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RESPECTING STATE JUDICIAL ARTICLES

Jeffrey A. Parness*

I. INTRODUCTION

Differences in the establishment and empowerment of American judicial systems should trigger variations in the ways in which cases are handled and law is practiced. Such differences are found in the sections of state constitutions dealing with the judiciary and known as judicial articles. Unfortunately, those differences are often overlooked. Perhaps the oversight is partially attributable to the widely-held view that any variations in the constitutional foundations of judicial systems are meaningless, in that no practical consequences flow from them. In effect, this view parallels the popular notion that all seemingly comparable branches of state governments actually have comparable powers, and that whatever differences exist originate chiefly from such non-constitutional sources as political ideology and community setting. A circuit court is a circuit court is a circuit court. When you've seen one intermediate appellate court, you've seen them all. Those sentiments are troubling because the differences in state judicial articles are meaningful and should result in significant consequences in judicial powers. Under current American constitutional law, all trial courts do not possess the same power to make substantive law; all high courts do not possess the same authority to regulate the practice of law; and all judges do not possess the same responsibility for checking legislative conduct.

This article will first explore some of the current differences in state judicial articles, as well as some of the historical changes in the judicial article of Illinois. The article will then highlight a few of the consequences that should flow from those differences. A brief discussion of a few problems in differentiating state judicial articles will conclude this article. In calling for more attention to constitutional language, this paper urges that as there has developed an

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increased sensitivity to the differences in individual rights from one American state to another, there should also develop a heightened recognition of and respect for variations in the structure, function and operation of American judicial systems.

II. CONTEMPORARY STATE JUDICIAL ARTICLES AND THEIR HISTORY

A. Comparing State Judicial Articles

A comparison of contemporary state judicial articles reveals diverse approaches to the allocation and use of judicial power. State constitutional provisions dealing with court structure and judicial rulemaking are illustrative of this diversity.

Provisions on court structure vary widely in the extent of responsibility accorded legislatures to establish or empower courts. In Illinois, there is little room for legislation because the Illinois Constitution vests the judicial power "in a Supreme Court, an Appellate Court and Circuit Court,"[1] and defines nearly all of these courts' jurisdictional authority.[2] By contrast, other state constitutions grant enormous legislative responsibility over the judiciary. For example, both the Rhode Island[3] and Maine[4] constitutions vest judicial power in a supreme court and in such inferior courts as the general assembly may establish.

Most state constitutions fall between those extremes. Those constitutions typically create and empower some, but not all, courts, often at the appellate level. The typical state constitution also allows for some legislative influence on these courts and, yet, permits greater legislative initiatives in creating and empowering other courts, particularly trial courts of limited jurisdiction. Michigan, for instance, allocates judicial power to "one supreme court, one court of appeals, one trial court of general jurisdiction . . . one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote."[5] Similarly, in Arizona judicial power resides in "a

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[1] ILL. CONST. art. VI, § 1.

[2] ILL. CONST. art. VI, §§ 4 (the Illinois Constitution defines the state Supreme Court's jurisdictional authority but allows the Supreme Court to provide by rule for appeals), 6 (legislature may provide only for Appellate Court direct review of administrative action), and 9 (Circuit Courts have original jurisdiction over all justiciable matters, but their power to review administrative action is provided by law).

[3] R.I. CONST. art. X, § 1.

[4] ME. CONST. art. VI, § 1.

[5] MICH. CONST. art. VI, § 1. In Michigan, only the high court's jurisdiction is without significant legislative guidance. *Id.* at §§ 4, 10, 13, and 15.

Supreme Court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts."[6]

Although state constitutional provisions on court structure and jurisdiction vary, the resulting judicial systems are frequently characterized similarly as "unified" or "integrated." Thus, the self-proclaimed unified court system in Wisconsin encompasses the constitutionally-created supreme court, court of appeals and circuit court, as well as any legislatively-created municipal court or other trial courts of general jurisdiction.[7] In North Carolina, the unified system contains only the Appellate, Superior and District Court Divisions.[8] The proclamation of unification in Idaho encompasses a supreme court, district courts and any other legislatively-created inferior courts,[9] while in Georgia the unified system includes magistrate, probate, juvenile, state and superior courts that operate at the trial level.[10] Thus, just as protections of privacy interests differ constitutionally from state to state, so, too, do the principles of court unification.

