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STATE CONSTITUTIONALISM AND THE LIMITS OF JUDICIAL POWER

*Hon. Jack L. Landau**

It is easy to think of state justiciability doctrine as an especially abstract topic, the subject of "technical, legalistic wrangling" that is perhaps of interest to scholars, but few, if any, others not suffering from insomnia.[1] In fact, it appears to be of little interest even to scholars.[2] As is so often the case, academic analysis and commentary tend to focus on federal—not state—law. So even when the subject of state justiciability theory arises, it usually does so in the limited context of determining what justiciability limitations exist when state courts address matters of federal law.[3]

* Associate Justice, Oregon Supreme Court; Adjunct Professor of Law, Willamette University College of Law and the Lewis and Clark Law School. This is a slightly expanded and footnoted version of the Twenty-Eighth Annual State Constitutional Law Lecture delivered at the Camden campus of Rutgers Law School on February 22, 2017. Thanks to Nora Coon for research assistance and editorial suggestions. All mistakes are my own.

1. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973).

2. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1876 (2001) ("The otherwise burgeoning literature on state courts and state constitutions largely ignores state justiciability doctrine as it applies to state constitutional adjudication.").

3. *See, e.g.*, William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 294–95 (1990) (arguing that state courts should be subject to federal justiciability limitations in cases involving federal

That is an unfortunate state of affairs, for the subject of justiciability generally—and state justiciability doctrine particularly—is of enormous practical significance. It concerns the scope of the "judicial power" that is typically conferred on state courts in their state constitutions. It establishes who has access to the courts and spells out when they can seek relief. Especially in recent years, when we see state courts more frequently being asked to weigh in on the most controversial legal and political topics of the day—abortion,[4] gay marriage,[5] school vouchers,[6] assisted suicide,[7] environmental protection,[8] climate change,[9] voting rights,[10] public education[11]—the subject of justiciability and its subsidiary issues of standing, mootness, and ripeness have taken on increasing importance as doctrinal gatekeepers to the courthouse. It is hard for me to think of a subject that is—or should be—of greater importance to state courts.

Yet few state courts have given the matter the sort of attention it deserves. As I will describe in more detail, most follow to some extent federal justiciability doctrine that has developed over the last century under the Article III "case or controversy" requirement.

My pitch is that all state courts should be open to rethinking the subject of justiciability from the ground up. I make this assertion for two reasons.

First, the essential underpinnings of federal justiciability doctrine do not translate well to state courts. The nature of the broad "judicial power"

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questions); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1151 (1984) (arguing that the Supremacy Clause requires state courts to vindicate federal rights even when similar rights under state law are held to be non-justiciable); Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 78 (1994) (arguing that state courts are not obligated to comply with federal justiciability standards in federal-question cases). The Oregon Supreme Court, has sided with those arguing for the application of federal justiciability limitations on the authority of state courts to address issues of federal law. Barcik v. Kubiaczyk, 895 P.2d 765, 772–73 (Or. 1995) (holding that federal mootness standards apply, at least to the extent that they impose fewer restrictions on the exercise of judicial power).

4. *See, e.g.*, Hodes & Nauser, MDs, P.A. v. Schmidt, 368 P.3d 667, 675–76 (Kan. Ct. App. 2016).

5. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

6. *See, e.g.*, Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 942–44 (Colo. 2004) (en banc).

7. *See, e.g.*, Krischer v. McIver, M.D., 697 So. 2d 97, 100–04 (Fla. 1997).

8. *See, e.g.*, Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999).

9. *See, e.g.*, Funk v. Wolf, 144 A.3d 228, 232–35 (Pa. Commw. Ct. 2016), *aff'd*, 158 A.3d 642 (Pa. 2017).

10. *See, e.g.*, Chavez v. Brewer, 214 P.3d 397, 406–09 (Ariz. Ct. App. 2009).

11. *See, e.g.*, McCleary v. State, 269 P.3d 227, 254–58 (Wash. 2012) (en banc).

conferred in state constitutions is different from the limited authority that the framers of our Federal Constitution spelled out in Article III. Second, and in any event, federal justiciability doctrine itself is based on historical footing that is something less than sound and—as is widely recognized—makes little doctrinal sense on its own terms.

In the last few years, some state courts have taken the plunge and reexamined the state constitutional basis for the imposition of justiciability limitations on the exercise of judicial power. I applaud the decisions of those courts, and I will end with a brief description of a couple of them, including one from my own court.

But first, a little background and terminology. The word "justiciability" is generally taken to refer to a collection of concepts that limit the circumstances under which it is appropriate—or even constitutionally possible—to exercise judicial power.[12] The traditional explanation for federal justiciability doctrine runs something along these lines: Article III of the Federal Constitution vests "judicial Power" in the Supreme Court and in such lower courts as Congress may establish.[13] It further provides that this judicial power may be exercised in nine categories of "Cases" or "Controversies."[14] Federal courts have come to understand both of those terms to embody a number of constraints.[15] Those constraints include the principles that federal courts may not render advisory opinions;[16] that they will not consider "political question[s]";[17] that they will decide only cases brought by individuals with "standing," that is, individuals who have been

12. *See generally* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529 (3d ed. 2008), Westlaw (database updated Apr. 2017) ("Concepts of justiciability have been developed to identify appropriate occasions for judicial action.").

13. U.S. CONST. art. III, § 1.

14. *Id.* § 2, cl. 1. The nine categories are:

> [1] Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [2] Cases affecting Ambassadors, other public Ministers and Consuls; . . . [3] Cases of admiralty and maritime Jurisdiction; . . . [4] Controversies to which the United States shall be a Party; . . . [5] Controversies between two or more States; [6] between a State and Citizens of another State; [7] between Citizens of different States; [8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

15. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citations omitted) ("The doctrines of [justiciability] all originate in Article III's 'case' or 'controversy' language . . . ."); Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976) ("[A]ll concepts of justiciability . . . derive[] from . . . the 'cases or controversies' limitation imposed by Art. III.").

