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STATE CONSTITUTIONS AS SEPARATE SOURCES OF FUNDAMENTAL RIGHTS

Address by

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[*On April 27, 1983, the Honorable Stewart G. Pollock, Associate Justice of the Supreme Court of New Jersey, delivered this address as part of the Weintraub Lecture Series at the S.I. Newhouse Center for Law and Justice in Newark, New Jersey. The Editorial Board of the* RUTGERS LAW REVIEW *has decided to publish the full text of Justice Pollock's speech in light of the importance of the issues addressed and the interest which it holds for the legal community.*]

Foreword by

William J. Brennan, Jr.
Associate Justice of the Supreme Court
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Justice Pollock's thoughtful speech on the role of state courts in applying state constitutions to guarantee fundamental rights should be read by every citizen concerned with the future evolution of constitutional protection for such rights. Probably the most significant current development in our constitutional jurisprudence is the application by more and more state courts of state constitutional counterparts of provisions of the federal Bill of Rights as providing citizens of their states even more protection than the federal provisions, even those identically phrased. Justice Pollock's own court has been a leader in reaffirming the independent nature of the New Jersey Constitution and his court's responsibility separately to define and protect the rights of New Jersey citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution. Justice Pollock forcefully demonstrates why, when federal scrutiny is diminished, state courts must respond by increasing their own.

Justice William J. Brennan, Jr.
Washington, D.C.
September 28, 1983

STATE CONSTITUTIONS AS SEPARATE SOURCES OF FUNDAMENTAL RIGHTS

The thesis of this speech is that for the balance of this century state constitutions will play an increasingly important role in guaranteeing fundamental rights. It is fitting that this theme be the subject of a lecture dedicated to the late Chief Justice Weintraub's contribution to justice and to the State. One of his landmark opinions, *Robinson v. Cahill*,[1] is a significant milestone in the emerging role of state constitutions. A comparative analysis of the role of state and federal constitutional law merits the attention of those interested in the advancement of law and the administration of justice.

Recent decisions from across the country have looked not just at the United States Constitution, but at state constitutions, for the protection of basic liberties. This trend is well-founded in history, logic and the theory underlying our federalist society. As the jurisprudence of state constitutional law proceeds, a vital role will be thrust upon the judiciary, upon organizations dedicated to the improvement of justice, and upon the faculty and students of our nation's law schools. The challenge is to develop a jurisprudence of state constitutional law, a jurisprudence that will make more predictable the recourse to and the results of state constitutional law analysis.

In the course of my remarks, I shall discuss briefly the historical relationship between state and federal constitutions. History establishes that state constitutions provided the model for the federal Bill of Rights. Through the Civil War Amendments to the United States Constitution, federal guarantees of fundamental rights applied to the states. By the 1960's the federal courts dominated the determination of constitutional law. More recently, however, we have witnessed a renaissance of state constitutional law. With particular reference to the Supreme Court of New Jersey, I shall examine how state courts, while operating within their proper sphere, have extended the guarantee of fundamental rights beyond the point where those rights are assured by federal law.

I shall then proceed to discuss three theories of interpreting state constitutions: (1) the primacy approach, in which courts would always examine fundamental rights under a state constitution and consider the federal Constitution only when the challenged state action is upheld under the state constitution; (2) an approach recently employed by the Vermont Supreme Court, in which opinions would discuss independently both state and federal constitutions; and (3) the interstitial or supplemental approach, in which courts would always

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1. 62 N.J. 473, 303 A.2d 273 (1973).

examine fundamental rights under the federal Constitution and consider a state constitution only when the challenged state action is valid under the federal Constitution.

At the outset it might be helpful, even at the risk of restating the familiar, to recapitulate some fundamental principles of our federalist system. We live in a dual sovereignty consisting of federal and state governments. The two governments not only peacefully co-exist, but depend on each other, in varying degrees, to do their work. The essence of the relationship is interdependence.

Each of those governments has a constitution guaranteeing certain basic rights and providing for executive, legislative and judicial branches of government. Although federal courts may interpret a state constitution, the final word on the meaning of that constitution is for the court of last resort in that state. If a state court of last resort predicates a decision on an independent state ground, the United States Supreme Court, as a general rule, will not review that decision. Conversely, state courts may interpret the federal Constitution, but the final word on interpreting that Constitution is reserved for the United States Supreme Court. The United States Constitution, as well as federal statutes and regulations, are the supreme law of the land, and if a state law, even a state constitution, conflicts with the federal law, the state law must yield.