State constitutional provisions on the rulemaking authority of the judiciary in areas such as civil, criminal and appellate procedure, evidence, and attorney and judicial conduct are equally divergent. These provisions differ regarding the composition of judicial rule-making bodies, as well as the oversight role of the legislature.

Judicial rulemaking bodies encompass individuals or groups which contain at least a single judge and possess some decision-making responsibility for rules affecting the judicial system.[11] Usually, such bodies are courts. Thus, many state high courts are recognized constitutionally as judicial rulemakers. State constitutions often delegate to courts of last resort duties regarding civil, criminal, appellate and professional conduct rules.[12] In contrast,

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[6] ARIZ. CONST. art. VI, § 1. In Arizona, legislation pertaining to supreme court and superior court jurisdiction is apparently far more limited than legislation affecting the power of other courts. *Id.* at §§ 5, 9, 14, 16 and 32.

[7] WIS. CONST. art. VII, § 2.

[8] N.C. CONST. art. IV, § 2.

[9] IDAHO CONST. art. VI, § 2.

[10] GA. CONST. art. VI, §§ 1, 2.

[11] For a review of types of American judicial rulemakers, see Parness and Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121, 125-27 (1980) (emphasizing the need for greater sensitivity to the stages of rulemaking and to the distinctions between fettered and unfettered rulemaking authority).

[12] *See, e.g.*, ALASKA CONST. art. IV, § 15 (rules governing the administration of all courts, as well as rules governing practice and procedure in civil and criminal cases in all courts); ARIZ. CONST. art. 6, § 5 (rules relative to all procedural matters in any court); ARK. CONST. amend. 28 (rules regulating the practice of law and the

California empowers a Judicial Council to adopt "rules for court administration, practice and procedure." The Judicial Council contains judges from a variety of courts, as well as members of the state bar and a few legislators.[13] In New York, the chief judge of the highest court has extensive rulemaking authority regarding "standards and administrative policies for general application throughout the state."[14]

As with the establishment of judicial rulemaking bodies, state constitutions vary regarding the role of the legislature in overseeing judicial rulemaking. Some provisions mandate that judicial rules not contravene any existing statutes,[15] while others dictate that judicial rules not conflict with statutes addressing only certain topics.[16] Yet, other provisions seemingly permit judicial rules to supersede statutes.[17]

Beyond concern for existing statutes, state constitutions vary on whether judicial rulemakers must submit their rules to legislative review. In Ohio, proposed practice and procedure rules cannot take effect unless the General Assembly has had the opportunity to adopt "a concurrent resolution of disapproval."[18] In South Carolina, however, similar proposed rules take effect unless three-fifths of the members of each house disapprove of them.[19]

By contrast, some state constitutions provide for legislative oversight regarding the work of judicial rulemakers only after the rules take effect. In Florida, the Supreme Court can adopt rules of practice without seeking the approval of the legislature. However, these rules "may be repealed by general law enacted by two-thirds vote of the membership of each house."[20] Likewise, in Maryland, similar judicial rules only have force "until rescinded, changed or

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professional conduct of attorneys at law); N.J. CONST. art. VI, § II (rules governing the administration of all courts and, subject to law, the practice and procedure in all such courts); N.D. CONST. art. VI, § 3 (rules of procedure, including appellate procedure, for all courts, as well as rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law); OHIO CONST. art. IV, § 5(a)(1) (rules regarding general superintendence over all courts).

[13] CAL. CONST. art. VI, § 6.

[14] N.Y. CONST. art. 6, § 28.

[15] *See, e.g.*, LA. CONST. art. VI, § 5; NEB. CONST. art. VI, § 25.

[16] MO. CONST. art. 5, § 5 (rules cannot alter laws on evidence or the oral examination of witnesses).

[17] OHIO CONST. art. IV, § 5(b) (laws in conflict with rules have no further force or effect). *Cf.* N.C. CONST. art. IV, § 13(2) ("exclusive" high court authority to make rules for the Appellate Division).