16. *See, e.g.*, Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

17. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228 (1993).

injured by a challenged law or action and have a personal stake in the outcome;[18] and that they will not decide cases that, after initiation, have become "moot."[19]

Now, you might be tempted to think, that is an awful lot to read into the words "cases" and "controversies." And you would be right. Still, the federal courts view those words as having an "iceberg quality."[20] Below the "surface simplicity" of the two words, the courts say, hide "submerged complexities" that comprise federal justiciability doctrine.[21]

Federal justiciability doctrine is also sometimes justified by reference to principles of separation of powers. As the United States Supreme Court explained in *Allen v. Wright*:

> [T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[22]

Especially significant to this underpinning of justiciability, the Court said, is the fact that federal judges are "unelected" and "unrepresentative."[23]

Federal justiciability doctrine reflects what is often called a dispute resolution or private rights model of the role of federal courts.[24] According to this view, federal courts exist to resolve disputes and nothing else. Their role is not to articulate legal principles, enforce laws generally, or ensure that the other branches of government behave themselves within the bounds of the authority conferred on them by the Constitution. Their decisions sometimes may have one or more of those effects. But they do so merely as incidents of deciding private disputes.[25]

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18. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009).
19. *See, e.g.*, Already, LLC v. Nike, Inc., 568 U.S. 85, 90–91 (2013).
20. Flast v. Cohen, 392 U.S. 83, 94 (1968).
21. *Id.*
22. 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).
23. *Id.* (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).
24. *See* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 63 (2015) (describing the federal justiciability doctrine as being based upon a "dispute resolution" model). *See generally* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 77–78 (2007) (summarizing the private rights "vision" of the role of federal courts).
25. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) ("Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.").

That doctrine—at least as one of *constitutional* law—is of surprisingly recent vintage. It is actually a creature of mid twentieth-century case law.[26] To be sure, before that, the United States Supreme Court had adopted various rules limiting the exercise of federal court authority. For instance, in the latter part of the nineteenth century, the Court had determined that it would not decide cases that had become moot.[27] But it did so as a matter of "economy and good sense in judicial administration," not constitutional law.[28] It was not until 1964, in *Liner v. Jafco, Inc.*,[29] that the Court linked the mootness doctrine to the Federal Constitution and its case or controversy limitation.[30]

State courts likewise did not come up with constitutional limits on the exercise of their judicial power until the twentieth century. Before then, state courts expressed few, if any, concerns with what we would now think of as "justiciability."[31]

Instead, American courts tended to borrow from a long tradition in the English courts recognizing that, although the courts may *choose* not to render decisions in cases in which a plaintiff lacks a personal stake in

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26. *See generally* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) (asserting that the Supreme Court "fabricat[ed] the doctrine[] of standing" in the twentieth century).

27. *See, e.g.*, Smith v. United States, 94 U.S. 97, 97 (1876) ("[W]e are not inclined to hear and decide what may prove to be only a moot case.").

28. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-11, at 344 n.1 (3d ed. 2000).

29. 375 U.S. 301, 306 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."). Interestingly, the Court cited no prior case law to support that proposition. *Id.* Rather, it cited two law review articles, one of which was a student note that actually asserted that Article III was too ambiguous to serve as a source of any limitations on the exercise of federal judicial power and that "any restriction of judicial power created by construction of such terms may properly be termed self-imposed." Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772, 772 (1955).

30. There were some earlier cases that suggested limits on the exercise of federal judicial power. But those cases were not rooted in the case or controversy limitation of Article III. Rather, they grew out of separation of powers concerns that arose when, for example, federal courts were asked to determine Revolutionary War veterans' disability benefits, subject to direct review by Congress. *See generally* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). Again, it was not until well into the twentieth century that such cases were recast in "case or controversy" terms. Tutun v. United States, 270 U.S. 568, 576 (1926).

31. *See generally* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (concluding that "a painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the [Supreme] Court were oblivious to the modern conception" of justiciability).

the outcome or in cases in which the controversy had become moot, no principle of constitutional law *required* them to do so.[32] In fact, in cases brought to vindicate "public rights"—that is, matters that would be of interest not just to the parties, but to the public at large—courts routinely dispensed with any requirement of a personal interest in the outcome entirely.[33]

Over the course of the twentieth century, though, state courts borrowed from newly developing federal notions of constitutional limitations on the exercise of judicial power. Today, a number of state courts explicitly recognize limits on the exercise of their judicial power based on federal justiciability doctrine.[34]

The Alabama Supreme Court, for example, has concluded that the exercise of state judicial power is limited to "cases and controversies," even though the Alabama Constitution contains no such phrasing in its text.[35] In Georgia, standing is regarded as subject-matter

32. For descriptions of the English tradition, see generally Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1993). On the nineteenth-century American case law, see generally Matthew Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 569 (2009), which explains that "nineteenth century decisions generally do not indicate that the court lacked *authority* to hear moot cases. Rather, courts dismissed moot cases using language suggesting an exercise of discretion."

It should be noted that the scholarship on this point is not quite unanimous. For a different perspective, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004), in which the authors suggest that, while they "do not claim that history *compels* acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on," there was nevertheless "an active law of standing in the eighteenth and nineteenth centuries" (although not stated in those terms), at least in private actions.

33. *See, e.g.*, People *ex rel.* Press Publ'g Co. v. Martin, 36 N.E. 885, 886 (N.Y. 1894) ("[W]hile the time has long since passed when any decision in this matter can have any practical, efficient operation, we will, in view of the public importance of the questions involved, overlook that circumstance, and proceed to the determination of the matter upon its merits . . . .").

34. For a very useful overview of state court decisions on the subject of standing, see generally Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RESOURCES L. 349 (2015–2016).

