of local government was introduced,⁴⁷ reforms were made in the article on public education,⁴⁸ and new provisions on agriculture, health, recreation, and welfare

39. See Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 179 (1983).

40. See Sturm & May, *supra* note 35, at 117.

41. See text accompanying notes 17-19 *supra*.

42. See note 24 *supra*.

43. The twenty-year rule is a common feature of state constitutions, preserving the option of periodic general revision. See Sturm & May, *supra* note 35, at 122.

44. See Bradshaw, *Constitutional Revision in a Southern State*, 19 TENN. L. REV. 734, 735 (1947); Faust, *Popular Sovereignty in Missouri*, 27 WASH. U.L.Q. 312 (1942).

45. See W. SWINDLER, *supra* note 11, ch. 6.

46. MO. CONST. art. I, §§ 18(b), 22(b), 29.

47. *Id.* art. VI, §§ 18(a), (c).

48. *Id.* art. IX, §§ 3(c), 7, 10.

were added.⁴⁹

In several fundamental respects, the new constitution reflected the national doctrines of the later New Deal as confirmed by the Hughes Court: the provision on collective bargaining was obviously an acceptance of the general rule in the Wagner Act case,⁵⁰ and the new article on welfare accommodated the Social Security decisions of the same Term.⁵¹ But the convention was equally zealous to modernize state constitutional dogma as well. The innovative concept of home rule introduced in the 1875 instrument, although tending to be exaggerated in its effect on American principles of government,⁵² was preserved and broadened in the document of 1945.⁵³ The convention draftsmen were concerned with a concept inherent in the changing federalism of the late 1930's and early 1940's—the public service obligations of municipal corporations.⁵⁴ In several instances, of course, these features of the new draft were essentially incorporations of provisions which had appeared earlier as amendments to the antecedent constitution: the state highway commission program of the 1920's, the creation of a conservation commission in 1936, and the widely-acclaimed "Missouri plan" of judicial selection in 1940.⁵⁵

By the time of the next invocation of the twenty-year rule, the legislature was prepared to revise and update the constitution on its own initiative.⁵⁶ Beginning with a new pollution control program in 1971⁵⁷ (which was substantially expanded in 1979⁵⁸), the series of revisionary amendments in 1972 included: creation of new departments of consumer affairs;⁵⁹ social services, and mental health;⁶⁰ general enlargement of the functions of the conservation commission;⁶¹ and enlargement of the processes of administration of natural resources, public safety, industrial relations, and higher education.⁶² The anti-discrimination provision for appointments to public office also reflected the changed national mood.⁶³

This series of amendments also reflected a practice which is becoming more general in state constitution making—substituting legislatively-supervised revisions in the form of amendments rather than resorting to a general convention.⁶⁴ Whether by legislative initiative or a continuing commission of

49. Swindler, *Missouri Constitutions: History, Theory and Practice* (pt. 2), 23 Mo. L. REV. 157, 167 (1958).

50. *Id.* at 169.

51. *Id.* at 170.

52. *Id.* at 164.

53. Mo. CONST. art. IV, §§ 19-22.

54. *Id.* §§ 23-29.

55. Swindler, *supra* note 49, at 162-64.

56. Karsch, *A Missouri Constitutional Convention in 1963?*, 25 Mo. L. REV. 50 (1960).

57. Mo. CONST. art. III, § 37(b).

58. *Id.* § 37(c).

59. *Id.* art. IV, § 36(a).

60. *Id.* § 37.

61. *Id.* § 43.

62. *Id.* §§ 47-49, 52.

63. *Id.* § 53.

64. Sturm & May, *supra* note 35, at 136.

revision,⁶⁵ this procedure has the advantages of greater economy and the efficiency resulting from specific agenda that have been subjected to expert studies.⁶⁶

B. *The Virginia Constitution of 1970*

Enabling legislation in 1968 established an ad hoc commission on constitutional revision to address the Virginia modernization project, *vis-a-vis* the constitution of 1901.⁶⁷ Except for a somewhat comparable procedure (the Prentis Commission in 1928) and some post-war "housekeeping" amendments in the late 1940's, the constitution of 1901 had become overgrown with verbiage and obsolescences, which could only discourage both bench and bar in seeking remedies based on the fundamental doctrines still latent in the instrument.⁶⁸ The uniform doctrines of national constitutional law, introduced and, under the Warren Court of the 1960's, rapidly consolidated, had remained largely unrecognized in the text of the state constitution.⁶⁹