Generally speaking, the first ten amendments to the United States Constitution set a minimum level of fundamental liberty for the citizens of the United States. Through the fourteenth amendment, most rights guaranteed by the Bill of Rights are protected against interference by the states. A state may add to those rights, but may not subtract from them. That is, the Bill of Rights in the United States Constitution establishes a floor for basic human liberty. To carry forward that metaphor, the state constitution establishes a ceiling. Although a state may supplement federally granted rights, it may not diminish them through a more restrictive analysis of the state or federal constitution.

The preceding principles are not just sterile rules of law developed in the abstract, but are at the heart of American society. When motorists proceed on a public highway, their freedom against unreasonable searches and seizures of their cars is assured by a state as well as the federal Constitution. When teachers, students or others speak out, their freedom of speech is guaranteed by a state as well as the federal Constitution. When citizens retire to their homes, their personal conduct may be protected by a state as well as the federal Constitution. The protections accorded by state constitutions may vary as one travels from one state to another within the United States. In some instances, the federal Constitution may provide greater protection. In others, protection under a state constitution may be more extensive.

Perhaps it would be helpful to illustrate with a hypothetical how fundamental rights under a state constitution may supplement federal constitutional rights. Imagine, if you will, a Rutgers law student, a young woman, who has decided to exercise her freedom of speech by distributing leaflets protesting the expansion of solid waste landfills in New Jersey. In the exercise of that right, she decides to visit private colleges and universities throughout the state. One of the colleges objects to her uninvited presence and charges her with criminal trespass. She is convicted in the municipal court and consults you, claiming her conduct is protected by her constitutionally guaranteed freedom of speech. Where would you look for the definition of her rights?

If you considered her rights under the first amendment, you might conclude her right to speak and to distribute the pamphlets should yield to the property rights of the university. That is, you might conclude that she did not have the right to distribute literature at a private college or university.

In a similar case argued before our court in 1979, *State v. Schmid*,[2] Princeton University contended it had the right to exclude Schmid, a representative of the American Labor Party, from its campus. In seeking to sustain the conviction of Schmid for trespass, the University relied in part on the decision of the United States Supreme Court in *Lloyd v. Tanner*.[3] That decision held that a shopping center, in protecting its private property rights, could exclude a pamphleteer seeking to distribute political literature in the shopping center. However, in *PruneYard Shopping Center v. Robbins*,[4] decided after *Tanner*, Justice Rehnquist, writing for the United States Supreme Court, stated that *Lloyd* does not limit the authority of the state "to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution."[5] That is, the United States Supreme Court recognized that an analysis based on federal constitutional rights may not yield the complete answer in every state.

Writing for our court in *Schmid*, Justice Handler first analyzed Schmid's rights under the first amendment and found those rights uncertain. Looking to the state constitution, however, he found more sweeping provisions assuring freedom of speech and of assembly. In fact, the New Jersey Constitution not only prohibits governmental interference with freedom of speech but affirmatively grants to every person the right to speak and the right to assemble. Justice Handler concluded that the then existing regulations of the University impinged improperly on Schmid's rights. Accordingly, the court reversed the conviction.

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2. 84 N.J. 535, 423 A.2d 615 (1980).
3. 407 U.S. 551 (1972).
4. 447 U.S. 74 (1980).
5. *Id.* at 81.

How did we reach this point where we must look at not one but two constitutions in each of fifty states to discover our basic rights? The answer is as old as—no, even older than—the United States. Some of our most prized rights have devolved from the early colonial governments. For example, freedom of the press is often traced back to the trial of Peter Zenger in 1735, a trial that occurred in the colony of New York before it became a state.

As you may recall, Peter Zenger was charged with the crime of seditious libel, the essence of which was publishing a statement in his New York Weekly Journal denouncing the colonial government. Zenger's defense was that the statements were true and that the freedom to publish the truth was necessary to prevent abuse of governmental power. The jury found him not guilty.