35. *See Ex parte* Jenkins, 723 So.2d 649, 656 (Ala. 1998); *see also Ex parte* McKinney, 87 So. 3d 502, 513 (Ala. 2011) (Murdock, J., dissenting) (internal quotation marks omitted) ("Although the Alabama Constitution does not have the same Article III language as is found in the Federal Constitution, this Court has held that Section 139(a) of the Alabama Constitution limits the judicial power of our courts to cases and controversies and to concrete controversies between adverse parties."); Hamm v. Norfolk S. Ry. Co., 52 So.3d 484, 500 (Ala. 2010) (Lyons, J., concurring specially) ("Much of the precedent in the area of standing comes from federal courts subject to the case-or-controversy requirement of Article

jurisdictional,[36] based in part on the United States Supreme Court's decision in *Lujan v. Defenders of Wildlife*.[37] The Idaho courts explicitly "adopted the constitutionally based federal justiciability standard."[38] The Montana Supreme Court reads its constitutional conferral of judicial power to include the same justiciability limitations required by Article III of the Federal Constitution.[39] The Ohio Supreme Court has expressly adopted *Lujan* as "the irreducible constitutional minimum of standing."[40] The Oklahoma courts have also adopted federal justiciability standards, although those courts have cited no source of those standards in the state constitution.[41]

A number of states have explicitly stated that they are not *bound* by federal justiciability doctrine.[42] And quite a number of them have developed exceptions or qualifications that are foreign to the federal case law.[43] Still, most of those courts continue to rely on the federal doctrine at least as the starting point for state justiciability analysis.[44]

I think state courts are mistaken in relying on federal justiciability doctrine *at all* in determining the existence of constitutional limitations on the exercise of state judicial power. Let us turn our attention to why I make that claim. I assert essentially two reasons for my claim that state

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III of the United States Constitution. Of course, we do not have a case-or-controversy requirement in the Alabama Constitution of 1901, but our concepts of justiciability are not substantially dissimilar."); Ala. Power Co. v. Citizens of State, 740 So. 2d 371, 381 (Ala. 1999) ("[O]ur [state] Constitution vests this Court with a limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts.").

36. Blackmon v. Tenet Healthsystem Spalding, Inc., 667 S.E.2d 348, 350 (Ga. 2008).

37. 504 U.S. 555, 560–62 (1992); *see also* Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta, 638 S.E.2d 307, 318 (Ga. 2006).

38. ABC Agra, LLC v. Critical Access Grp., 331 P.3d 523, 525 (Idaho 2014) (citing Davidson v. Wright, 151 P.3d 812, 816 (Idaho 2006)); *see also* Koch v. Canyon Cnty., 177 P.3d 372, 375 (Idaho 2008) ("When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.").

39. Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 226 P.3d 567, 569 (Mont. 2010).

40. Moore v. City of Middletown, 975 N.E.2d 977, 982 (Ohio 2012) (quoting *Lujan*, 504 U.S. at 560)).

41. *See* Hendrick v. Walters, 865 P.2d 1232, 1236 n.14 (Okla. 1993).

42. *See, e.g.*, Duncan v. State, 102 A.3d 913, 923 (N.H. 2014) (citations omitted) ("[A]lthough the standing requirements under Article III of the Federal Constitution are not binding upon state courts . . . [the New Hampshire Constitution] imposes standing requirements that are similar . . . .").

43. For example, some three dozen states recognize some form of "taxpayer standing." *See generally* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1277 (2013).

44. Sassman, *supra* note 34, at 398 (concluding that, for purposes of developing constitutional standing doctrine, "the federal courts were the first mover in all but a very small minority of states").

courts should independently determine whether they are constitutionally bound by the sort of justiciability limitations that exist under Article III. The first is that federal and state courts are different in significant ways. The second is that federal justiciability analysis does not stand up to scrutiny on its own terms.

Let us start with the first of those assertions—differences between the texts of the federal and state constitutions that define the nature of federal and state "judicial power." These differences reflect more than just variations in phrasing. They reflect a profound distinction between federal and state constitutions in general and between federal and state judiciaries in particular.

Recall that the United States Supreme Court has asserted that its justiciability doctrine flows from the text of Article III, specifically its phrasing that limits the exercise of federal judicial power to "cases" and "controversies." State constitutional judicial power provisions are quite different. So far as I can tell, none contains a case-or-controversy limitation.[45] Instead, the usual state constitutional provision simply provides that the judicial power "is vested" in one or more courts.

Alabama's constitution, for example, provides that "[t]he government of the State of Alabama shall be divided into three distinct branches: legislative, executive, and judicial."[46] No mention of "cases" or "controversies." No mention of any limitations on the exercise of judicial power at all. The constitutions of Arkansas,[47] Colorado,[48] Connecticut,[49] Indiana,[50] and Utah[51] are similarly worded.

Washington's constitution is typical of many others. It provides that the judicial power "shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."[52] Again, no mention of "cases" or "controversies." No mention of any other limitations on the exercise of judicial power.

In other words, the principal textual justification for federal justiciability analysis simply does not apply to state courts.[53]

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45. The closest to a case-or-controversy provision may be Montana's, which confers original jurisdiction in "all civil matters and cases at law and in equity." MONT. CONST. art. VII, § 4(1).

46. ALA. CONST. art. III, § 42(b).

47. ARK. CONST. art. IV, § 1.

48. COLO. CONST. art. III.

49. CONN. CONST. art. II.

50. IND. CONST. art. III, § 1.

51. UTAH CONST. art. V, § 1.

52. WASH. CONST. art. IV, § 1.

53. *See generally* James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 876 (2008) ("Given the importance

Aside from that, the presence or absence of a case-or-controversy limitation on the exercise of judicial power is reflective of a deeper and more significant difference between federal and state courts. Federal power is, by its very nature, limited.[54] It extends only so far as the Constitution confers it.[55] State power, in contrast, is inherent in state sovereignty.[56] Congress, for example, can legislate only to the extent that Article I, Section 8 of the Constitution confers authority to do so and that Article I, Section 9, or some other provision, does not limit.[57] State legislatures, in contrast, have plenary legislative authority and can enact laws on any subject whatever, so long as there is no limitation on that authority expressed in the state constitution or in federal law.[58]

Federal courts likewise exercise only the authority that the Constitution confers.[59] On top of that, the Constitution itself authorizes

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these words ['cases' and 'controversies'] have taken on in American legal discourse, . . . the failure of state constitutions to explicitly incorporate them should be read as additional authority for courts to diverge from federal practices.").

54. WRIGHT ET AL., *supra* note 12, at § 3522 ("It is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction.").

55. *See generally* Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1985 (2016) ("This familiar 'enumeration principle' has deep roots in American constitutional history . . . .").

