ARTICLES

CONTRIBUTIONS OF STATE CONSTITUTIONAL LAW TO THE THIRD CENTURY OF AMERICAN FEDERALISM*

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In the fascinating area of state constitutional law,[1] the trickle of deep scholarly interest evident during the 1970's has grown thunderously.[2] More and more, learned journals are reflecting, dissecting, anticipating—possibly even generating—the burgeoning case law in the area.

In 1973, a comprehensive study of state bill of rights litigation

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* This article is based, in part, on the forty-first Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York on February 26, 1987. *See also* 61 ST. JOHN'S L. REV. 399 (1987).

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1. State constitutional law of course embraces both provisions found uniquely in state charters, and under provisions with analogues in the federal Constitution. The focus, however, is on situations where the state constitutional provision is similar, if not identical, to the federal provision. Where a state constitutional provision has no parallel in the federal Constitution, obviously the state court must reach a decision independent of federal law.

2. For a recent bibliography on the subject of state constitutional law, see Collins & Galie, Nat'l L.J., Sept. 29, 1986, at p. S-9. There has been a steady outpouring of cases and materials on the subject ever since then. On February 26, 1987, I delivered the Cardozo Lecture at the Association of the Bar of the City of New York on "dual constitutionalism." *See Dual Constitutionalism in Practice and Principle*, 42 REC. A.B. CITY N.Y. 285 (1987); 61 ST. JOHN'S L. REV. 399 (1987) [hereinafter *Dual Constitutionalism*]. In just one week soon afterward, I received extensive materials from a symposium sponsored by the Center for the Study of Federalism, Temple University, held March 15-17, 1987, entitled, "State Constitutional Law in the Third Century of American Federalism: New Developments and Possibilities" [hereinafter *Temple Symposium*]; *see also* PUBLIUS, Winter 1987, at 1 (the Winter issue of PUBLIUS was devoted to new developments in state constitutional law); Note, *Miranda and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986). The flow of significant literature continues. *See, e.g.*, Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381 (1987) [hereinafter *Our Constitutions—Alive and Well*]; Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431 (1987) [hereinafter *Interpretation*]; Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) [hereinafter *Separate Sphere*]; Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds*, 42 U. MIAMI L. REV. 159 (1987) [hereinafter *Inadequacies*]; Abrahamson & Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88 (1987) [hereinafter *New Federalism*]. Throughout 1987 several articles by Professors Ronald K. L. Collins and Peter Galie, major contributors to the field, have appeared in the National Law Journal and Judicature.

concluded with this provocative thought: "In all fairness to the commentators, their neglect of the field can be explained by the fact that state courts have not produced a great number of important state bill of rights decisions. But, then again, what the state courts produce is at least partially a function of what commentators and litigants expect them to produce."[3] Whatever the precise catalyst—whether the United States Supreme Court's apparent retreat from earlier federal Bill of Rights decisions, or its explicit green light on the development of "state jurisprudence unimpeded by federal interference,"[4] or the activity of sister states and the infection of "horizontal federalism,"[5] or indeed the expectation of commentators and litigants, heightening the consciousness of Bench and Bar so that these issues are propely preserved—state courts seem increasingly to be turning to their state constitutions as the dispositive ground for their decisions,[6] which may then be insulated from review by the United States Supreme Court. While perhaps not universally cheered,[7] the "new federalism"[8]—or "eclectic federalism"[9]—unquestionably has arrived.

What has to my mind been decisively established by the flood of analysis—if ever it was in doubt—is the legitimacy of state constitutional decisionmaking by state courts. We do, after all, *have* state constitutions, a fact that is central to American Government.

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3. Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 320 (1973).

4. Michigan v. Long, 436 U.S. 1032, 1041 (1983). "The primary effect of *Long* is its instruction to the states on how they may entirely avoid review: the states are encouraged and empowered to use state law to construct their own inviolable spheres." Althouse, *Separate Spheres*, *supra* note 2, at 1503.

5. "Horizontal federalism, a federalism in which states look to each other for guidance, may be the hallmark of the rest of the century." Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985).

6. *See* Collins, Galie & Kincaid, *State High Courts, State Constitutions and Individual Rights Litigation Since 1980: A Judicial Survey*, PUBLIUS, Summer 1986, at 141.

