THE 2007 CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE:

THE NEW JERSEY SUPREME COURT: A LEADERSHIP COURT IN INDIVIDUAL RIGHTS

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I am honored to have been asked to deliver the 2007 Weintraub Lecture, named so appropriately for our second chief justice under the New Jersey Constitution of 1947. Although I did not know Chief Justice Weintraub personally, I know his work and I am proud to have followed him on the bench some twenty-three years later.

When the dean invited me to speak about the decisions of the New Jersey Supreme Court during the ten years I served as chief justice, I found myself looking back, remembering the court as it was in 1996, the year that I arrived. I was the titular head of a court whose members had worked with one another for years—Justice Coleman excepted—and who knew one another, and their craft, well.[1] More to the point, it was a court that had earned a reputation as a leader among state supreme courts.[2] With the appointment of a new chief justice, however, some questioned whether the court would lose its independence, its willingness to address, creatively,

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1. *See generally* Virginia A. Long, *The Purple Thread: Social Justice as a Recurring Theme in the Decisions of the Poritz Court*, 59 RUTGERS L. REV. 533 (2007).

2. John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701 & n.1 (1998); *see also* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 184 (1988); Jonathan Banks, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 155 n.177 (1991); G. Alan Tarr & Robert F. Williams, Decidedly Co-Equal: The New Jersey Supreme Court 1-4 (1999) (unpublished manuscript), *available at* http://camlaw.rutgers.edu/statecon/publications/occpap1.pdf.

controversial and difficult issues, whether it would no longer function as a "leadership court."[3] More than ten years later, it is possible to look back and to evaluate the work of the court during that period.

The court's approach to certain controversial and difficult issues from 1996 through 2006 is, then, my topic tonight. More specifically, I will examine cases in which the power of government to curtail individual rights has been challenged, and I will argue that the court, over the course of those ten years, remained committed to the fundamental values of its predecessors. But first, to frame the discussion, I will consider the context within which the court functions. Institutional constructs and the social, historical, and cultural climate that is New Jersey shape the work of the court in powerful ways, irrespective of who sits on the court. Those forces both constrain the justices (adherence to precedent, for example, coupled with a commitment to reasoned scholarly discourse) and free them (a tradition of support for a strong and independent judiciary). Those forces provide the underpinnings for leadership.

I

The Constitution of 1947 set forth a framework for the revitalization of a judiciary previously considered the worst in the nation.[4] Indeed, the simple unified court system established in 1947 is now generally acknowledged as the premier state system in the country.[5] In substantial part, the framers used the federal court model, and that has ensured judicial independence, more so than in most other states. Unlike those states where judges are elected, in New Jersey judges are nominated for appointment by the governor, contingent on approval by the state senate.[6] Like their federal counterparts, New Jersey judges are not subject to the pressures of powerful interest groups or the need for campaign funding. Also, New Jersey judges generally are tenured after a seven-year initial term[7] and are, therefore, able to function without fear of reprisal.

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3. *See* Wefing, *supra* note 2, at 707; Tarr & Williams, *supra* note 2, at 15-16.

4. *See* Carla Vivian Bello & Arthur T. Vanderbilt II, JERSEY JUSTICE: THREE HUNDRED YEARS OF THE NEW JERSEY JUDICIARY 186-87 (1978).

5. *Id.* at 185.

6. *See* Fact Sheet on Judicial Selection Methods in the United States, http://www.abanet.org/leadership/fact_sheet.pdf; PATRICIA A. GARCIA, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES (1998); AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES (2007), http://www.ajs.org/selection/docs/Judicial%20selection%20charts.pdf.

7. *See supra* note 6. After initial appointment and prior to the expiration of seven years, the then-sitting governor may nominate, and the senate may approve, reppointment and tenure for both superior court judges and supreme court justices.