56. Alexander Hamilton famously asserted that "the State Governments would [after ratification] clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). James Madison echoed the sentiment, saying that the Constitution was "partly federal, and partly national" in that it "leaves to the several States a residuary and inviolable sovereignty over all other objects" not delegated to the United States government. THE FEDERALIST NO. 39, at 256–57 (James Madison) (Jacob E. Cooke ed., 1961).

I recognize that, in framing the relationship between federal and state power in terms of sovereignty, I am treading on contested ground. Scholars debate the nature of "Our Federalism" and whether it is rooted in sovereignty or some other source. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6–7 (2011). Among other things, they struggle with whether there are two, three, or five distinct aspects to federalism. *See, e.g.*, Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1230 (1994); Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 285 (2008); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004).

57. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–34 (2010) (summarizing enumerated power principles as to congressional authority); United States v. Morrison, 529 U.S. 598, 610 (2000) ("Congress' authority is limited to those powers enumerated in the Constitution . . . .").

58. *See, e.g.*, Torres v. Lynch, 136 S. Ct. 1619, 1625 (2016) ("State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers . . . .").

59. *See generally* MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE 25 (2015) ("[F]ederal courts can exercise their authority only over those subject-matter disputes cognizable under the Constitution

Congress to enact "Exceptions" and "Regulations" to the jurisdiction of the federal courts.[60] State courts have much broader authority. Typically, state constitutions confer original and general jurisdiction over all civil and criminal cases.[61] As a result, they have authority to adjudicate anything and everything, so long as there is no limit on that authority elsewhere in the state constitution or under federal law.[62]

As I have noted, federal justiciability doctrine has been justified not solely on the case-or-controversy provisions of Article III, but also on separation of powers principles. As the United States Supreme Court explained in *Allen v. Wright*, justiciability limitations are necessary to preserve the distinctions between the roles of elected policy makers and those of "unelected" and "unrepresentative" judges.[63] Otherwise, we are confronted by the dreaded "counter-majoritarian difficulty."[64]

Here again, though, the argument does not translate very well to the state judiciary. While it is true that federal judges are not elected, most state judges *are*. According to one recent count, as many

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through Article III, which remains the fundamental prerequisite for invoking federal judicial power.").

60. Known as the "Exceptions Clause," Article III, Section 2, Clause 2 provides that "[i]n all . . . Cases . . . the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 672 (2006) (Scalia, J., dissenting).

61. *See, e.g.*, HAW. CONST. art. VI, § 1 ("The several courts shall have original and appellate jurisdiction . . . ."); MO. CONST. art. V, § 14(a) ("The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.").

62. WRIGHT ET AL., *supra* note 12, at § 3522 ("Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary."). State courts even interpret and apply federal law. *See generally* Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2118–27 (2016).

63. 468 U.S. 737, 750 (1984) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

64. The phrase, coined by Alexander Bickel, refers to the fundamental problem of explaining the authority of unelected federal judges to invalidate legislation that is the product of decisions by democratically elected representatives. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1986) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."). The point has spawned thousands of books and articles. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002). Of course, the whole argument assumes that (1) our constitutional system is predicated on principles of majoritarian democracy and (2) that federal courts are, in fact, counter-majoritarian merely because they are unelected. Both of those assumptions have been contested. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 587, 609–10 (1993). But that is a whole other matter.

as ninety percent of state judges face some sort of election.[65] Thirty-eight states require all of their judges to be elected.[66] In the case of state courts, then, justiciability limitations are not needed to avoid the counter-majoritarian difficulty. There is no counter-majoritarian difficulty in the first place.[67]

Aside from that, the distinctions between branches that are so critical to federal separation of powers arguments find little parallel in the case of state constitutions. The allocation of political power between the branches is not quite as tidy in the case of state constitutions as it may be under the Federal Constitution.

The Federal Constitution, for example, establishes a single executive official—the President of the United States. State constitutions, in contrast, establish multiple executives, dividing executive power between a number of independently elected officials.[68] In Oregon, for instance, the state constitution divides executive authority among the office of governor, secretary of state, and state treasurer,[69] and state statutes create additional statewide, elected executive officers such as attorney general and labor commissioner.[70]

Moreover, there often is a certain blurring of functions between branches of government in state constitutions. State legislatures have historically exercised a number of functions usually thought of as judicial

65. MATTHEW J. STREB, RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 7 (2007).

66. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 3 (2012).

67. If anything, the election of judges poses a *majoritarian* difficulty—the possibility that elected judges respond not to the dictates of the law, but to the perceived will of the electorate. *See* Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, *in* THE JUDICIAL BRANCH 60, 64 (Kermit L. Hall & Kevin T. McGuire eds., 2005); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995) ("[E]lective judiciaries pose two problems for the constitutional democrat. First, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary. Second, and more mundane but no less important, the impartial administration of 'day-to-day' justice may be compromised."); Amanda Frost & Stefanie A. Linduist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731 (2010) ("[E]lective judiciaries pose a risk to the rule of law, which is compromised whenever a judge's ruling is influenced by preferences."). But that is not a problem of justiciability.

68. *See, e.g.*, William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448, 2467–68 (2006).

69. OR. CONST. art. V, § 1 (governor); *id.* art. VI, § 2 (secretary of state); *id.* § 4 (state treasurer).

70. OR. REV. STAT. § 180.010 (2015) (attorney general); *id.* § 651.030 (labor and industries).

or executive, including granting divorces, issuing licenses, or awarding government contracts for road construction.[71]

This blurring of government functions is especially evident when considering the comparative functions of federal and state judges. Under the Federal Constitution, courts exist to do essentially one thing: adjudicate cases and controversies. The Federal Constitution mentions no other obligations, no other responsibilities. In light of that limited role, the private-rights model of adjudication—and the justiciability limitations that flow from it—arguably makes some sense. Adjudication is the only thing that the Constitution says the federal courts can do.