Virginia is a conservative Southern state, and one of many practical considerations in undertaking to overhaul the constitution of 1901, even as amended substantially in 1928, was to avoid the appearance of doing violence to venerated sections of the instrument. The famous Virginia Declaration of Rights, first drafted by George Mason at the time of independence and adopted June 12, 1776—more than two weeks before the Constitution of 1776 was adopted⁷⁰—was sufficiently sacrosanct that it could be "modernized" only with caution.⁷¹ Yet the commission's principal charge was to revise and streamline the instrument.⁷² The apologia of the final commission report, accordingly, was prepared with an acute awareness of the sensitivity of a tradition-minded population.⁷³

Substantive changes were needed to come to terms with the national constitutional framework evolved in the Warren era, as well as Supreme Court doctrines that had been developing before then. Thus, in the Declaration of Rights (article I), section 8 on fair trials was modified to accommodate the 1948 holding of *In re Oliver*⁷⁴ that the due process clause of the fourteenth amendment barred secret proceedings in state criminal cases. A speedy trial

65. See note 43 *supra*.

66. See generally CONGRESSIONAL INFORMATION SERVICE, STATE CONSTITUTIONAL CONVENTIONS, COMMISSIONS AND AMENDMENTS, 1959-1978 (1981); A. STURM, A BIBLIOGRAPHY ON STATE CONSTITUTIONS AND CONSTITUTIONAL REVISION, 1945-1975 (1975).

67. 1968 Va. Acts 1568.

68. See generally W. VAN SCHREEVEN, THE CONVENTIONS AND CONSTITUTIONS OF VIRGINIA, 1776-1966 (1967).

69. See text accompanying notes 74-76 *infra*.

70. 10 W. SWINDLER, *supra* note 1, at 48, 51 (1st ser. 1979).

71. REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 85 (1969) [hereinafter cited as REPORT].

72. The 1901 constitution had grown to 35,000 words; the original draft of the 1971 constitution came to 18,000 words. *Id.* at 10.

73. *Id.* at 13-14.

74. 333 U.S. 257 (1948).

provision was added to reflect the 1967 holding in *Klopfer v. North Carolina*.⁷⁵ An anti-discrimination clause was added to the general due process provisions of section 11 in consideration of a series of Supreme Court holdings of the past three decades,⁷⁶ and the freedom of association provisions of section 12 were the subject of commission comment admonishing state judicial attention to federal case law on the general subject.⁷⁷

Other parts of the instrument similarly reflected a response to national constitutional doctrine. In article II, section 1 on voter qualifications, the obsolete poll tax clause was deleted,⁷⁸ while residence qualifications for candidates for elective office in section 5 were phrased to conform to the one-person one-vote principle as clarified by the Supreme Court in a provision for at-large canvassing in Virginia Beach, Virginia.⁷⁹ The public education provisions of article VIII were rewritten to reflect a succession of desegregation decisions.⁸⁰ On the other hand, both political entrenchment and tradition proved a firm obstacle to efforts to make any significant changes in article XII on the State Corporation Commission, the major regulatory agency which had evolved from the Constitution of 1901 with far-advanced reforms reflecting the tenor of the Progressive Movement.⁸¹

Probably the major change in constitutional tradition was a limited departure from Virginia's vaunted "pay as you go" principle, article X, section 9.⁸² The commission supported this change with elaborate documentation, citing a wide range of interstate and national studies.⁸³ The remaining innovation was a very general conservation article (article XI). For the Old Dominion, the revisions of 1970 were comprehensive; it was considered politic—in view of recent failures of more sweeping proposals for constitutional modernization in New York⁸⁴—to submit the changes during a special election in discrete "packages" or propositions. As it turned out, the voters approved all of the propositions, and the new constitution went into effect July 1, 1971.⁸⁵

The Missouri Constitution of 1945 (as amended in 1972) and the Virginia Constitution of 1970 may be treated as prototypes of the various state instruments which were being adapted to a changing federal character in the period following World War II.⁸⁶ To a degree, these adaptations were state

75. 386 U.S. 213 (1967).