[18] OHIO CONST. art. IV, § 5(B) (practice and procedure rules).

[19] S.C. CONST. art. V, § 4 (practice and procedure rules).

[20] FLA. CONST. art. VI, § 2(a) (practice and procedure rules).

modified . . . by law."[21] Also, in Montana, practice, procedure and professional conduct rules are "subject to disapproval by the legislature in either of the two sessions following promulgation."[22]

B. The Judicial Articles of Illinois

Many of the contemporary constitutional differences among states in court structure and judicial rulemaking are comparable to the constitutional differences found within a particular state over a period of time. For example, the Illinois constitutional history on judicial power reflects significant shifts in the balance of power between the General Assembly and the courts.

The Illinois Constitution of 1818, expressly granted broad duties regarding the judiciary to the General Assembly. Most importantly, the Assembly had the power to ordain and establish courts inferior to the supreme court.[23] Under the Illinois Constitution of 1848, the legislature's authority over the Illinois courts was reduced. Thus, the General Assembly's total control over lower court structure was eliminated. A new constitutional provision created circuit courts and defined the jurisdiction of those courts.[24] County judges and justices of the peace, however, remained under legislative direction.[25]

Under the 1870 amendments to the Illinois Constitution a further erosion of legislative authority transpired. For example, the new constitutional provisions on county and probate courts diminished legislative control over these courts.[26] Nevertheless, extensive legislative authority over some courts continued. Specifically, the 1870 amendments recognized expressly the legislature's power to create inferior appellate courts and to establish certain probate courts.[27]

General Assembly responsibility for the judiciary was further reduced in 1962. A new constitutional amendment declared, "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."[28] No longer were lower courts to be established by statute. Other amendments wholly or substantially eliminated legis-

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[21] MD. CONST. art. IV, § 18(a) (practice and procedure rules).

[22] MONT. CONST. art. VII, § 2 (practice and procedure, professional conduct, and appellate procedure rules).

[23] ILL. CONST. of 1818 art. V, § 1.

[24] ILL. CONST. of 1848 art. V, § 8.

[25] ILL. CONST. of 1848 art. V, §§ 18, 19.

[26] ILL. CONST. of 1870 art. VI, §§ 18, 20.

[27] ILL. CONST. of 1870 art. VI, § 20.

[28] ILL. CONST. of 1870 art. VI, § 1 (1962).

lative authority to define the subject-matter jurisdiction of lower courts.[29]

The movement toward increased constitutional establishment and empowerment of Illinois courts continued under the 1970 constitution. Thus, while a 1962 amendment granted to the supreme court the authority to provide for certain appellate rules "subject to law hereafter enacted,"[30] the 1970 constitution recognized such rulemaking without noting the impact of legislation.[31]

The trend in Illinois is clear. Constitutional history from 1818 to 1970 reflects diminishing General Assembly control over the judicial system. Over time, the legislature's power to create and empower courts has diminished. Increasingly, constitutional mandates appeared, and, where ambiguous, judges usually interpreted the mandates.

The Illinois experience is comparable to developments in other American states. Such developments, in some part, are attributable to the push for more unified court systems (spurred by the American Bar Association, the American Judicature Society, the National Municipal League, and others).[32] Yet, as noted earlier, many states today approach court unification quite differently from one another. Thus, the present relationships between many state legislatures and judiciaries on the matters of court structure and judicial rulemaking differ greatly, as do the histories of such relationships in many individual states.

In addition to court structure and judicial rulemaking, considerable divergence in contemporary state judicial articles and in state constitutional histories exist in such areas as court financing, the mechanisms for selecting or removing judges, the terms of judicial office, and the judicial role in rendering advisory opinions. Some courts are state-financed, while others are locally-financed. Judges may be elected in partisan or non-partisan elections. They may serve terms ranging from 2 to 15 years. State high courts may or may not have the duty to advise the legislature or the governor on the legality of certain conduct. Variations in those areas result in further differences in separation of powers principles from state to state and in a single state over a period of time.