History establishes that state bills of rights preceded and were the models for the federal Bill of Rights. Before the enactment of the first ten amendments to the United States Constitution, even before adoption of the United States Constitution itself, people looked to state constitutions to protect their fundamental liberties. Moreover, the federal Bill of Rights protected fundamental liberties from federal interference only, while state constitutions protected against interference by state government.

Not until after ratification of the Civil War Amendments did the federal-state dichotomy begin to change. Although the fourteenth amendment imposed federal restrictions on state interference, decades passed before those restrictions were applied against the states. It was not until *Gitlow v. New York*[6] in 1925 that the United States Supreme Court declared that the first amendment guaranteed freedom of speech and freedom of the press against unconstitutional state action. Similarly, it was not until 1949, in *Wolf v. Colorado*,[7] that the court recognized that the fourth amendment proscription against unreasonable searches and seizures applied against state officials.

During the 1950's and '60's, however, the United States Supreme Court dominated the development of constitutional law. Throughout that activist era, attorneys—many of them employed by legal aid, public defenders, and other public interest groups—sought redress through the federal courts with a vigor not previously witnessed in American history. Often complaining of the violation of constitutional rights, they looked to the United States Supreme Court to rectify problems of discrimination, poverty and oppression. During this time, state government was regarded sometimes not as part of the answer, but as part of the societal problem. In some states, such basic rights as the right to vote, to an education, even to a fair trial were undermined.

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6. 268 U.S. 652 (1925).
7. 338 U.S. 25 (1949).

The spotlight was on national standards of equal protection and due process as decided by the federal courts, the favored forum for litigants seeking vindication of fundamental liberties. More recently, some observers have commented that federal constitutional law has taken a different tack. Indeed, one member of the United States Supreme Court, a former member of the Supreme Court of New Jersey, Justice William Brennan, has described the trend of United States Supreme Court opinions as pulling back or suspending the liberal construction of the federal Bill of Rights.[8]

Another problem is the uncertainty of the status of some rights under the federal Constitution. The United States Supreme Court has been concerned constantly about the extent to which the United States Constitution protects against unreasonable searches and seizures. Some members of that court have described fourth amendment protection as uncertain and as imposing substantial burdens on law enforcement officers.[9] Chief Justice Weintraub made a similar observation in *State v. Basaccia*,[10] in reversing the suppression of evidence obtained under a search warrant.

The uncertainty of the protection accorded by the federal Constitution will continue at least through this year. Just this term, the United States Supreme Court heard argument in several cases involving searches and seizures, including *Illinois v. Gates*,[11] in which the issue is whether the Court should adopt a good faith exception to the exclusionary rule.

The seeming uncertainty of federal fourth amendment analysis has caused the Oregon Supreme Court to establish rules of search and seizure under its own constitution.[12] One member of the Oregon Supreme Court, Justice Hans Linde, contends that decisions based on state constitutions would result in greater consistency in the law of a particular state. Justice Linde writes:

> If we construe the search and seizure clause of our state constitutions to follow the latest Supreme Court holding under the fourth amendment, for instance with respect to search of an automobile trunk, what is the state's

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

9. *See* New York v. Belton, 453 U.S. 454 (1981); Robinson v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Harlan, J., concurring).

10. 58 N.J. 586, 590-91, 279 A.2d 675, 677 (1971).

11. The *Gates* case was decided after the delivery of this speech. 103 S. Ct. 2317 (1983). The Supreme Court, however, "with apologies to all," determined that since the question of a "good faith exception" was not before the Illinois courts, the Court would refrain from addressing that issue. *Id.* at 2321.

12. *See* State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982).

law when the Supreme Court changes direction in the next automobile search case?[13]

In any event, analysis of freedom from unreasonable searches and seizures requires recourse to both state and federal constitutions. To illustrate, let's return to our pamphleteering law student who, by this time, has exhausted her supply of pamphlets and resolved her first amendment problem. She obtains a ride home with an acquaintance. During the trip, they have a flat tire. While they are changing the tire, a policeman appears. He asks them for identification, but the law student's handbag with her identifying papers, like the car owner's license and registration, are in the car. The policeman asks the owner for the keys, searches the car and discovers marijuana on the floor on the passenger's side. Both the car owner and the passenger are charged with possession of a controlled dangerous substance. Before trial, they both move to suppress the seized marijuana as having been obtained in an illegal search. The state rejoins that, as a passenger, the student has no standing to contest the search.