Courts decide issues that lie at the heart of the social fabric and that engender powerful feelings and partisan attacks. When judges are elected, as they are in many states, the judiciary begins to resemble the political branches and loses the independence and impartiality that is the source of its strength in a tripartite form of government. The judicial article of the 1947 Constitution was designed to avoid that result. In addition, New Jersey has maintained a long-standing practice of politically balanced judicial appointments, a part of the state's historical culture not easily rejected by an incumbent governor. That tradition may not guarantee a balance of views on the bench, but it certainly makes that balance a real possibility.

Moreover, under the New Jersey Constitution, the supreme court and the chief justice, together, administer the system.[8] The chief justice is, in some sense, the CEO of the courts, assisted by an administrative director;[9] it is, however, the supreme court that establishes the ethical rules governing the conduct of judges and attorneys, and there too New Jersey leads.[10] Because the court has steadfastly sought to foster public confidence in the impartiality of the judicial process, it has promulgated ethical rules that are considered by various commentators to be the most stringent in the nation.[11] In respect of the rules applicable to judges, the court has underscored the nonpartisan, nonpolitical nature of the judiciary by severely curtailing activities that might suggest bias or lack of independent judgment.[12]

The structure I have been describing is quite remarkable. It provides for the strong and independent judiciary and the strong and independent state supreme court that are the hallmarks of the New Jersey system. Nonetheless, it is not the whole picture. The work of the supreme court is carried out in a formal manner that is, by now,

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8. N.J. CONST. art. VI, § 2, para. 3 ("The Supreme Court shall make rules governing the administration of all courts in the State . . . ."); *see* also N.J. CONST. art. VI, § 7, para. 1 ("The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State.").

9. *Id.* art. VI, § 7, para. 1 (allowing the chief justice to appoint an administrative director).

10. *See id.* art. VI, § 2, para. 3 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.").

11. *See* Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 389 (1997) ("New Jersey's disciplinary and ethical rules are now recognized as among the strictest in the nation. As the Wilentz Court recently stated, 'our disciplinary system, [is] regarded throughout the nation as one of the best and beyond question the strictest, the most severe.'").

12. N.J. CT. R., CODE OF JUD. CONDUCT, CANON 7 (mandating "[a] judge shall refrain from political activity").

a part of the culture of the court, a tradition that, like the balanced appointment process, is not easily set aside. The chief justices who have led the court have crafted practices for decision making and set standards for opinion writing that contain checks and balances, ways to test the application of precedent and argument, which are now an integral part of the institution that is the court. Yes, Justice Stewart Pollock wrote *Right to Choose v. Byrne*[13] and Justice Alan Handler wrote *Abbott V*[14] and Justice Marie Garibaldi wrote *Toys 'R' Us*,[15] but every opinion derives from the consensus of the majority—or of the entire court—and the other justices stand behind that opinion and give it weight.

The court, at its best, is greater than its individual members because together the justices forge a collective understanding refined and stamped by the intelligence and style of the opinion writer. Participating in that decision-making process includes, at the very least, reviewing the arguments in respect of the issues before the court; listening to sisters and brothers who sometimes have an entirely different view of those arguments; considering the rules of law that apply; knowing as much as possible about how lives are affected by what the court does; and forging, around the conference table, an approach to the case at bar. And when the law is not clear or the facts do not fit the legal paradigm or recent legislative enactments reflect changed attitudes or norms, then the court must mine deeply and creatively for the principles that sustain its work. That experience affects the members of the court profoundly; it alters their understanding of the world around them and forces them to consider anew the values that shape the law. It is a process that, at its best, fosters leadership.

Which brings me back to my subject tonight: an examination of certain cases decided by the New Jersey Supreme Court during the period from 1996 through 2006, cases in which the court considered issues arising under the New Jersey Constitution and raising questions related to governmental power and individual rights.

II

The subject I have chosen has an interesting history, having attracted notice in the 1970s that continues to this day. In preparing for this talk I discovered, to my dismay, an enormous body of scholarly literature[16] on the subject that I will not present—although

13. Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

14. Abbott v. Burke V, 710 A.2d 450 (N.J. 1998).

15. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445 (N.J. 1993).