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[29] *Compare* ILL. CONST. of 1870 art. VI, §§ 11, 12, *with* ILL. CONST. of 1870 art. VI, §§ 7, 9 (1962) (legislature's authority over appellate and circuit court jurisdiction).

[30] ILL. CONST. of 1870 art. VI, § 5 (1962).

[31] ILL. CONST. art. VI, § 4(b).

[32] Ashman and Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1 (1974) (tracing the unification movement).

III. THE SIGNIFICANCE OF DIFFERENCES IN AMERICAN JUDICIAL ARTICLES

In light of the variations between state judicial articles and of the changes that can occur over time in a single state's articles, several questions arise. First, what impact do those differences in constitutional rhetoric have upon judicial systems? Second, how might those differences properly influence the resolution of troubling contemporary issues?

Consider first state legislative authority to remove civil disputes from courts and to place them within the jurisdiction of administrative agencies. Such removals are increasingly attractive to legislators concerned with the delays and costs of traditional litigation. Legislatures are presently discussing removals for certain civil cases such as medical malpractice actions.[33] Even with an expressly recognized right to trial by jury, legislative removal of judicial jurisdiction should be easier for a state legislature which remains chiefly responsible for defining the business of the state's trial courts. Legislative removal is more problematic where the courts' jurisdiction over the diverted cases is constitutionally recognized. Individual interests such as the right to jury trial are not the only limits upon the extent of a legislature's removal authority.[34] Rather, the unique approach to the separation of legislative and judicial powers that the constitutional drafters adopted also limits removal authority. Thus, removal of medical malpractice actions may occur in some states via statute, but in other states only after constitutional amendment.[35]

Consider also the legislative authority to delegate certain litigation duties of traditional trial judges to quasi-judicial or parajudicial officers.[36] Questions about such authority have been and are currently raised in the federal judiciary with respect to tasks

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[33] American Medical Association/Specialty Society Medical Liability Project, *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based, Administrative System* (January, 1988).

[34] Other personal rights occasionally asserted during challenges to legislative removal of disputes from traditional courts include access to courts, full legal redress or remedy, equal protection, and due process.

[35] Case law is somewhat more developed in the federal system than in most states, though certainly not fully illuminating. *See, e.g.,* Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) (reviewing and applying precedential distinctions between public rights and private rights cases).

[36] A general commentary on such officers is found in Parness, *The Parajudge—Oiling the Wheels of Justice,* 10 TRIAL 54 (March/April, 1974).

assigned to magistrates[37] and bankruptcy judges.[38] Similar questions on the state level can be answered only after there is a comprehensive review of the judicial article and other relevant constitutional sources. Parajudicial activity in trial courts is more problematic when the responsibilities of trial judges for and during litigation are constitutionally defined.

Another troubling contemporary issue demanding separation of powers analysis involves legislative power to cap or abolish certain damages. Again, such legislative authority should be easier to sustain if the jurisdiction of state courts is subject to legislative invention rather than constitutionally defined. Seemingly, a court whose power to hear a case is dependent upon legislative will is in a weaker position to question a limit or ban on non-economic or punitive damages than is a court invested with the constitutional responsibility to hear and resolve the case. In other words, the court's power to make common law rulings contravening statutes is somewhat more doubtful when the power to adjudicate the dispute is dependent upon statute.

Unfortunately, at least some courts considering the legitimacy of such monetary caps have focused exclusively on the constitutionally-protected right to jury trial (and other individual rights).[39] That emphasis seems misplaced because the jury only infrequently determines the substantive law. Typically the jury only applies the facts the jury finds to the law that others determine. Those courts have failed to focus on what their own constitutionally assigned tasks of resolving civil disputes encompass. Does the job of civil dispute resolution inevitably include the task of establishing, or at least helping to enforce, certain substantive law regardless of what the legislature says? Is there some deeply-rooted common lawmaking

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[37] *See, e.g.*, Gomez v. United States, 109 S. Ct. 2237 (1989) (may magistrates preside at jury selection in felony trials without defendant's consent?); United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989) (may magistrates accept jury verdicts in criminal cases when judges are out of town?); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989) (may magistrates accept jury verdicts in civil cases after sending the jury back to complete a special verdict form?).