Does a passenger have standing to complain that evidence was obtained in an illegal search of the car of another? If you look at the federal Constitution as interpreted by the United States Supreme Court, you would conclude that mere passengers lack a reasonable expectation of privacy in the area searched. Therefore, if your analysis stopped with federal law, the student would not have standing to challenge the legality of the search.[14]

Under the New Jersey Constitution, however, one charged with a possessory offense has the automatic right to bring a motion to suppress where he or she has a proprietary, possessory or participatory interest in the place searched or the property seized. Writing for our court in *State v. Alston*,[15] Justice Clifford first analyzed the relevant federal cases. He continued: "Because we find that these recent decisions of the Supreme Court provide persons with inadequate protection against unreasonable searches and seizures, we respectfully part company with the Supreme Court's view of standing and construe article I, paragraph 7 of our state constitution to afford greater protection."[16] With respect to both freedom of speech and freedom from unreasonable searches and seizures, then, the New Jersey Constitution has been interpreted as providing greater protection than the federal Constitution.

Modern recognition of the breadth of the protection accorded by the New Jersey Constitution might well be considered as beginning

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13. Linde, *First Things First: Rediscovering the State's Bill of Rights*, 9 U. BALT. L. REV. 379, 394 (1980).

14. *See* Rakas v. Illinois, 439 U.S. 428 (1978).

15. 88 N.J. 211, 440 A.2d 1311 (1981).

16. *Id.* at 226, 440 A.2d at 1318-19.

with the opinion of Chief Justice Weintraub in *Robinson v. Cahill.* In that case, the trial court found that the then existing method of school financing, which was based on real property taxation, discriminated against students in districts with low real estate values. Accordingly, that court concluded that financing public education through real estate taxes violated the equal protection clause of the United States Constitution and the New Jersey Constitution.

After argument of the appeal before the Supreme Court of New Jersey and while Chief Justice Weintraub was writing the opinion, the United States Supreme Court in a five-to-four decision decided that a similar system of taxation in Texas did not violate federal equal protection standards.[17] Chief Justice Weintraub picked up the gauntlet, writing: "The question whether the equal protection demand of our state constitution is offended remains for us to decide. Conceivably, a state constitution could be more demanding."[18] Relying on the state constitutional mandate that the legislature "provide for the maintenance and support of a thorough and efficient system of free public schools,"[19] the Chief Justice found that the New Jersey Constitution demanded more.

The apparent conflict between *San Antonio v. Rodriguez* and *Robinson v. Cahill* illustrates the differing roles of the state and federal courts. The six successive decisions of the Supreme Court of New Jersey in *Robinson* are tantamount to a textbook study in the dynamics of the interrelationship between a state court of last resort and the executive and legislative branches of state government. The decisions demonstrate not only a sensitivity to the problems of other branches of state government, but a patient, albeit firm, dedication to the vindication of the constitutional rights of school children to a thorough and efficient education.

Issues such as local taxation and school finance can implicate, as they did in *Robinson v. Cahill*, the interrelationship of all three branches of state government. Federal courts, by definition, are strangers to that relationship. When an issue so intimately concerns various branches of state government, may not state courts provide the more appropriate forum for judicial involvement?

Considerations of practicality, as well as history and logic, support the conclusion that the state courts provided a more suitable forum. That suggestion should not be considered as bespeaking anything less than the most profound respect for the federal courts.

As the ultimate arbiter of fundamental rights under the United States Constitution, the United States Supreme Court and that Court alone speaks to a national audience on matters of constitutional law.

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17. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
18. Robinson v. Cahill, 62 N.J. at 490, 303 A.2d at 282.
19. *Id.* at 501, 303 A.2d at 288.

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19. *Id.* at 501, 303 A.2d at 288.