16. *See, e.g.*, Joseph F. Sullivan, *New York Court Seen as Leader on Rights*, N.Y. TIMES, July 18, 1990, at B1; John Kincaid, *The New Federalism Context of the New*

I will give you a short overview or introduction to state constitutional adjudication in order to provide some background for the discussion of the cases. My purpose is to examine the bases for the holdings of the court in this subject matter area and to let you decide for yourselves how you would characterize the court's decisions.

The year I graduated from law school, 1977, Justice Brennan published an article in the Harvard Law Review entitled *State Constitutions and the Protection of Individual Rights*.[17] "Reaching," he said, "the biblical summit of three score and ten seems to be the occasion—or the excuse—for looking back."[18] And so he did:

> Forty-eight years ago I entered law school and forty-four years ago was admitted to the New Jersey bar. In those days of innocence, the preoccupation of the profession, bench and bar, was with questions usually answered by application of state common law principles or state statutes. Any necessity to consult federal law was at best episodic. But those were also the grim days of the Depression, and its cure was dramatically to change the face of American law. The year 1933 witnessed the birth of a plethora of new federal laws and new federal agencies developing and enforcing those laws; ones that were to affect profoundly the daily lives of every person in the nation.[19]

What Justice Brennan focused on, however, was the revolution that had taken place during his tenure on the United States Supreme Court. It was a time when that Court enforced the protections of the Fourteenth Amendment; it was a time of expansion of federal constitutional rights, rights Brennan understood as the "fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty";[20] and it was a time when the guarantee of federal constitutional liberties was imposed, through the Fourteenth Amendment, on the states. Indeed, between 1962 and 1969 we saw the "extension to the states of nine of the specifics of the Bill of Rights."[21] In Brennan's view:

> The thread of this series of Bill of Rights holdings reflects a conclusion—arrived at only after a long series of decisions grappling with the pros and cons of the question—that there

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Judicial Federalism, 26 RUTGERS L.J. 913 (1995); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189 (2002).

17. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

18. *Id.* at 489.

19. *Id.*

20. *Id.* at 490.

21. *Id.* at 493.

> exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America.[22]

But when Brennan wrote those words in 1977 he was concerned about the end of an era. He saw the United States Supreme Court, his Court, retrenching, drawing lines he was unable to accept. He had been a state court trial judge and then a justice of our New Jersey Supreme Court;[23] he understood what the state courts could do. In 1977, Brennan turned to the state courts of last resort. He urged them to guarantee, under their own state constitutions, greater protection of individual rights than the Federal Constitution provided.

There are reasons why the United States Supreme Court and state supreme courts might analyze the tension between governmental action and individual rights differently. Those who have considered the subject point out that the Court sets the floor for the protection of our liberties across fifty states, a responsibility different in kind from that of state supreme courts.[24] In the often-quoted words of Justice Brandeis, "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."[25] In that vein, the United States Supreme Court has said repeatedly that the states are free to provide greater protection of individual rights so long as their holdings are grounded explicitly and clearly in the state constitution—in other words, if states stay on their own ground, they will be left alone.[26]

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22. *Id.* at 495.

23. William Joseph Brennan, Jr. served as a "New Jersey superior court judge (1949–50), appellate division judge (1950–52), and state supreme court justice (1952–56). In 1956 President Eisenhower appointed him to succeed Sherman Minton on the Supreme Court." THE COLUMBIA ENCYCLOPEDIA 377 (6th ed. 2000).

24. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 279-80 (1932).

25. *Id.* at 311-12 (Brandeis, J., dissenting).

26. *See* Cooper v. California, 386 U.S. 58, 62 (1967) (holding that states are free to impose higher standards than required by the Constitution); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (acknowledging a state's authority to use its police power or own constitution to increase individual liberties beyond those protected by the Constitution); Oregon v. Hass, 420 U.S. 714, 719 (1975) (restating premise that a state can expand its law beyond the federal bounds); Herb v. Pitcairn, 324 U.S. 117,

Whatever the reasons, there has been a renewed interest in state constitutional adjudication that includes numerous scholarly articles reflecting the considered views and research of academics and state supreme court justices, and that can also be found in the dialogue between the majority and dissents and/or concurrences of state court opinions.[27] It has been thirty years since Brennan's article appeared, and that dialogue continues—although I would suggest that in New Jersey there is less debate and more established law.