76. VA. CONST. art. I, § 11. "The anti-discrimination clause which the Commission proposes . . . would perform functions analogous to those of the federal equal protection clause." REPORT, *supra* note 71, at 96 nn.26-27.

77. VA. CONST. art. I, § 12; REPORT, *supra* note 71, at 97-98.

78. REPORT, *supra* note 71, at 104.

79. *Id.* at 116 (citing *Dusch v. Davis*, 387 U.S. 112 (1967)).

80. *Id.* at 253-57 & nn.3-6, 12, 14.

81. See generally W. SWINDLER, *supra* note 9, chs. 5-10.

82. VA. CONST. art. IX, § 9; REPORT, *supra* note 71, at 307-19.

83. REPORT, *supra* note 71, at 318 n.24.

84. See Nunez, *New York State Constitutional Reform—Past Political Battles in Constitutional Language*, 10 WM. & MARY L. REV. 366 (1968).

85. REPORT, *supra* note 71, at 23-28.

86. See W. SWINDLER, *supra* note 11, ch. 6.

reactions to the dynamism of the Warren years; a study of a number of state court constructions of their own new constitutions will suggest echoes of the federal court's interpretations of its own doctrine. This is desirable in terms of uniform understanding of national constitutional theory and practice, but the experience of the states with many uniform laws in non-constitutional areas has consistently been one of variance and modification in terms of their local precedents.⁸⁷ It should be expected that state constitutional construction in this age of a new judicial federalism would follow the same course.

IV. A RENASCENCE OF STATE CONSTITUTIONAL LAW

To a degree, the activism of the Supreme Court in the sixties stimulated some state courts to a comparable response. The Kentucky Supreme Court invoked a Hughes-Frankfurter standard of delegability of legislative authority in a 1963 case,⁸⁸ and police power in several states came to be defined in terms of Ernst Freund rather than Tiedemann.⁸⁹ The self-executing character of many new amendments of constitutional texts also has been identified.⁹⁰ Questions of standing and class actions, while conforming to federal standards, have been addressed in terms of a broadening state jurisprudence.⁹¹ Judiciaries have increasingly tended to avoid second-guessing legislatures' understanding of their own constitutional powers, a policy traceable to Holmes's early rationale.⁹²

It is of particular interest, in light of the preceding section of this paper, to note: (1) how the state courts in Missouri and Virginia have construed constitutional issues, particularly those arising in the past decade; and (2) how such construction compares with similar issues addressed in other jurisdictions.⁹³ The Missouri Supreme Court, for example, in the 1974 case of *Americans United v. Rogers*,⁹⁴ undertook to reassert a long-held theory of political science that a state constitution is not a grant of power but only a limitation of a power of government which is "practically absolute."⁹⁵ Although this ap-

87. See Merrill, *Uniform Laws—Unattained Ideal*, 43 A.B.A. J. 834 (1957).

88. *Commonwealth v. Associated Indus. of Ky.*, 370 S.W.2d 584 (Ky. 1963); see also *City of St. Joseph v. Hankinson*, 312 S.W.2d 4 (Mo. 1958); *Ours Properties v. Ley*, 198 Va. 792, 96 S.E.2d 754 (1957).

89. See *Kerkemeyer v. Midkiff*, 299 S.W.2d 409 (Mo. 1957); *Southern Ry. v. Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964); see also *New Orleans v. Dukes*, 427 U.S. 297 (1976).

90. See, e.g., *City of Hannibal v. Winchester*, 391 S.W.2d 279 (Mo. 1965) (en banc). Compare *State ex rel. St. Louis Fire Fighters Ass'n v. Stemmler*, 479 S.W.2d 456 (Mo. 1972) (en banc) with *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969).

91. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

92. Compare *De Febio v. School Bd.*, 199 Va. 511, 100 S.E.2d 760 (1957) with *State v. Mucie*, 448 S.W.2d 879 (Mo.), cert. denied, 398 U.S. 938 (1970).

93. Because of time and space limitations, the following examples are drawn from state bill of rights cases, which represent the area of the most pronounced constitutional dynamism.

94. 538 S.W.2d 711 (Mo.), cert. denied, 429 U.S. 1029 (1976).