Chief Justice Weintraub recognized as much in *Robinson v. Cahill* when he pointed out that state courts interpreting their own constitutions need not bear the burden of the national impact of invalidating fifty separate systems of school financing.[20]

Two years after the decision in *Robinson v. Cahill*, the court rendered another significant decision in *State v. Johnson*,[21] which involved an alleged consensual search of an apartment where the defendant kept some of her personal belongings. Relying on the decision of the United States Supreme Court in *Schneckloth v. Bustamonte*,[22] the appellate division reversed the trial court's grant of a motion to suppress the evidence. *Schneckloth* had "rejected the contention that the validity of a consent to a search in a noncustodial situation should be measured in terms of waiver, and that the state should be required to show that there had been an intentional relinquishment of a known constitutional right."[23] In reaching a different result, former Justice Sullivan relied on the prohibition against unreasonable searches and seizures in the New Jersey Constitution. The court concluded that the validity of a nonconsensual search must be measured in terms of waiver, and that the state must prove that the defendant knew of his right to refuse consent.

Interestingly, counsel had not briefed or argued that the state constitution should be given a broader reading than the United States Constitution. The court was obliged to request additional briefs on that point.[24] If nothing else results from these remarks, I hope that in the future lawyers claiming a violation of fundamental rights will always discuss the relevance of the state constitution. A lawyer who ignores the change in tide towards state constitutions runs the same risk as a sailor who ignores a change in the tides of the sea.

New Jersey is not alone in its recognition of the important role of state courts and state constitutions in the preservation of personal liberties. For example, Justice Shirley Abrahamson of the Wisconsin Supreme Court has joined Justice Linde in urging a primary role for state constitutions.[25] Law reviews, other legal publications, and the popular press have reported the growth of state constitutions as separate sources of fundamental liberties.[26] Moreover, Professor Ronald

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20. *Id.* at 490, 303 A.2d at 282.
21. 68 N.J. 349, 346 A.2d 66 (1975).
22. 412 U.S. 218 (1973).
23. 68 N.J. at 352, 346 A.2d at 67.
24. *Id.* at 353, 346 A.2d at 67-68.
25. *See* Abrahamson, *Resurrection of State Courts*, 36 Sw. L.J. 951 (1982).
26. *See, e.g.*, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Seidenstein, *Taking Liberties with Rights*, Newark Star Ledger, Nov. 28, 1982, §3, at 1.

Collins of the Willamette University Law School now writes a regular column on state constitutional law for the National Law Journal.[27]

Perhaps the most distinguished spokesman for the proposition that state constitutions are separate sources of fundamental rights is Justice Brennan. He first drew attention to state constitutions in a speech delivered at the annual meeting of the New Jersey State Bar Association in 1976. His HARVARD LAW REVIEW article in the following year has been regarded as the Magna Carta of state constitutional law.[28] Just two weeks ago, at the dedication of our new courtroom in Trenton, he again referred to the fact that state constitutions may provide greater protection than the federal Constitution. He urged the audience to rejoice in the perception by state courts "that state constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the United States Supreme Court's interpretation of federal law . . . ."[29]

Just this term, our court rendered two decisions that rely in varying degrees on the New Jersey Constitution. In our most prominent decision this year, *Mount Laurel II*,[30] the court unanimously affirmed the unconstitutionality of zoning ordinances designed to exclude the poor. The original *Mount Laurel* decision relied on article 4, section vi, paragraph 2 of the New Jersey Constitution, which states, in effect, that a municipality's power to zone is derived from the police power of the state and must promote the general welfare. By declaring that municipalities do not necessarily meet their *Mount Laurel* obligation merely by eliminating exclusionary zoning, Chief Justice Wilentz, who authored the opinion of the court, recognized an affirmative obligation of municipalities to do more than simply eliminate the restrictions against low and moderate income housing.

Our decision in *Mount Laurel II* should be compared with the earlier decision of the United States Supreme Court in *Lindsey v. Normet*.[31] In *Lindsey*, the Court upheld the constitutionality of an Oregon summary dispossess statute against a challenge that it violated the federal due process and equal protection clauses. The Court held that there is no "constitutional guarantee of access to dwellings of a particular quality."[32] In *Mount Laurel II*, we, too, acknowledged that housing was not a fundamental constitutional right. By recourse to the duty to zone for the general welfare, however, we required

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27. *See, e.g.*, Collins, *Important Precedents Emerging as States Use Their Constitutions*, Nat'l L.J., Sept. 19, 1983, at 25, col. 1.

28. *See* Brennan, *supra* note 8.

29. *Id.* at 491.

30. 92 N.J. 158, 456 A.2d 390 (1983).

31. 405 U.S. 56 (1972).