III

In 1982, Justice Schreiber wrote the court's opinion in *State v. Hunt*, a case that challenged the admissibility in a criminal trial of telephone billing records obtained without a warrant.[28] The United States Supreme Court had signaled clearly "that it [would] not protect information or material beyond the [telephone] conversation itself,"[29] and the New Jersey Supreme Court therefore turned to the state constitution. Although our court had held "that the search and seizure provisions in the federal and New Jersey Constitutions are not always coterminous, despite the congruity of the language,"[30] the justices were concerned about the path they had chosen.

> Though notions of federalism may seem to justify this difference, enforcement of criminal laws in federal and state courts, sometimes involving the identical episodes, encourages application of uniform rules governing search and seizure. Divergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same.[31]

Despite those countervailing considerations, "[s]ound policy" reasons prompted the justices to set their own course.[32] They relied on state legislative enactments that supported the concept of privacy in connection with telephonic communications and that "have enlarged [citizens'] conception of what constitutes the home."[33] Although other state courts had followed the reasoning of the United

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125 (1945) (holding that the Court "will not review judgments of state courts that rest on adequate and independent state grounds").

27. *See, e.g.*, State v. Eckel, 888 A.2d 1266, 1277 (N.J. 2006); State v. Hunt, 450 A.2d 952, 958-62 (Pashman, J., concurring) (N.J. 1982); *id.* at 962-69 (Handler, J., concurring).

28. 450 A.2d 952 (N.J. 1982).

29. *Id.* at 954 (citing Smith v. Maryland, 442 U.S. 735 (1979)).

30. *Id.* at 955 (citing State v. Alston, 440 A.2d 1311, 1318 (N.J. 1981); State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975)).

31. *Id.*

32. *Id.*

33. *Id.*

States Supreme Court, the New Jersey Supreme Court declined to get in line. Justice Schreiber recognized a basis for divergence in New Jersey's legislative history and in "the better reasoned opinions" of those courts that had found a legitimate expectation of privacy in personal telephone billing records.[34]

Justices Pashman and Handler agreed with the result, but took the opportunity *Hunt* offered to discuss the analytical approach a state supreme court should use in conducting an independent assessment of state constitutional rights—Justice Pashman arguing for a "general rule" extending state constitutional protections beyond their federal counterparts and constrained only by the requirements of "sound constitutional analysis,"[35] and Justice Handler suggesting reliance on a set of "judicial principles [that support] the salutary resort to state constitutions as a fountainhead of individual rights."[36] Concerned about "consistency and uniformity"[37] and mindful of the value of federal precedents, Justice Handler enumerated specific standards for the determination whether the state constitution should serve "as an independent source for protecting individual rights," including "Textual Language," "Legislative History," "Preexisting State Law," "Structural Differences," "Matters of Particular State Interest or Local Concern," "State Traditions," and "Public Attitudes."[38]

Those standards, or divergence criteria, have provided an analytic framework for responsible state court decision making and, also, have served as a focal point for the debate about the restraints state courts should impose on divergence, if any.[39] Indeed, Justice Pollock entered the debate in this very forum, taking as his subject on delivering the second Weintraub Lecture in 1983, *State Constitutions as Separate Sources of Fundamental Rights.*[40] He, too, noted the burgeoning interest in state constitutions and, like Justice Handler, worried about the development of a jurisprudence that would "make more predictable the recourse to and the results of state constitutional law analysis."[41] He understood that the ship already had left the dock, however, and urged state courts to base decisions grounded in state constitutions on sound principles of law.

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34. *Id.* at 957.

35. *Id.* at 960.