7. *See, e.g.*, Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

8. "New federalism refers to the renewed willingness of state courts to rely on their own law, especially state constitutional law, in order to decide questions involving individual rights. In new federalism, the federal Constitution establishes minimum rather than maximum guarantees of individual rights, and the state courts determine, according to their own law (generally their own state constitutions), the nature of the protection against state government. New federalism also includes the potential for greater deference by federal courts to state court proceedings and decisions." Abrahamson & Gutmann, *New Federalism*, *supra* note 2, at 88-90. *See also* Williams, *State Constitutional Law Processes*, 24 WM & MARY L. REV. 169 (1983), characterizing the development as a "Constitutional Revolution."

9. E. Peters, Remarks at the Second Circuit Judicial Conference, at 4 (Sept. 5, 1986), 115 F.R.D. 405-09.

The very design of our federal system contemplated "a double source of protection for the rights of our citizens."[10] The federal Constitution "did not *create* the American constitutional system; rather it *completed* that system."[11] The federal Bill of Rights mirrored state constitutions, which long predated the federal charter;[12] the fifty states continue to have, and continue to amend, their own constitutions;[13] and their courts, as the ultimate interpreters of state constitutions, have throughout this nation's history premised decisions on their own constitutions.[14] That state courts were for many years content to accept the rising constitutional "floor" as their state constitutional "ceiling" neither permanently fixes that relationship nor relegates state constitutions to the dustbin. These matters by now appear to be well settled. Less settled—perhaps never to be truly "settled"—is the question of balance. As recently noted, "the fundamental puzzle is to determine what the appropriate criteria are for deciding which questions the federal Constitution should be deemed to have made a matter of uniform national policy."[15]

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10. Brennan, *State Constitutions and the Protection of Individual Liberties*, 90 HARV. L. REV. 489, 503 (1977). *See also* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

11. Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 395-96 (1987) (emphasis in original). The federal Constitution was preceded by eighteen state charters as well as the Articles of Confederation. "The most important way in which the United States Constitution is incomplete is that from the beginning the national document included the state constitution as part of the complete text." Lutz, *The United States Constitution as an Incomplete Text*, *Temple Symposium*, *supra* note 2, at 8.

12. *See* I B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 199, 286, 383 (1981); II B. SCHWARTZ, *id.* at 1205. Katherine Drinker Bowen, in her classic work, MIRACLE AT PHILADELPHIA, quotes John Adams as follows: "What is the Constitution of the United States, but that of Massachusetts, New York and Maryland? There is not a feature in it which cannot be found in one or the other." *Id.* at 199.

13. The New York Constitution, for example, in its 211-year life, has been amended about 170 times, most recently in November 1987. *See* Titone, *Interpretation*, *supra* note 2. The fact of the amendments, as well as the public interest in them, alone indicate that the state constitution is more than a treasured relic.

14. There is certainly a long history of state constitutional adjudication in New York State. *See, e.g.*, Galie, *State Constitutional Guarantees and Protection of Defendant's Rights: The Case of New York, 1960-1978*, 28 BUFFALO L. REV. 157 (1979); Kramer & Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, PUBLIUS, Fall 1978, at 75.

15. Abrahamson & Gutmann, *New Federalism*, *supra* note 2, at 99 (citing Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J.L. & PUB. POL'Y 51, 58 (1982)). *See also* Althouse, *Separate Sphere*, *supra* note 2; Comment, *Inadequacies*, *supra* note 2, and Collins, *High Court's Rights-Claims Record: A Challenge to 'New Federalism'?*, Nat'l L.J., Aug. 31, 1987, at 26, commenting on the Supreme Court's failure in two recent decisions to remand the cases for state law review.

I would like to focus here neither on the settled matters nor the unsettled, but instead to proceed from this heavily footnoted introduction to two more theoretical facets of the subject: intensely local implications of state constitutional law, and broad national implications.[16]

I.

My first perception is that the issues surrounding state constitutional decisionmaking particularly, in fact raise the most fundamental issues of constitutionalism generally.