95. See *Danforth v. Merrell*, 530 S.W.2d 209 (Mo. 1975) (en banc); *Lewis Trucking Corp. v. Commonwealth*, 20 Va. 23, 147 S.E.2d 747 (1966); accord *Tetreault v. Franchise Tax Bd.*, 255 Cal. App. 2d 277, 63 Cal. Rptr. 326 (1967); *North Shore Post No. 21 v. Korzen*, 38 Ill. 2d 231, 230 N.E.2d 833 (1967).

pears to be a restatement of old state sovereignty doctrine, in the context of the changed national character of American constitutionalism it becomes an assertion of a revitalized state constitutionalism.

The Missouri courts recently have declared that the constitution should be more liberally construed than statutes⁹⁶ and that the instrument as a whole is to be taken into account in determining the meaning of any particular provision.⁹⁷ In addition, certain provisions may be determined from this context to be self-executing.⁹⁸ From this broader construction of constitutional powers emerges a correspondingly broad construction of police power (*pace* Tiedemann). This in turn has led to a reaffirmation of the breadth of the so-called "classification power" of the legislature, as in *Slater v. St. Louis*,⁹⁹ where the appellate court held that statutes may be limited to particular categories or groups when there is a rational basis for doing so.¹⁰⁰ Because of the suspect classification rule of review enunciated by the Warren Court in the sixties, state courts generally have been meticulous in applying a reasonableness test to such matters.¹⁰¹ Absent any invidious or arbitrary discrimination, however, the police power generally has been defined with sufficient breadth to support classifications under state and federal equal protection provisions.¹⁰²

The federal standards of the Warren era similarly underlie tests of "compelling state interests," but these interests now may often be defined in terms of state constitutional language which goes beyond the federal guidelines. Thus, the United States District Court for the Eastern District of Missouri pointed out in *Luetkemeyer v. Kaufman*¹⁰³ that first amendment standards on non-establishment were substantially exceeded by the state's long-settled policies on separation of church and state. Before an issue of due process denial can be raised, the state courts require that the plaintiff establish the existence of a constitutionally protected right that the state has allegedly infringed upon.¹⁰⁴ A Missouri appellate court looked again at the "procedural due pro-

96. *E.g.*, *Slater v. City of St. Louis*, 548 S.W.2d 590 (Mo. 1977); *see also* *Warren v. State*, 632 S.W.2d 67 (Mo. Ct. App. 1982).

97. *See* *Highway Comm'n v. Spainhower*, 504 S.W.2d 121 (Mo. 1973).

98. *City of St. Louis v. Liberman*, 547 S.W.2d 452 (Mo. 1977) (en banc), *cert. denied*, 434 U.S. 832 (1978); *see also* *State v. Greer*, 605 S.W.2d 93 (Mo. 1980) (felony prosecutions by indictment or information), *vacated*, 451 U.S. 1013 (1981).

99. 548 S.W.2d 590 (Mo. 1977); *see also* *Warren v. State*, 632 S.W.2d 67 (Mo. Ct. App. 1982) (prospective application of expungement law does not violate equal protection clause).

100. The rebuttable character of classification was stressed in *Potomac Elec. Power Co. v. Fugate*, 341 F. Supp. 887 (E.D. Va.), *aff'd*, 409 U.S. 943 (1972).

101. *See* *Nelson v. Miwa*, 56 Hawaii 601, 546 P.2d 1005 (1976); *Hayes v. Gill*, 52 Hawaii 251, 473 P.2d 872 (1970), *appeal dismissed*, 401 U.S. 908 (1971); *see also* *State ex rel. Toedebusch Transfer v. Public Serv. Comm'n*, 520 S.W.2d 38 (Mo. 1975) (en banc); *Sandiford v. Commonwealth*, 217 Va. 117, 225 S.E.2d 409 (1976); *City of Portsmouth v. Citizens Trust Co.*, 216 Va. 695, 222 S.E.2d 532 (1976). *But cf.* *O'Connell High School v. Virginia High School League*, 581 F.2d 81 (4th Cir. 1978) (test is whether classification makes sense in light of the purpose sought to be achieved), *cert. denied*, 440 U.S. 936 (1979).

102. *See, e.g.*, *Crane v. Riehn*, 568 S.W.2d 525 (Mo. 1978) (en banc).

103. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).