32. *Id.* at 74.

municipalities to provide a realistic opportunity for low and moderate income housing.

As with the declaration of the right to a thorough and efficient education, I suggest that state courts are a more appropriate forum than federal courts for defining a municipality's power to zone and its responsibility to provide a realistic opportunity for low and moderate income housing. State courts provide a preferred forum not because state judges are any more sensitive to fundamental rights than are federal judges, but because state courts are not obligated to a national constituency in the same way as are federal courts. Furthermore, state courts can respond more readily to local conditions. As difficult as it may be to develop constitutional principles to govern the exercise of zoning power in a given state, how much more difficult it would be to define and enforce a single set of constitutional obligations to govern an entire nation!

Indeed, as Justice Brandeis stated: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[33]

Our decisions in the combined cases of *State v. Williams*[34] and *State v. Koedatich*[35] also rely upon the state constitution. Those opinions, written by Justice Handler, required balancing a defendant's right to a fair trial with the right of the press and public of access to pre-trial hearings. Observing that the holdings of the United States Supreme Court leave uncertain the right of access, the court relied on the New Jersey Constitution in opening pre-trial proceedings. Even in death penalty cases, the court found that it could maintain both the defendant's right to a fair trial and the public's right of access to pre-trial proceedings.

As the role of state constitutions expands, it will become increasingly important for state courts to develop a rationale to explain when they will rely on their own constitutions. State courts should not look to their constitutions only when they wish to reach a result different from the United States Supreme Court. That practice runs the risk of criticism as being more pragmatic than principled. Nor will it be sufficient to append a laconic reference to the state constitution as a supplement to an analysis predicated on the United States Constitution. This approach adds little to the development of a jurisprudence of state constitutional law.

Three identifiable approaches defining the relationship between state and federal constitutions merit further comment. In the first, the "primacy" approach, courts look initially to the state constitution in

33. New State Ice Co. v. Liebman, 285 U.S. 262, 310 (1931) (Brandeis, J., dissenting).
34. 93 N.J. 39, 459 A.2d 641 (1983).
35. *Id.*

cases involving fundamental liberties. Only if the alleged infringement is permissible under state constitutional standards would a court consult the federal Constitution. A supplementary federal analysis insures that the state does not tolerate action that falls below the federal floor.

This model is true to history—the state constitutions came first—and is consistent with the proposition that state constitutions are the basic charters of individual liberties. The primacy approach is also supported by some practical considerations—reliance on state constitutions can better reflect circumstances peculiar to a given state. One problem with this approach, however, is that it downplays the reality of the dominant role of the federal Constitution.

The second approach is to tie decisions in all instances to both the state and federal constitutions, a process pursued by the Supreme Court of Vermont last year in suppressing a confession and physical evidence.[36] Such an approach provides additional, but perhaps unnecessary, security. Because decisions invalidating state action on independent state grounds preclude federal review, such decisions constitute final disposition of the cases. Cognizant of this, the Vermont court was motivated by its obligation to define the scope of rights provided by its state constitution, by considerations of administrative efficiency, and by the parties' interest in concluding the litigation. Addressing both the state and federal constitutions in every case, however, may lead to a body of state constitutional law that merely mimics the federal rulings, a result inconsistent with the federalist principles that motivate separate analysis under state constitutions.

A third approach, supplemental or interstitial, requires a court to consider first the impingement on fundamental rights under the federal Constitution. If the challenged restraint is found valid or uncertain under that Constitution, recourse is then sought to the state constitution. This approach acknowledges the United States Constitution as the basic protector of fundamental liberties and treats the federal declaration as the lowest common denominator in protecting those liberties. A state would diverge from federal law only in accordance with objective criteria. By employing identifiable criteria or factors, decisions should become more predictable. Like the other approaches, this alternative recognizes that states may supplement the minimum protection accorded by the United States Constitution. In pursuing this alternative, a state court would not merely copy the approach of the United States Supreme Court. Using the criteria as grounds for independent analysis, a state court interpreting its own constitution might develop its own rules for such matters as criminal

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36. *See* State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982).

procedure, equal protection and due process. Characterized by self-reliant interpretation, this method honors the state constitution "as an independent source of rights to be elaborated on its own terms."[37]