36. *Id.* at 962.

37. *Id.* at 964.

38. *Id.* at 965-67.

39. *See id.*

40. *See* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

41. *Id.* at 708.

The debate rages still, twenty-four years later. Looking back, one scholar has observed that state constitutional adjudication has gone through several phases over this period.[42] In some states where constitutions are easily amended, decisions expanding fundamental rights beyond the federal minimum have been "overturned" by the electorate,[43] and in some states where judges are elected, there has been a backlash against those judges who have interpreted their state constitutions "independently."[44] Further, as Oregon Justice Hans Linde pointed out in 1984, independent state constitutional analysis takes work.[45] The unique history associated with a particular constitution or a particular clause, the differences in text between cognate provisions found in both the federal and the state constitution, the state's legal precedents and cultural traditions—all of those factors and more may be important to the state court's analysis. It would undoubtedly be easier to follow the United States Supreme Court whenever the federal and state provisions cover the same ground. Yet, today, many state courts have chosen not to take the easier path.[46] I would suggest that the New Jersey Supreme Court has earned its reputation as a "leadership court" in large part because it has been willing to entertain—and discuss—argument rooted in the individual rights provisions of the New Jersey Constitution.

IV

The New Jersey approach has its roots in a case decided in 1973. Although *Hunt* provides insight into the justices' thinking about the rules for deciding individual rights cases, as Justice Pollock has observed it was Chief Justice Weintraub's 1973 opinion in *Robinson v. Cahill* that opened up the possibilities of the state constitution as an independent source for those rights.[47] In *Robinson*, various plaintiffs challenged New Jersey's system of financing public education as "viola[tive] of the equal protection mandates of the Federal and State Constitutions [and of] other provisions of the State

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42. *See generally* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

43. *See* Robert F. Williams, *The Third Stage of the Judicial Federalism*, N.Y.U. ANN. SURV. AM. L. 211, 216 (2003).

44. *See* TARR & PORTER, *supra* note 2, at 56.

45. *See* Harris A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

46. *See, e.g.,* Graves v. Mississippi, 708 So. 2d 858, 863 (Miss. 1997) (holding that the state must show defendant is cognizant of his right to refuse to prove consent was voluntary); State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (applying a higher standard for consent searches than presented by the Supreme Court).

47. 303 A.2d 273, 276, 283 (N.J. 1973); Pollock, *supra* note 40, at 714.

Constitution relating to public education and to the assessment of real property for taxation . . . ."[48] While the matter was pending, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez*,[49] in which the Court held that the Equal Protection Clause of the Federal Constitution did not require the State of Texas to address inequalities in its school funding formula, inequalities much like those found in the New Jersey system.[50] Because of *Rodriguez*, the New Jersey Supreme Court focused on the New Jersey Constitution. The court turned to the "thorough and efficient" education clause to invalidate New Jersey's funding scheme[51]—and that was the beginning of a line of school funding cases that has occupied the court for decades.

Chief Justice Weintraub's opinion is instructive in the way it frames the discussion in relation to state constitutional adjudication. First, the chief justice finds in the *Robinson* majority a "reluctance to say the Federal Constitution supplies single solutions by which all the States are bound," in other words, an openness to a diversity of state court holdings. And second, he unapologetically looks to the New Jersey Constitution for a New Jersey response.[52]

> 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. [In that setting,] there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.[53]

Third, and most significant, although the court's holding rests on New Jersey's education clause, a type of specifically directed mandate found only in state constitutions, the chief justice, "[i]n passing," rejects the construct used by the United States Supreme Court to decide equal protection claims.[54] He finds that the classification of rights as "fundamental," or of state interests as "compelling," is insensitive to the nuances of the questions before the court, explaining:

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48. *Id.* at 276.

49. 411 U.S. 1 (1973).

50. *Id.* at 56-59; *cf. Robinson*, 303 A.2d at 280.

51. *See Robinson*, 303 A.2d at 285-87, 295-97 (citing N.J. CONST. art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.")).