A great debate rages in the law today as to how a constitution should be interpreted. Some insist that it must be read by the intent of the framers. Attorney General Edwin Meese, for example, precipitated heated controversy when he announced that the administration "will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."[17] Others reason persuasively that intent of the framers cannot be controlling, and that the federal constitution must be interpreted in light of prevailing attitudes and modern values.[18] It occurs to me that we can best answer the question of how to interpret a constitution, state or federal, by first exploring what, in a real sense, a constitution is.

The very word "constitution," in common understanding, means the most basic structure of a thing, how it is constituted. The English regarded themselves as having a constitution long before the Colonials began drawing up constitutions for themselves on paper, and the English constitution has never been written down in a single document. That the English can speak of their "constitution" helps to underscore exactly what a constitution means. A community's constitution is its basic make-up, the source, delineation and delimitation of rights and powers within that society, the collective assessment of the rules of the game under which the process of decisionmaking and exercise of power

16. *See Dual Constitutionalism*, *supra* note 2, from which these perceptions are taken.

17. Address by Edwin Meese, III, Attorney General of the United States, at the American Bar Association in Washington, D.C. (July 9, 1985), *reprinted in* Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465-66 (1986).

18. *See, e.g.*, Wachtler, *Our Constitutions—Alive and Well*, *supra* note 2, at 386. *See also* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

within that community will proceed. As the very basis of a living community, a constitution is necessarily a thing of that community.

The critical difference between British and American constitutionalism is not that American constitutions are written. Rather, it is that the British constitution is founded upon a concept of parliamentary supremacy; the rights of Englishmen limited *the Crown*, not the Parliament. Under British constitutional theory sovereign power resides in Parliament. The laws enacted by Parliament, though restrained by traditions and principles, are perforce within the constitution. Our nation, by contrast, is rooted in a concept that sovereignty resides in the People.[19] Thus it is possible that our designated lawmakers can at times enact laws that fall outside the basic law established by the People. Where the People are sovereign, their conception of their constitution exists apart from—above—laws continually enacted by the legislature.

The day-to-day function of a constitution, however, goes further. It is a fact of human nature, and of the democratic process, that our actions—both as individuals and as a community—sometimes conflict with our most basic values. Therefore, what we set out to embody in a constitution are those values we wish to place beyond the risk of sacrifice to transient choices. Our constitutional values can of course be explicitly changed, but amendments are accomplished only through extraordinary political processes—the approval of two successive legislatures followed by a popular referendum in the case of the New York State Constitution,[20] and the approval of two-thirds of both Houses of Congress and three-fourths of the states in the case of the federal charter.[21] A constitution, in short, is that set of values to which we have bound ourselves, the values that transcend even our currently made choices—or, in the words of James Madison, the values that

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19. *See* Brennan, *Reason, Passion, and "The Progress of the Law"*, 42 REC. A.B. CITY N.Y. 948, 962 (1987). Historically, of course, long before the federal Constitution, the Colonists set out to draw up their own constitutions. The very first provision of the first New York State Constitution, in 1777, specifies that "no authority shall on any pretense whatever be exercised over the people or members of this State, but as such shall be derived from and granted by them." While the New York State resolution for a provincial convention had also called for the preparation of a bill of rights, none was drafted; none was thought to be necessary. *See* 1 C. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 715-27 (1905).

20. N.Y. CONST. art. XIX.

21. U.S. CONST. art. V.

"counteract the impulses of interest and passion."[22]

This is not abstraction but rather a reflection of the most abiding reality of both our past and present. We talk a great deal about the constitutional shield provided the People against the government, but in a democracy the threats to our values often have popular support. The United States Constitution throughout history has been called upon to protect long venerated values that are momentarily abandoned or neglected.

It is a function of a constitution and constitutional law, then, to preserve a community's most basic, or overarching, values in the face of its transient choices. Moreover, it is a function of the courts to ascertain and identify these most basic values, to flag them when they are at risk, and to preserve constitutional boundaries on majority rule.