Not so with state courts and the authority conferred on them under state constitutions. State constitutions routinely confer on state courts a much wider range of responsibilities—a range that suggests that the "judicial power" conferred under state constitutions is quite a bit broader than what is conferred under Article III.[72]

Consider, for example, the fact that a number of state courts regularly deliver advisory opinions. In fact, the state constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota expressly authorize the courts to give legal advice when requested by the governor or the state legislature.[73]

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71. Divorces originally were the domain of ecclesiastical courts, but in the late seventeenth century, Parliament asserted the authority to grant them. American colonies followed the parliamentary practice, at least until the mid- to late-nineteenth century, when they authorized the courts to grant divorces. *See generally* Maynard v. Hill, 125 U.S. 190, 206–08 (1888) (discussing American colonial adoption of the parliamentary tradition of granting divorces). By the late nineteenth century, the work of state legislatures was dominated by the enactment of such "private laws." *See generally* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 726 (2012) ("[E]arly to mid-nineteenth century legislatures busied themselves with essentially adjudicatory adjustments of private needs such as the granting of divorces. In Indiana, for example, the overwhelming majority—nearly 90%—of the legislative output of 1849–50 was private laws.").

72. For an interesting account of the evolution of the role of state courts from the founding era to the present, see generally BUENGER & DE MUNIZ, *supra* note 59, at 45–95.

73. COLO. CONST. art. VI, § 3; FLA. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3; MASS. CONST. pt. II, ch. III, art. II; MICH. CONST. art. III, § 1.III(8); N.H. CONST. pt. II, art. LXXIV; R.I. CONST. art X, § 3; S.D. CONST. art V, § 5. In several other states, legislatures authorize the courts to deliver advisory opinions. ALA. CODE § 12-2-10 (1975); DEL. CODE ANN. tit. 10, § 141 (1974). For a good introduction to the origins of advisory opinions and their modern use, see generally Jonathan D. Persky, Note, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005).

The scope of a state's authority to issue such advisory opinions is not uniform. The Massachusetts Constitution, for example, limits the practice to "important questions of

In addition, as early as colonial times, state courts operated as "organs of governance" that had served as "quasi-administrative agencies" in a number of areas.[74] And since then, state constitutions routinely require state courts to exercise authority in a number of areas that go well beyond the private adjudication model of judicial power.[75] State courts often are given responsibility for the regulation of practice and procedure, as well as court administration, which entails considerable rule-making authority.[76] The New Jersey Constitution, for instance, provides that the supreme court "shall make rules governing

law." MASS. CONST. pt. II, ch. III, art. II. In contrast, the Florida Constitution confines it to constitutional questions. FLA. CONST. art. V, § 3(b)(10). Nevertheless, the fact that such authority exists at all under state constitutions has significant implications as to the nature of state "judicial power." *See* Hershkoff, *supra* note 2, at 1844–52.

Courts issuing advisory opinions often assert that such opinions are not binding. *See, e.g.*, Opinion of the Justices, 424 A.2d 663, 664 (Del. 1980) (stating that advisory opinions do "not result in binding precedent"). And, because of that, some have suggested that issuing an advisory opinion is not actually an exercise of "judicial power." The Alabama Supreme Court, for example, referred to the legislature's conferral of the authority to issue advisory opinions with the comment that "the giving of such opinions by the Justices is 'not the exercise of a judicial function.'" *In re* Opinion of the Justices, 96 So. 487, 491 (Ala. 1923). Recognition of the non-binding nature of advisory opinions, however, is not universal. *See, e.g.*, *In re* Senate Resolution Relating to Senate Bill No. 65, 21 P. 478, 469 (Colo. 1889) (stating that advisory opinions have the "force and effect of judicial precedents"). Moreover, although some state courts may *say* that their advisory opinions are not binding, it has been suggested that, in practice, that is not the case. Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DET. C.L. 101, 129 (2001) ("Advisory opinions are taken as binding by virtually everyone including at times the advising justices."). And, in any event, it does not necessarily follow that, because such decisions are not binding, they do not amount to an exercise of "judicial power," at least not without assuming a particular definition of "judicial power" in the first place.

74. Hershkoff, *supra* note 2, at 1871; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 18 (3d ed. 2005) ("The basic courts were *governing* courts; they did not merely settle disputes.").

75. *See generally* Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence!*, 46 WM. & MARY L. REV. 1273, 1276–82 (2005) (discussing "[d]istinctive [r]oles of [s]tate [c]ourts").

76. Some thirty-eight state supreme courts are authorized by their state constitutions to promulgate rules of procedure and court administration. *Rulemaking/Administrative Orders*, NAT'L CTR. ST. CTS., http://www.ncsc.org/topics/court-management/rulemaking-and-administrative-orders/state-links.aspx (last visited Aug. 23, 2017). To be sure, the United States Supreme Court also has rulemaking authority, but it derives from a grant of authority from Congress under the Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (1988)). State court rulemaking authority is constitutional and thus bears on the nature of the "judicial power" that the state constitution confers. *See generally* BUENGER & DE MUNIZ, *supra* note 59, at 83–90; Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 208–09 (1983).

the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."[77]

Similarly, state courts often are called upon to participate with the other branches in law reform activities. Judges from both the Oregon Supreme Court and the Oregon Court of Appeals also sit on the Oregon Law Revision Commission.[78] State court judges sometimes are called on to participate in the decennial legislative redistricting process, and in ways that go well beyond judicial review. Oregon's constitution, to illustrate, requires the Oregon Supreme Court not just to review legislative apportionment, but also to "correct the reapportionment if the court considers correction to be necessary."[79] State courts sometimes are required to perform functions that have nothing to do with resolving disputes between parties. The Indiana Constitution, for instance, authorizes its supreme court to determine whether, on petition from the Senate President and Speaker of the House, the Governor is unable to discharge official duties.[80]

In addition, state courts across the country have developed "specialty" or "problem-solving" courts that require judges to engage in activities that go well beyond traditional adjudication of disputes.[81] Such specialty courts as veterans' courts, elder courts, drug courts, mental health courts, and the like entail a significant reshaping of the role of the judge, from adjudicators to "therapeutic agents" who work with treatment and social service agencies not just to resolve litigation disputes, but also to address underlying social issues. The existence of such courts, among other things, demonstrates that "the exercise of state judicial power is elastic, empowering state courts to act along multiple avenues in reshaping the formalities of judicial process and the very structures and historical assumptions upon which that process rests."[82]

The upshot of all this is that state courts are different. As Professor Williams has stated, state courts are not just "'little' versions of the

77. N.J. CONST. art. VI, § 2, para. 3.

78. OR. REV. STAT. § 173.315 (2015) (establishing commission to include the Chief Justice of the Oregon Supreme Court, Chief Judge of the Oregon Court of Appeals, and a circuit court judge, as well as the Attorney General, a person appointed by the Governor, and members of both houses of the legislature).