[38] *See, e.g.*, In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990) (may bankruptcy judges preside over certain civil jury trials?), *cert. granted sub nom.* Insurance Co. of Pa. v. Ben Cooper, 58 U.S.L.W. 3834 (U.S. June 6, 1990) (No. 89-1784).

[39] *See, e.g.*, English v. New England Medical Center, 405 Mass. 423, 541 N.E.2d 329 (1989) (considering the constitutionality of a cap on charitable institution's tort liability in light of individual jury trial, equal protection and due process rights). *Cf.* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989) (addressing the constitutionality of a cap on noneconomic damages in light of individual rights and separation of powers). Incidentally, litigants' failure to raise separation of powers issues normally should not preclude their consideration.

authority or law enforcement power immunized from legislative review?

Yet another troubling contemporary issue involves legislative responsibility to fund courts adequately. Such a legislative duty should be more compelling if there are huge backlogs in civil cases and if the relevant judicial article mandates court jurisdiction over such cases. The nature of the legislature's funding duty should not rest exclusively on such individual constitutional rights as jury trial, access to courts or a remedy for every wrong. The mandate that no one branch of government should unduly burden the ability of another branch to fulfill its assigned functions is no trivial matter.

Finally, consider the relevance of differences in current judicial articles to questions about who oversees the practice of law; stated differently, who regulates admission to legal practice, the discipline of lawyers, judicial ethics, and the like. Many courts simply cite to their inherent power, and then declare that such responsibility lies with the judiciary.[40] However, such inherent power is easier to rationalize if the courts are constitutionally established and empowered; if the courts are constitutionally authorized to hear admission to practice and lawyer discipline cases; or if rulemaking for the legal profession is delegated constitutionally to the courts. Courts whose creation, jurisdiction and rules depend upon the legislature may well have their inherent power over the legal profession inhering in statute. Such inherent power seems much weaker than judicial power deriving from judicial articles that establish courts, define adjudicatory duties, and delegate judicial rulemaking responsibilities.

IV. THE DIFFICULTIES IN RESPECTING DIFFERENCES IN AMERICAN JUDICIAL ARTICLES

The awareness of the differences in American judicial articles and their relevance to many current issues does not insure sensitivity to the varying separation of powers schemes. In fact, certain forces create difficulties for those courts striving to be more sensitive.

One complicating force is the duty to be bound, and the desire to be guided, by federal law. In particular, troubles often ensue because of the fundamental differences between constitutional rights and constitutional judicial systems. In the area of individual rights, federal guarantees stand as the minimum threshold below which no state may go. Thus, in many cases involving state constitutional

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[40] For a critical examination of two differing state high court declarations about legislative ability to mandate openness in judicial rulemaking, see Parness, *Comparative American Judicial Systems*, 24 U. RICH. L. REV. 171, 181-6 (1990).

rights, courts must first consider federal rights. In addition, notwithstanding such notable exceptions as the right to privacy, state courts often look to federal case law for guidance on the scope of state law because many state constitutional rights are grounded in language comparable to the language in the federal Constitution.

There is today, however, little federal constitutional constraint on the establishment of state judicial systems. Federal law says little about the separation of legislative and judicial responsibilities for a state's legal profession.[41] Little federal due process or equal protection authority addresses whether there should be state trial courts of limited jurisdiction, some form of legislative power to influence judicial rules, or state-funded courts. Thus, the federal Constitution[42] appears to permit considerable state variations on those and other related questions, but not on many questions of individual rights.

Also, the judicial article of the federal Constitution has not been significantly amended since the nation's founding.[43] Furthermore, the United States Constitution delegates to Congress enormous discretion regarding the establishment and empowerment of federal courts.[44] Many state judicial articles have a different history and content. The Illinois experience and the comparison of state judicial articles governing court structure and judicial rulemaking exemplify those differences. Thus, employing federal precedents as guides to

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[41] Professor Wolfram has written: "Separation of powers doctrines of state and federal constitutional law, in general terms, do not directly affect each other. Thus no federal constitutional principle requires the states to follow, or restricts the states from adopting, any particular conception of separation of powers among the branches of state government." Wolfram, MODERN LEGAL ETHICS 33 (West Pub. Co. 1986). In the absence of federal limits, states have chosen differing paths. *Compare, e.g.,* ARK. CONST. amend. 28 ("The Supreme Court shall makes rules regulating the practice of law and the professional conduct of attorneys at law."); *with* N.D. CONST. art. VI, § 3 ("The supreme court shall have authority . . . unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law."); *and,* S.D. CONST. art. V, § 12 ("The Supreme Court by rule shall govern . . . admission to the bar, and discipline of members of the bar. These rules may be changed by the legislature.").