What many have sought in a jurisprudence of original intent—the protection of civil liberties by fixing us to an *a priori* commitment to them—cannot realistically be achieved in that manner. The right to a fair trial or free speech does not exist today simply because a group of framers two centuries ago intended them to exist. They can and do exist today because we mean them to, even though at times we may do or say otherwise. The overarching values of the past can and surely do inform our inquiry into what values make up our "constitution" today.[23] We are, after all, *interpreting* a text, not *inventing* one. Moreover, we look to the past because our most basic values, when they change, tend to do so very slowly, and then by a process of evolution rather than revolution. But interpreting our constitution cannot stop with values of the past. It necessarily involves as well the community's present values—identifying the values that this community has declared should limit the ordinary processes of its government.

All of this speaks with particular force, and has special relevance, to the subject of state constitutions. Where a provision has been adopted into a state constitution from the federal charter, intent-based interpretation would obviously be unusually difficult. When dealing with intentions of several distinct groups of framers, ratifiers and amenders, are we to look to the intent of the federal

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22. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* THE WRITINGS OF JAMES MADISON 273 (G. Hunt ed. 1904).

23. *See* United States v. Classic, 313 U.S. 299, 315-16 (1941).

framers, or the intent that the state framers believed—perhaps erroneously—the federal framers held? Or did the state framers intend something altogether different? Do we look to the intent of the drafters, the ratifiers or the succeeding generations of "retainers"? A text-based "contemporary values" approach fares no better. If we read the words of all the constitutions of this nation in terms of what those words mean to us today, it is hard to argue that the same words have any different meaning anywhere. Obviously, if there is any variation across this nation it is not in the words themselves, it is in the concepts they embody.

It should be immediately apparent that the constitution established by New York State, for example, and reviewed and amended scores of times by New York State voters throughout the ensuing centuries, reflects the State's own values, which may or may not be identical to those held elsewhere.

Indeed, the history that has shaped the values of New York State is different in many respects from that which has shaped the consensus in other states, not to mention our nation as a whole. Many states today espouse cultural values distinctively their own; Alaska, for instance, is unique in its constitutional guarantee of the right to possess marijuana in one's home.[24] If it is our duty to look at what our "constitution" represents in order to determine what it states, and if what a constitution represents is that community's most basic values, then it is only right to interpret a state constitution independently of others, even where concepts are expressed in the same words. An independent interpretation of course does not mean that identical clauses will invariably be read differently, or more broadly, than their counterparts elsewhere.[25] The United States Supreme Court, in reading the federal constitution, must lay out a minimal rule for a diverse nation, with due concern for principles of federalism. State courts, even when working with the same basic provisions, have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations. Their solutions may thus at times be identical to the

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24. *See* Ravin v. State, 537 P.2d 494, 511 (Alaska 1975). The court in part based its holding on article I, section 22 of the Alaska Constitution, which states: "the right of the people to privacy is recognized and shall not be infringed." *Id.* at 500-04.

25. *See, e.g.*, People v. Alvarez, 70 N.Y.2d 375, 515 N.E.2d 898, 521 N.Y.S.2d 212 (1987), where—in a case involving breathalyzer tests—the New York State Court of Appeals read the due process clause of the state constitution as demanding no more than required by the United States Supreme Court, under a like clause of the federal constitution, in California v. Trombetta, 467 U.S. 479 (1984).

federal solutions, but they are not necessarily so.

Practical considerations support this theory. State courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People.[26] Moreover, building a coherent body of law—one that is not wholly reactive to particular United States Supreme Court decisions, or held in suspense locally while the Supreme Court fleshes out the contours of a developing right nationally—has the advantage of furthering predictability and stability in state law.[27] In short, the development of state constitutional law by state courts not only has deep historical roots but also is theoretically sound.

II.

My second perception is that state constitutional law may also be significant in the development of national law. In a judicial system of concurrent courts, the relationship between the state and federal courts—each sovereign within its sphere—is naturally a subject of interest.[28] While there are many models of interaction, my focus here is on the influence of state law on federal law.

Development of federal law through experimentation within the states of course has a long tradition. Justice Brandeis in his famous *New State Ice* dissent[29] described as one of the "happy incidents" of the federal system that a state, if its citizens chose, could serve as a laboratory for novel social and economic experiments without risk to the rest of the country.[30] The United States

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26. *See* Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 948-49 (1964); *see also* Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

27. *See* State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986); State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983); People v. Hicks, 68 N.Y.2d 234, 243, 500 N.E.2d 861, 866-67, 508 N.Y.S.2d 163, 168-69 (1986); People v. Elwell, 50 N.Y.2d 231, 406 N.E.2d 471, 428 N.Y.S.2d 655 (1980).