79. OR. CONST. art. IV, § 6(2)(d).

80. IND. CONST. art. V, § 10(d).

81. *Problem-solving Courts*, NAT'L CTR. ST. CTS., http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Problem-solving-courts.aspx (last visited Aug. 23, 2017). Some 3,600 such specialty courts operate around the United States. BUENGER & DE MUNIZ, *supra* note 59, at 90–95.

82. BUENGER & DE MUNIZ, *supra* note 59, at 95.

federal courts."[83] The "judicial power" conferred in state constitutions and exercised by state courts is markedly different from what federal courts are permitted to exercise under Article III. Consequently, the arguments that are so often asserted as the bases for federal justiciability doctrine just do not apply to state courts.

Let us turn to the second reason for my claim that state courts should consider the subject of constitutional justiciability limitations on judicial power completely independently of federal constitutional analysis; namely, that federal justiciability analysis makes no sense on its own terms.

As I have noted, the principal textual justification for federal justiciability doctrine is the "case" or "controversy" provisions of Article III. In particular, it is premised on a more or less originalist assessment of the meaning of the words "cases" and "controversies," as they are used in the Constitution. As Justice Frankfurter explained in *Coleman v. Miller*:

> In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move . . . by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies."[84]

The problem with Justice Frankfurter's analysis is that it is almost certainly wrong. Scholars have long since, almost universally, agreed that Frankfurter's analysis in *Coleman* represents a significant "historical blunder."[85] As I summarized at the outset, the English

83. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 285 (2009).

84. 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

85. Sunstein, *supra* note 32, at 172–73. That is not to say that there is universal agreement about what the references to "cases" and "controversies" were intended to mean. Some scholars have asserted that the distinction between "cases" and "controversies" is that "cases" refers to all disputes, whether civil or criminal, while "controversies" refers only to civil disputes. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction*

tradition to which Justice Frankfurter referred required a personal stake in the outcome only in private litigation, and even then, as a matter of substantive law, not a limitation on the jurisdiction of the courts. And in cases involving matters of significant public importance, the courts saw no justiciability impediments to their exercise of judicial power at all.

To the extent that federal justiciability analysis is premised on separation-of-powers considerations, it rests on similarly shaky footing. Remember that, in cases such as *Allen v. Wright*, the Supreme Court has asserted that, because courts are "unelected" and "unrepresentative," they must play a limited role in our democratic system of government.[86] But the fact remains that the Supreme Court's reasoning does not follow from its premise. Merely because federal judges should play a limited role does not mean that the *particular limits* that federal justiciability doctrine imposes are constitutionally required.[87] Requiring the Supreme Court to issue no more than three opinions each month imposes a limit on the role of the Court in our democratic system of government. But that fact alone certainly does not explain why it is the *type* of limit that the Constitution requires. In the same manner, imposing standing and mootness requirements certainly has the effect of limiting the role of the federal courts. It remains utterly unexplained, however, why those particular limits serve a constitutional purpose. Saying the words "separation of powers," in other words, does not really explain anything; it amounts to little more than ipsedixitism.

Even assuming, for the sake of argument, that there are adequate constitutional justifications for such limitations on the exercise of judicial power as standing, mootness, ripeness, and the like, there remains the unpleasant reality that the way that the federal courts have applied those principles makes little to no sense at all. This is no intemperate observation of a state court judge jealous of his life-tenured federal

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in State-Party Cases, 82 CALIF. L. REV. 555, 607 n.207 (1994). Professor Akhil Amar argues that the two terms differentiate between those disputes over which Congress has jurisdiction—"controversies"—and those over which it does not—"cases." Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1656–58 (1990). Professor Robert Pushaw, on the other hand, argues that the term "controversy" simply refers to a dispute that requires resolution by a neutral judge. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 450 (1994). In a similar vein, Professor Andrew Hessick argues that a "controversy" amounts to a dispute "amenable to judicial resolution." Hessick, *supra* note 24, at 78.

86. 468 U.S. 737, 750 (1984).

87. As one scholar commented, "allusions to the countermajoritarian difficulty do not automatically justify the justiciability requirements any more than allusions to the war on terrorism automatically justified the invasion of Iraq." Siegel, *supra* note 24, at 96.

counterparts. It is the view of the Supreme Court itself. Take the words of Chief Justice Rehnquist in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, in which he candidly admitted that, "[w]e need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . ."[88] The views of scholars have tended to be somewhat less charitable, describing the federal cases as "incomprehensible,"[89] a "mess,"[90] and "incoherent."[91]

To illustrate the incoherence of federal justiciability doctrine, consider this: the United States Supreme Court has concluded that Article III renders federal courts without constitutional authority to decide moot cases.[92] The courts, it has said, lack subject matter jurisdiction even to entertain such actions. Yet, the same Supreme Court has concluded that there are no fewer than four exceptions to that very rule.[93] One of the exceptions is that federal courts can decide an otherwise moot case if the injury at issue is "capable of repetition" and yet evades review.[94] If federal courts lack constitutional authority to decide moot cases, what is the constitutional source for the capable-of-repetition exception? You would think that either the federal courts lack constitutional authority to decide moot cases, or they do not.[95]

Let us recap the bidding so far: The stated rationales for federal justiciability doctrine do not translate very well to state courts. State

88. 454 U.S. 464, 475 (1982).

89. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (stating that federal mootness doctrine is "incomprehensible").

90. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 696 (1990) ("The law in the area of justiciability is a mess.").

91. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) ("The structure of standing law in the federal courts has long been criticized as incoherent.").

92. *See, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases and controversies.").

93. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 132–147 (5th ed. 2007).

94. *See, e.g.*, Kingdomware Tech., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016).

95. Chief Justice Rehnquist recognized that very problem in his concurring opinion in *Honig v. Doe*, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring), in which he observed that:

> If it were indeed Art. III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review."

Id.

constitutions do not contain such limitations on the exercise of judicial power as Article III's case-or-controversy clause. And the nature of state constitutional conferrals of judicial power strongly suggests that the nature of state "judicial power" is broader than what is conferred under Article III. What is more, the historical and doctrinal justifications for federal justiciability analysis does not stand up well to careful scrutiny on their own terms, as it appears to be all but universally agreed.

The question remains: What should state courts do about all that? Let me offer a few suggestions and describe a couple of examples.

I begin by saying that what state courts should *not* do is use federal justiciability doctrine as the default position and then try to figure out whether there is a good reason to depart from it. This is an interpretive strategy that state courts often adopt when trying to determine the meaning of provisions in state bills of rights. Known as the "interstitial" approach to state constitutionalism, courts that follow it start with federal constitutional law and then ask whether it is adequate to the task and whether there is any good reason to depart from it.[96] I am not a fan of this approach to state constitutionalism in general, for reasons that stray beyond my topic here.[97] But, even assuming that it makes sense when dealing with individual rights cases, it makes no sense in the case of justiciability analysis. The basic rationale for interstitial analysis is the fact that state and federal bills of rights share a common text. Thus, for example, the New Mexico Supreme Court tends to apply Federal Fourth Amendment case law because the search and seizure guarantees

96. *See generally* WILLIAMS, *supra* note 83, at 142–43 (summarizing the "interstitial" approach to state constitutional interpretation).

97. My reasons are set out in Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 845–47 (2011). In a nutshell, I subscribe to what is known as the "primacy," or "first-things-first" view of state constitutional interpretation, which proposes that state courts always should begin with any applicable state constitutional provision and turn to the Federal Constitution only if the state constitutional provision does not afford complete relief. The rationales for this approach are theoretical and practical. In theory, there is no reason to turn to the Federal Constitution if a state constitution affords complete relief. In fact, it has been suggested that, unless state law fails to afford relief, there is no constitutional basis for resorting to federal law, at least not to the Federal Bill of Rights. That theory was first set out in Hans A. Linde's now-famous article, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970), and was adopted by the Oregon Supreme Court in *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981). The practical justification for primacy derives from the United States Supreme Court's decision in *Michigan v. Long*, in which the Court held that, if a state court decision rests on a clearly stated "independent state ground[]," federal courts lack subject-matter jurisdiction to review the matter. 463 U.S. 1032, 1038–39 (1983).

in the state and federal constitutions are so similarly phrased.[98] The same reasoning does not apply to justiciability analysis. As I have mentioned, there is a complete lack of any textual connection between federal and state constitutions in that regard.

What state courts should do instead is look at their own state constitutions, in the light of their own legal and political histories, and determine whether there is a source for any limits on the exercise of judicial power, as a matter of constitutional law. My own state supreme court did just that in a recent decision, *Couey v. Atkins*.[99]

By way of background, for a number of years the Oregon Supreme Court had followed federal justiciability analysis.[100] In fact, in its mootness decisions, the Oregon Supreme Court went a step further than the federal courts, attempting to avoid some of the logical incoherence of federal justiciability analysis. In a previous case, *Yancy v. Shatzer*,[101] the court concluded that, because state courts—like their federal court counterparts—lack constitutional authority to decide moot cases, it logically follows that there is no constitutional basis for creating exceptions, whether for cases capable of repetition or otherwise.[102] In response to *Yancy*, the Oregon legislature enacted a law that purported to create a statutory capable-of-repetition exception; that is the statute expressly authorized state courts to decide otherwise moot cases if the injury involved was capable of repetition, yet evading review.[103]

Obviously, if *Yancy* was correct about the courts lacking constitutional authority to decide moot cases—any moot cases, whether capable of repetition or otherwise—the legislature's action was of

98. *See, e.g.*, State v. Ketelson, 257 P.3d 957, 961 (N.M. 2011) ("Because both the United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures, we apply our interstitial approach." (citing State v. Rowell, 188 P.3d 95, 94 (N.M. 2008))).

99. 355 P.3d 866 (Or. 2015).

100. *See, e.g.*, Gortmaker v. Seaton, 450 P.2d 547, 548 (Or. 1969) (relying on United States Supreme Court precedent in concluding that a plaintiff lacked standing to pursue a declaratory judgment action).

101. 97 P.3d 1161 (Or. 2004), *abrogated by Couey*, 355 P.3d at 901.

102. *Id.* at 1169–70. In fact, the court noted Chief Justice Rehnquist's complaint in *Honig* concerning the incoherence of federal doctrine on this very point. *Id.*

103. OR. REV. STAT. § 14.175 (2015). The statute provides that, "[i]n any action in which a party alleges that an act, policy or practice of a public body . . . is unconstitutional or is otherwise contrary to law," the court is authorized to "issue a judgment on the validity of the challenged act, policy or practice" even though the case has become moot if the court determines that the party had standing, the challenged act is "capable of repetition, or the policy or practice challenged . . . continues in effect[,]" and it is "likely to evade judicial review in the future." *Id.*

questionable constitutionality. Legislatures cannot authorize courts to take unconstitutional action.[104]

The constitutionality of that statute was confronted in *Couey*. Marquis Couey was a professional signature collector for initiative petitions.[105] The legislature had previously enacted statutes that limited the political activities of paid signature collectors.[106] Couey initiated a declaratory judgment action challenging the constitutionality of that statute on free expression grounds.[107] The problem was, by the time the case wound its way through discovery, the election cycle for which Couey was registered had expired, and he was no longer a signature collector.[108] The state moved to dismiss the case as moot.[109] Couey responded that, even though the case may be moot, he was entitled to push forward under the capable-of-repetition statute.[110]

The Oregon Supreme Court agreed with the state that the matter had indeed become moot.[111] It also agreed with Couey, though, that the capable-of-repetition statute seemed to apply.[112] The question remained whether that statute was constitutional.