104. *See* *Warren v. State*, 632 S.W.2d 67 (Mo. Ct. App. 1982); *Christophel v. Parkway School Dist.*, 600 S.W.2d 61 (Mo. Ct. App. 1980).

cess" question in 1981, and defined the concept as a meaningful opportunity to be heard, before an impartial tribunal, with a right to be confronted by adverse witnesses.¹⁰⁵ The same court held the previous year that substantive due process—an even older question—was distinguishable from, but no greater than, procedural due process.¹⁰⁶ In either case, whatever remedies may be inherent in state or federal due process must begin with a precise determination of the private interest and state action which may be involved.¹⁰⁷

The separate question of state action, also subject to the application of the minimum standards enunciated by the Warren Court,¹⁰⁸ remains a matter of continuing scrutiny by the Supreme Court.¹⁰⁹ Even at the height of judicial activism, the District Court for the Eastern District of Virginia emphasized that the threshold question was the distinction between state and private involvement.¹¹⁰ The same court more recently has held that state involvement may be constructive, as in the receipt of federal funds.¹¹¹ The "entwinement theory" of state and private actions and interests, discussed in detail by the Seventh Circuit in 1975,¹¹² and the "public function" test of state action, addressed in similar detail by the District of Columbia Circuit the same year,¹¹³ demonstrate the continuing disposition of the federal judiciary to review the question. On the other hand, a California court has held that government regulations governing business in general do not of themselves constitute state action,¹¹⁴ and other state courts have revived and applied Frankfurter's well-remembered "nexus" test on such questions.¹¹⁵

The minimum standards identified and relied upon by the Supreme Court of the United States in the past quarter of a century continue to be applied as a yardstick in various states. Racial questions are still vigorously litigated in states like Virginia,¹¹⁶ as are voting rights and equality of electoral process,¹¹⁷

105. State *ex rel.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (en banc).

106. Johnson v. City of Buckner, 610 S.W.2d 406 (Mo. Ct. App. 1980).

107. See Lewandowski v. Danforth, 547 S.W.2d 470 (Mo. 1977) (en banc), *cert. denied*, 434 U.S. 832 (1978).

108. See W. SWINDLER, *supra* note 11, ch. 14.

109. See Parham v. J.R., 442 U.S. 584 (1979); Warren v. Government Nat'l Mortgage Ass'n, 611 F.2d 1229 (8th Cir. 1980).

110. Motley v. Virginia Hardware & Mfg. Co. 287 F. Supp. 790 (W.D. Va. 1968).

111. Large v. Reynolds, 414 U.S. 45 (1976).

112. Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975).

113. Greenya v. George Wash. Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

114. Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (en banc); see also Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (en banc); People v. Francis, 40 Ill. 2d 204, 239 N.E.2d 129 (1968); Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975) (en banc), *cert. denied*, 423 U.S. 1026 (1976).

115. *E.g.*, Stearns v. VFW, 394 F. Supp. 138 (D.D.C. 1975).

116. See, *e.g.*, Talbert v. City of Richmond, 648 F.2d 925 (4th Cir.), *cert. denied*, 454 U.S. 1145 (1981).

117. See, *e.g.*, Howlette v. City of Richmond, 485 F. Supp. 17 (E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978).

desegregation of public facilities,¹¹⁸ and equality of public employment.¹¹⁹ The "adverse impact" doctrine, originated in the federal sector,¹²⁰ was invoked by the Fourth Circuit in *United States v. Commonwealth of Virginia*¹²¹ in 1980. By contrast, gender-based classifications have been sustained where a reasonable governmental purpose could be established.¹²² Except for special questions that occasionally get into the courts, the basic principles of equal educational opportunity seem to be accepted.