28. *See* Althouse, *Separate Sphere*, *supra* note 2, at 1485; Friedelbaum, *Reactive Responses: The Complementary Role of Federal and State Courts*, PUBLIUS, Winter 1987, at 33.

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

30. An analogous process, recognizing common law rights before recognizing constitutional rights—which are then beyond legislative revision—may occur within state law. Many issues have not been immediately "constitutionalilzed." To illustrate, in In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981), the New York Court of Appeals recognized, as a matter of common law, the right of competent adults

Supreme Court implicitly recognized this process in *Mapp v. Ohio*,[31] in giving the exclusionary rule national application, noting that since its own prior decision declining to recognize the exclusionary rule as binding nationally,[32] two-thirds of the states had themselves adopted the rule.[33] Only recently, in *Batson v. Kentucky*,[34] the Supreme Court reversed its prior ruling on the discriminatory use of peremptory challenges. A few years earlier, in denying *certiorari* in *McCray v. New York*,[35] three Justices explicitly made known their interest in the issue, but said they preferred to allow it to percolate further in the state laboratories, to generate solutions upon which the Supreme Court might rely. The growing trend among the states ultimately led the Court to depart from its holding in *Swain v. Alabama*,[36] and also provided content for the new rule.[37] A similar process is underway right now, as recent Supreme Court decisions under the search and seizure provision of the fourth amendment are tested in the state court laboratories.

As individual states have different constitutions from the national community, and as their courts have read even identical pro-

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to control the course of their medical treatment, and not to have their lives prolonged by medical means; the court did not reach the question whether this right is also guaranteed by the Constitution. *Id.* at 376-77, 420 N.E.2d at 70-71, 438 N.Y.S.2d at 272-73. The lower court, in In re Eichner (Fox), 73 A.D.2d 431, 426 N.Y.S.2d 517 (2d Dep't 1980), had held that the right to refuse medical treatment was guaranteed by the constitutional right to privacy. *Id.* at 461, 426 N.Y.S.2d at 536. In Rivers v. Katz, 67 N.Y.2d 485, 493, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986), the Court of Appeals concluded that the fundamental common law right to refuse medical treatment "is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Id. See also* People v. Novembrino, 105 N.J. 95, 159, 519 A.2d 820, 857 (1987) (Handler, J., concurring).

31. 367 U.S. 643 (1961).

32. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (fourth amendment binding on states, but exclusionary rule is not). For further models of interactive judicial federalism, see Friedelbaum, *Reactive Responses: The Complementary Role of Federal and State Courts*, *supra* note 28.

33. *Mapp*, 367 U.S. at 651.

34. Batson v. Kentucky, 476 U.S. 79 (1986).

35. McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, Blackmun, and Powell, JJ., concurring).

36. 380 U.S. 202 (1965).

37. After it became apparent that the *Swain* rule had virtually no bite, two state courts, California and Massachusetts, decided on the basis on their *state* constitutions to adopt a stricter rule. *See* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). The Supreme Court noted in Batson v. Kentucky that two federal courts of appeals had found discriminatory peremptory challenges violative of the *federal* Constitution by "[f]ollowing the lead of a number of state courts construing their *state's* Constitution." *Batson*, 476 U.S. at 82 n.1 (emphasis added). The Court's ruling itself basically adopted the California-Massachusetts procedure nationally.

visions differently from the federal document, it logically follows that if a value is recognized by enough such communities, then that value has come to be so recognized by—and part of the "constitution" of—the larger community as well. In short, rights that come to be recognized as such by enough of the People acting through the states may become federal rights—values of national, constitutional importance.

I suggest that there is a place in our traditional constitutional structure for the recognition of such new constitutional rights—the ninth amendment.

The ninth amendment reads: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage other rights retained by the People." Largely ignored until the past two decades—and only recently a subject of unusual publicity in connection with a recent United States Supreme Court nomination—the ninth amendment "seems ideally suited to provide a constitutional home for newly found rights."[38] While mentioned in several Supreme Court opinions,[39] the ninth amendment has not yet served as the predicate for decision. If, as society matures and law progresses, public attention and analysis indeed generate expectations of commentators and litigants that influence what the courts produce, then the ninth amendment's time may well have come.