The court took the opportunity to reexamine its justiciability case law from scratch. It scrutinized the text of the judicial power provisions of the Oregon Constitution and found no basis for adopting federal justiciability doctrine generally or a rule against deciding moot cases particularly.[113] Article VII of the state constitution, the court observed, simply vested the judicial power in the supreme court[114] and lower courts.[115] The court

104. *See, e.g.*, Or. Med. Ass'n v. Rawls, 574 P.2d 1103, 1105 (Or. 1978) (holding the legislature cannot "deem" a matter justiciable under the judicial power provisions of the Oregon Constitution).

105. *Couey*, 355 P.3d at 870–71.

106. Specifically, the legislature enacted a statute that provides that a registered, paid initiative petition signature collector may not collect signatures for other measures on a volunteer basis. OR. REV. STAT. § 250.048(10) (2015).

107. *Couey*, 355 P.3d at 871.

108. *Id.* at 859.

109. *Id.* at 871.

110. *Id.* at 871–72.

111. *Id.* at 874.

112. *Id.* at 877–81.

113. *Id.* at 885–86.

114. Actually, it was the "Suprume" Court, the framers of the constitution being less than fastidious spellers in 1857. A copy of the original, handwritten version of the 1857 Oregon Constitution can be viewed on Oregon's Blue Book website. *Original 1856 Constitution of Oregon: Judicial Department*, OR. BLUE BOOK, http://bluebook.state.or.us/state/constitution/orig/article_VII_01.htm (last visited Aug. 23, 2017).

115. *Couey*, 355 P.3d at 885–86.

noted a complete absence of any case-or-controversy language or any other limitations on the exercise of judicial power.[116]

The court turned to the historical context in which the constitution had been adopted.[117] In brief, the court recounted the tradition of early English cases recognizing the authority of courts to entertain cases of public significance without regard to whether the parties have a personal stake in the outcome.[118] The court further described the substantial body of nineteenth-century American cases that essentially tracked that English tradition.[119] And it identified a number of early Oregon Supreme Court decisions to the same effect.[120] The court noted that the state supreme court did not recognize justiciability limitations of a constitutional nature until well into the twentieth century.[121]

In short, the court concluded that nothing in the wording of the state constitution, its historical context, or the state's early decisional history justified the adoption of federal justiciability doctrine, certainly not in cases involving matters of public significance.[122] The court overruled *Yancy* and concluded that the legislature's capable-of-repetition statute was within its constitutional authority to enact.[123] The court cautioned, however, that it was not concluding that courts henceforth would be obligated to decide moot cases. It asserted that its holding was narrower: the state constitution does not impose any such limitations on the exercise of state judicial power. That does not prevent the courts from rejecting moot cases as a matter of policy and sound judicial administration.[124]

Since *Couey* was decided, the sky has not fallen, the floodgates of litigation have not been overrun. Oregon courts continue to dismiss moot cases rather routinely.[125] But they do so because they believe that to be wise policy. Not because the state constitution requires it.

The Oregon Supreme Court is not alone in this regard. Several years back, the Michigan Supreme Court followed a very similar course. In *Lee*

116. *Id.*
117. *Id.* at 886–95.
118. *Id.* at 886–88.
119. *Id.* at 888–91.
120. *Id.* at 894–95.
121. *Id.* at 895–98.
122. *Id.* at 895.
123. *Id.* at 901.
124. *Id.*
125. *See, e.g.*, Carleton v. Or. Health Auth., 385 P.3d 1242, 1243 (Or. Ct. App. 2016) (dismissing petition for judicial review as moot); State v. Walraven, 385 P.3d 1178, 1179 (Or. Ct. App. 2016) (dismissing appeal as moot).

v. Macomb County Board of Commissioners,[126] the court had adopted federal justiciability analysis more or less wholesale, holding that, although the state constitution said nothing about limiting the exercise of judicial power to "cases" or "controversies," state constitutional standing law would henceforth conform to the requirements of the United States Supreme Court's decision in *Lujan*.[127] Nine years later, in *Lansing Schools Education Association v. Lansing Board of Education*,[128] the court reconsidered the whole matter from the ground up, ultimately overruling *Lee* and concluding that there was simply no textual, historical, or doctrinal basis for adopting federal justiciability analysis as a matter of state constitutional law.[129]

The Florida Supreme Court similarly rejected the adoption of federal standing rules in *Department of Revenue v. Kuhnlein*.[130] The court explained that, "[u]nlike the federal courts, Florida's circuit courts are tribunals of plenary jurisdiction. They have authority over any matter not expressly denied them by the constitution or applicable statutes."[131]

At this point, such cases appear to represent a minority view.[132] As I said at the outset, although a number of states have departed from federal justiciability doctrine in some particulars, most continue to use it as the starting point for their state constitutional justiciability analysis. Still, there is hope that, in the coming years, those courts will find some encouragement in decisions such as *Couey*, *Lansing*, and *Kuhnlein*; that they will question the need for perpetuating the errors and incongruities of federal justiciability doctrine; and that they will undertake a truly independent examination of their own constitutions as the source for any limitations on the exercise of state judicial power.

126. 629 N.W.2d 900 (Mich. 2001), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 688 (Mich. 2010).

127. *Id.* at 905–08 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

128. 792 N.W.2d 686 (Mich. 2010). For a summary of the Michigan court's decisions in both *Lee* and *Lansing*, see generally Kenneth Charette, Comment, *Standing Alone?: The Michigan Supreme Court, the* Lansing *Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199 (2011).

129. *Lansing*, 792 N.W.2d at 688–89.

130. 646 So. 2d 717, 720 (Fla. 1994).

131. *Id.* (internal citations omitted).

132. *See* Charette, *supra* note 128, at 209 ("Despite the fact that some state courts have chosen not to adopt the federal test for standing, the Michigan Supreme Court's decision to abandon the federal test based on a lack of an explicit constitutional 'case' or 'controversy' requirement appears to represent a minority view nationally.").