This was the approach our court pursued last year in deciding *Right to Choose v. Byrne*.[38] In that decision, we recognized that the United States Supreme Court in *Harris v. McRae*,[39] had decided that the federal constitution did not invest pregnant women with the right to Medicaid funds for abortions. Nonetheless, we found under the New Jersey Constitution that the state cannot restrict funds to those abortions performed to preserve a woman's life but not her health. In reaching a divergent result from the United States Supreme Court, we relied on several factors. First, the text and history of the New Jersey Constitution, in language more expansive than the United States Constitution, declared a right to life, liberty and the pursuit of safety and happiness that protects the right of privacy from which the right to an abortion followed. That text reflected a different history from that of the United States Constitution. Second, we explained that a pre-existing body of state law recognized a woman's right to choose whether to carry a pregnancy to full term or to undergo an abortion. Finally, we noted the high priority historically accorded to the preservation of health in this state. Weighing these factors, we concluded that the restriction of Medicaid reimbursement to abortions to protect the life of the mother was not compatible with the state constitutional guarantee of equal protection of the laws. In reaching that conclusion, the court, after employing conventional two-tiered equal protection analysis, invoked a balancing test, which led to the conclusion that a woman's health and her fundamental right to privacy outweighed the asserted state interest in protecting potential life.

Separate opinions by Justice O'Hern and former Justice Pashman reached diametrically opposing conclusions. In dissenting, Justice O'Hern concluded that the issue at stake touched upon the national identity and that the court should adhere to the view of the United States Supreme Court in *Harris v. McRae*.[40] Justice Pashman would have found a right under the New Jersey Constitution to funding for an elective or non-therapeutic abortion.[41] This position was consistent with the view frequently expressed by Justice Pashman that state constitutional rights should be completely independent of federal constitutional analysis.

On the same day we decided *Right to Choose v. Byrne*, the court rendered another decision predicated on the state constitution, *State*

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37. *See The Interpretation of State Constitutional Rights*, *supra* note 26, at 1364.
38. 91 N.J. 287, 450 A.2d 925 (1982).
39. 448 U.S. 297 (1980).
40. Right to Choose v. Byrne, 91 N.J. at 335, 450 A.2d at 950 (O'Hern, J., dissenting).
41. *Id.* at 319, 450 A.2d at 941 (Pashman, J., concurring in part and dissenting in part

v. Hunt.[42] In that case, the court found that the privacy interest in telephone toll billing records protected individuals from unreasonable searches and seizures of those records. The opinion, written by Justice Schreiber, recognized that the United States Supreme Court had reached a contrary result under the United States Constitution,[43] but found that the New Jersey Constitution accorded greater protection to a person's privacy interest.

In a concurring opinion, Justice Handler identified several criteria in addition to the text of the constitution, its legislative history and pre-existing state law as grounds for independent analysis of a state constitution. He noted as additional criteria structural differences between federal and state constitutions, matters of particular state interest or local concern, state traditions, and public attitudes.

It is not my purpose to advocate one alternative rather than another. My purpose is to bring to your attention the rebirth of state constitutions, and to urge an orderly analysis of state constitutional law in classrooms, conference rooms and courtrooms.

As we look to the future, one can envision issues that might implicate fundamental liberties. Evolving public attitudes about euthanasia may present courts with the problem of determining when a terminally ill patient has "the right to die." Changes in lifestyles, family relationships, and methods of conception may raise issues about surrogate parenthood with its implications for parental responsibility and the right to custody. The tension between freedom of the press and other competing constitutional rights is bound to surface from time to time. If the current trend continues and issues of constitutional dimensions are remitted to the states, it will become increasingly important to develop rules and criteria to predict when, independent of federal decisions, a state court will construe its own constitution.

A recent decision of the United States Supreme Court underscores the need for state courts to spell out the adequacy of independent state grounds. In *South Dakota v. Neville*,[44] the United States Supreme Court, speaking through Justice O'Connor,[45] reversed the judgment of the South Dakota Supreme Court and held that the defendant's refusal to submit to a blood-alcohol test did not violate the fifth amendment privilege against self-incrimination. In remanding, Justice O'Connor noted that the South Dakota Court decided that a state

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42. 91 N.J. 338, 450 A.2d 952 (1982).
43. *Id.* at 343, 450 A.2d at 954.
44. 103 S.Ct. 916 (1983).
45. Justices Stevens and Marshall dissented, finding that the judgment of the South Dakota Supreme Court rested on state grounds that were both independent and adequate. *Id.* at 924 (Stevens, J., dissenting).

statute authorizing the admissibility of the refusal violated both the state and federal privilege against self-incrimination. Although this could be an adequate state ground, Justice O'Connor found that it was not an independent ground.