The ninth amendment is perhaps the one sentence in the federal Constitution that has never been figured out. "In sophisticated legal circles," John Hart Ely tells us, "mentioning the Ninth Amendment is a surefire way to get a laugh. ('What are you planning to rely on to support that argument, Lester, the Ninth Amendment?')."[40] The ninth amendment has been dismissed as stating a mere truism: that all powers not delegated by the constitution to the federal government remain undelegated as a result of the Bill of Rights. But, as Dean Ely points out, the tenth amendment, added to the constitution at the same time as the ninth, says

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38. Redlich, *Ninth Amendment*, 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1316 (1986).

39. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

40. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34 (1980); *See also* C. BLACK, DECISION ACCORDING TO LAW (1981); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962).

this much more clearly. Thus, the ninth amendment becomes not only an unneeded truism but also a redundant unneeded truism. As a commonplace of constitutional interpretation, however, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[41]

In the case of the ninth amendment, then, what might that intended effect be? The amendment's relatively few boosters have been singularly unsuccessful at developing any content for it that would do more than license the federal judiciary to define new rights without providing any standards or mechanisms for so doing. Yet as the text must have been intended to mean something, the task must be to reason our way to some set of standards or mechanisms that make sense of it. Reasoning through what it must mean to say that the enumeration of rights in the original Bill of Rights does not "deny or disparage" other rights retained by the People, one might very well arrive at the point also reached from the opposite direction: approaching state constitutional values as the building blocks of federal constitutional values.

It makes sense that rights protected by the federal Constitution should be expandable by the People acting through the states. Under prevailing political theory when the constitution was framed—particularly among the recalcitrant ratifiers at whose insistence the Bill of Rights was added—it was fundamental "that the powers granted under the Constitution, being derived from the people, may be resumed by them whenever perverted to their injury; that every power not therein granted remains in the people at their will; that no right of any denomination can be cancelled, abridged, restrained or modified except in the instances and for the purposes for which power is given; and that among other essentials, liberty of the press and of conscience cannot be abridged."[42]

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41. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

42. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 314-15 (1936) (summarizing Virginia's reservations in ratifying the Constitution). The theory of the ninth amendment is, essentially, that "nothing has or can be lost by the people because these rights exist independent of the limited powers granted to the federal government." Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, 130 (1960). The problem lies in identifying what these rights may be. One student of the ninth amendment found, upon pursuing its legislative history, that the amendment's purpose was "to guarantee that rights protected under state law would not be construed as supplanted by federal law merely because they were not expressly listed in the Constitution." Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 248 (1983). "The retained rights envisioned by the framers, however, included not only those established by common law and statute as of the Constitution's adoption, but also those to be subsequently established by

As Chief Justice Marshall made clear in *Marbury*, "[t]hat the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."[43]

Whatever other rights may have been contemplated by the framers of the ninth amendment, one of these "original" rights was clearly the right to establish, and to alter, the principles of government.

The conception that state-generated constitutional rights could at some point become binding nationally gives the ninth amendment substance without license. First, it allows for growth in the federal constitution slowly and through cautious experimentation, subject to testing and confirmation, and provides the People the time and opportunity, acting through their state processes, to reject, expand or modify rights declared at the state level before they are taken as part of a national consensus. Second, this conception of the ninth amendment gives the federal judiciary a point of reference as to the overarching values embodied in our constitution today, insuring that the constitution grows to fit society, but in a way more accessible to the democratic process and less dependent on any individual judge's view of "contemporary values." Finally, this process reinforces the role of the states as not only the guarantors but also the generators of individual rights.

III.

As we enter the third century of this nation's history, American federalism in the form of increased state constitutional decision-making engenders new issues regarding the balance and accommodation between the separate state and federal spheres of autonomy. Not among the open issues, however, are the legitimacy of process, its sound historical and theoretical foundations, and its implications for the development of national law.

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state legislation." *Id.* at 248.

43. Marbury v. Madison, 5 U.S. (1 Cranch) at 175-76.