The federal courts let stand a 1974 Virginia decision in which a newsman's claim of confidentiality was rejected in favor of the due process right of the accused person to compel disclosure of evidence material to his defense.¹²³ First amendment protection of expression through demonstration, however, was upheld in a 1972 Fourth Circuit case.¹²⁴ Nevertheless, in determining conditions for the exercise of free expression, officials may consider the circumstances or environment of the exercise.¹²⁵ Advertising and other forms of commercial speech have consistently been upheld under the state and federal bills of rights,¹²⁶ and picketing as a form of expression in labor disputes was reaffirmed by the Fourth Circuit in an elaborate opinion in 1981.¹²⁷ A Virginia court, however, invoked the federal first amendment to strike down an overbroad state statute prohibiting assembly without provably violent intent, under the "clear and present danger" doctrine.¹²⁸

A comprehensive review of current state constitutional development had enumerated a series of reasons for broadening construction at the state level, particularly in the area of individual rights and liberties.¹²⁹ As the California Supreme Court said in 1975:

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.¹³⁰

118. See, e.g., *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *aff'd*, 384 U.S. 890 (1966).

119. See, e.g., *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir.), *cert. denied*, 454 U.S. 1145 (1981).

120. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

121. 620 F.2d 1018 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980).

122. See *Bukhari v. Hutto*, 487 F. Supp. 1162 (E.D. Va. 1980).

123. *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974), *cert. denied*, 419 U.S. 966 (1975).

124. *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); see *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

125. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979).

126. See, e.g., *Virginia Bd. of Pharmacy v. Citizens Consumers Council*, 425 U.S. 748 (1976).

127. *Henrico Firefighters Ass'n v. Board of Supervisors*, 649 F.2d 237 (4th Cir. 1981).

128. *Owens v. Commonwealth*, 211 Va. 633, 179 S.E.2d 477 (1971).

129. *Williams*, *supra* note 39, at 185.

130. *People v. Brisendine*, 12 Cal. 3d 528, 550, 531 P.2d 1009, 1113, 119 Cal. Rptr. 315, 329 (1975), *quoted in Williams*, *supra* note 39, at 186 n.70.

Despite the desirable tendency on the part of state courts to accept federal pronouncements as uniform and minimal standards, identical language in two distinct constitutional texts, state or federal, need not demand the same interpretation of the words as applied to a particular set of facts.¹³¹ Moreover, the fact that the same fundamental provision may be expressed in different words, and that many state constitutions, particularly as recently amended, have expanded upon clauses in the federal instrument or upon the language of judicial construction of those clauses, encourages broader construction in state courts. This is gradually moving state courts into their own body of construction, which points to a more varied body of constitutional rights based upon the fundamental doctrines of federal construction.

In two 1961 cases,¹³² the Missouri Supreme Court emphasized that the fifth amendment of the federal Constitution had no controlling effect upon state activity based exclusively upon state law.¹³³ Although the subsequent incorporation of the federal Bill of Rights into the fourteenth amendment would seem to qualify these decisions, the Missouri courts in the seventies appear to have followed the general trend of state courts in treating the federal doctrines as minimum standards upon which broader state doctrines may be based.¹³⁴ There have been, as in Virginia, continuing revisions of particular constitutional rules where these constructions of the new state doctrines have been reviewed in the federal courts in terms of the incorporation criteria.¹³⁵ The test on review, however, is essentially one of determining whether the state doctrine is below the federal minimum and reversible, or above it and non-reviewable.

This may be described as a period of final settlement of the federal jurisprudence based on the issues of the middle third of the twentieth century. Until new national constitutional doctrine is activated, the present decade offers the prospect that state construction of state constitutional law will be the dominant theme.

131. Williams, *supra* note 39, at 186 n.71.

132. State v. Cooper, 344 S.W.2d 72 (Mo.), *cert. denied*, 368 U.S. 855 (1961); State v. Williams, 343 S.W.2d 58 (Mo. 1961).

133. The basis for such assumptions appears to be statements, perhaps dicta, in State *ex rel.* St. Louis Firefighters' Ass'n v. Stemmler, 479 S.W.2d 456 (Mo. 1972).

134. See Owen v. City of Independence, 445 U.S. 622 (1980); Reproductive Health Servs. v. Freeman, 614 F.2d 585 (8th Cir.), *vacated*, 449 U.S. 809 (1980); see also Rodgers v. Danforth, 486 S.W.2d 258 (Mo. 1972).

135. See, e.g., Ross v. Kansas City Gen. Hosp., 608 S.W.2d 397 (Mo. 1980) (en banc) (abortion); Labor's Educ. & Political Club v. Danforth, 561 S.W.2d 339 (Mo. 1977) (privacy); Hill v. State Dep't of Pub. Health & Welfare, 503 S.W.2d 6 (Mo. 1973) (en banc) (welfare benefits).