She wrote, "we think the court determined that admission of this evidence violated the fifth amendment privilege against self-incrimination, and then concluded without further analysis that the state privilege was violated as well."[46] Notwithstanding the recognition by the South Dakota Supreme Court of the textual differences between state and federal constitutions, Justice O'Connor concluded that the state court had "simply assumed that any violation of the fifth amendment privilege also violated, without further analysis, the state privilege."[47]

The message to state courts is clear. It will not be sufficient to decide a case on federal grounds and then append an unsupported comment that the result is also supported by the state constitution. A state court must carefully set forth the reasons that it believes the state constitution leads to a different result.[48]

If we are to succeed in the endeavor to develop a jurisprudence of state constitutional law, we must have the assistance of able counsel who present thoughtful arguments predicated not only on the United States Constitution but also on state constitutions. If counsel are to

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46. *Id.* at 919 n.5.

47. *Id.*

48. Recently, the Court has announced that a state must make a "plain statement" of its reliance on the state constitution to avoid the presumption that it relied on the federal constitution. In reversing the judgment of the Michigan Supreme Court which had suppressed evidence obtained in an automobile search, the Court in Michigan v. Long, 103 S.Ct. 3469 (1983), found that the state constitutional analysis was inadequate to preclude federal review. Justice O'Connor, writing for the majority, advised that a state court should "make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the Court has reached." *Id.* at 3476. Thus, the Court continued, when the independent and adequate grounds are not clear from the opinion, the United States Supreme Court "will merely assume that there are no such grounds." *Id.*

Moreover, those seeking recourse to state constitutions may find the concurring opinion of Chief Justice Burger in Florida v. Casal, 103 S.Ct. 3100 (1983), to raise even more profound questions. Sustaining the decision of the Florida Supreme Court to suppress one hundred pounds of marijuana discovered on a fishing vessel, the majority, in a one sentence opinion, found the decision to rest on independent and adequate state grounds.

In his concurring opinion, Chief Justice Burger noted that the Florida Supreme Court relied on its interpretation of the Florida constitution, which had since been amended so the Florida courts will no longer be able to rely on the state constitution to suppress evidence would be admissible under the decisions of the Supreme Court of the United States."

He continued:

> With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require more than the federal constitution requires, the citizens of the state must be aware that they have the power to amend state law to insure rational law enforcement.

Id. at 3101-02.

present persuasive arguments on state constitutional grounds, I respectfully suggest they should be taught how to do it in law school or continuing legal education courses. Teaching such a course may require the revision of casebooks or the preparation of new materials. To a significant extent, casebooks and texts have ignored state constitutional law. The result is that principles of state constitutional law are difficult to discover. It is time to take state constitutional law off the shelf.

Law students, too, can make a significant contribution. Law review articles and other student work can stimulate a reasoned analysis of the role of state constitutions. Indeed, one of the outstanding articles is a note published last year by the HARVARD LAW REVIEW, *Developments in the Law—The Interpretation of State Constitutional Rights.*[49]

I suggest it would be appropriate also for organizations dedicated to the improvement in the law and the administration of justice to consider the emerging role of state constitutions. Organizations such as the American Law Institute, the American Judicature Society, and the Institute of Judicial Administration might find the topic an appropriate one for their consideration. By conducting research, publishing articles, and sponsoring conferences, such organizations can further the development of state constitutional jurisprudence. In fact, next year the National Center for State Courts, with the support of the Conference of the Chief Justices, plans to sponsor a seminar on state constitutions.

In the first half of this century, the most significant historic fact about New Jersey constitutional law was the adoption of a modernized constitution in 1947. During the balance of this century, the most significant fact may be the extent to which courts look to state constitutions as separate declarations of fundamental rights. If those declarations are to endure, courts must base their decisions on a principled theory justifying recourse to the constitutions. This is the right time, the right place, and the right audience to begin the quest.

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49. *See supra* note 26.