[42] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[43] *But see* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[44] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The limits on such discretion are unclear. Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 STAN. L. REV. 895 (1984).

resolving many state law questions involving the legislative/judicial balance of power in overseeing the legal profession would be both unwise and wrong.

Differences between federal and state constitutional theory regarding judicial power create further difficulties for those courts desirous of respecting their state's unique approach. Again, the federal experience is often misleading. Debates about the values of this country's founding fathers and about original intent, typically heard during consideration of questions of federal constitutional law, are usually inappropriate during debates on state judicial articles. Unlike article III of the federal Constitution which governs the federal judiciary, state judicial articles have been frequently amended. Those amendments often reflect differing views about the proper role of the legislature in regulating the judiciary. The result is that in many states, more legislative history and differing constitutional theories exist than with the federal Constitution. Thus, it is often necessary to read a state constitutional provision on the judiciary in the context not only of the current judicial article, but also in the context of earlier judicial articles in which the same provision appeared.

It is possible for the meaning of a single state constitutional provision to have changed over time because its context has been altered. Unfortunately, that change is not always recognized. For example, many state constitutions contain a longstanding provision vesting the state's judicial power in a supreme court. Occasionally, courts read such provisions comparably over time, even though other related provisions in their judicial article have been subject to amendment. Amendments have often yielded provisions recognizing the high court's rulemaking power, or eliminating references to the legislature's influence on high court jurisdiction and court-promulgated rules. Such amendments should affect judicial interpretations of provisions vesting judicial power in a high court.

Thus, the so-called inherent power of a high court should vary with the amendments of the judicial article provisions governing that court. This analysis further suggests that dangers exist in the rather commonplace practice of one state court using a second state's precedents to determine the parameters of inherent judicial power.[45] As American judicial articles vary on matters of court structure, court rulemaking, court financing and the like, so, too, should the unwritten, inherent powers of American courts vary from state to state.

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[45] One unfortunate use is reviewed in Parness, *supra* note 40, at 181-6.

Finally, the need to examine the model provisions or recommended standards of such national groups as the American Bar Association, the American Judicature Society, and the National Municipal League further complicates inquiries into the constitutional history of a state judicial article. The works of these bodies are relevant because each body promulgated a series of proposals this century which gained the attention of at least some state constitutional drafters. Yet, the proposals of these national organizations have differed with each other, and each organization's proposals have been changed over time.[46] Perhaps these changes help to explain the differing approaches today to the concept of a unified court system. The need to consider the varying reforms suggested by national organizations certainly adds to the difficulties involved in respecting differences in separation of powers principles among states.

V. Conclusion

Extensive variations now exist in American constitutional provisions on the judiciary. Those variations frequently compel different relationships between the legislature and the courts. Nonetheless, those variations are often overlooked by courts and commentators. Perhaps as a result, an incorrect impression of comparability has developed, which presumes similarity from state to state in such matters as the balance of legislative and judicial duties regarding the legal profession. The time has come to recognize fully the differences in American judicial articles, as well as the rationales underlying the varying approaches that our state governments have taken. Such a sensitivity should prompt more informed, though perhaps seemingly inconsistent, state judicial decisions in such troubling areas as administrative agency adjudication, the use of parajudicial officers, statutory limits on damages, the adequacy of court funding, and the regulation of the legal profession. Yet, respect for the differences in state judicial articles often will not be easy. Complications will arise because differences exist in the content and history of the federal Constitution and because difficulties exist in assessing state constitutional history.

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[46] Ashman and Parness, *supra* note 32, at 5-17.