52. *Id.* at 281.

53. *Id.* at 282.

54. *Id.*

> Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.[55]

That formulation became the New Jersey test. It was more fully developed in *Right to Choose v. Byrne*,[56] decided in 1982 and written by Justice Pollock who, we know, was keenly aware of the possibilities of state constitutional interpretation, and it provided the analytical framework in two important opinions issued in the last ten years: *Planned Parenthood of Central New Jersey v. Farmer*,[57] decided in 2000, and *Lewis v. Harris*,[58] decided in 2006.

In *Planned Parenthood*, plaintiffs challenged a New Jersey law "that condition[ed] a minor's right to obtain an abortion on parental notification unless a judicial waiver [was] obtained, but impose[d] no corresponding limitation on a minor who seeks 'medical and surgical care [otherwise] related to her pregnancy or her child.'"[59] The United States Supreme Court, as the opinion notes, had upheld both parental consent and parental notification statutes that included judicial waiver procedures,[60] and many state courts had followed suit, relying on federal due process analyses to sustain similar legislation.[61] The New Jersey Supreme Court focused on article I, paragraph 1 of the New Jersey Constitution, which contains language quite different from the wording of the Fourteenth Amendment Equal Protection and Due Process Clauses.[62] Our version of the federal clauses states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[63]

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55. *Id.*

56. 450 A.2d 925 (N.J. 1982).

57. 762 A.2d 620 (N.J. 2000).

58. 908 A.2d 196 (N.J. 2006).

59. 762 A.2d at 621.

60. *Id.* at 627-30.

61. *Id.* at 630; *see also In re* Anonymous, 531 So. 2d 901, 903-04 (Ala. 1988); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 656 (Miss. 1998); *In re* Anonymous, 558 N.W.2d 784, 789 (1997).

62. *See* N.J. CONST. art. I, para. 1.

63. *Id.*

Citing *Right to Choose* and other longstanding New Jersey precedents, the justices noted that the language of the state provision is "more expansive" than the clauses of the Fourteenth Amendment and includes "a woman's right of privacy and its concomitant rights."[64] They reaffirmed their prior rejection of the tiered framework for equal protection analysis under the New Jersey Constitution and applied the test proposed by Chief Justice Weintraub—they considered and weighed the nature of the right asserted, "the extent of the governmental restriction," and, finally, the government's interest in maintaining that restriction.[65]

It is here that I would like to pause for a moment to examine the process by which the court conducted its review. In each of these cases—in *Planned Parenthood* and later in *Lewis*—the court relied heavily on the record developed by the parties to explain the full extent of the burdens imposed on unemancipated minors by the parental notification act and on same-sex couples by the withholding of the benefits that accrue when heterosexuals marry.[66] In many respects those facts were unique to New Jersey; when detailed in the opinions, they painted a picture of social and legal disabilities experienced by the plaintiffs that shifted the weights on the New Jersey scale.[67] What we observe is that the result, when a state supreme court turns to its own constitution, does depend in part on the environment, the history, and the traditions that make up the culture of the state. In *Planned Parenthood*, the court determined that the state had not met its burden on the facts presented and, further, that "special burdens [could not be imposed] only on that class of minors seeking an abortion."[68]

Six years later, in *Lewis*, the court again relied on article I, paragraph 1 of the New Jersey Constitution and applied its "three factor" equal-protection balancing test.[69] Again the court described the New Jersey context, this time as a predicate for the discussion "whether committed same-sex couples have the right to the statutory benefits and privileges conferred on heterosexual married couples."[70] Looking back "three decades," Justice Albin found "decisional law and sweeping legislative enactments" protecting New Jersey citizens from discrimination based on sexual orientation.[71] He carefully and thoroughly described, and then compared, the protections and

64. *Planned Parenthood*, 762 A.2d at 631.
65. *Id.* at 633.
66. *See id.*; *see also* Lewis v. Harris, 908 A.2d 196, 218 (N.J. 2006).
67. *See Lewis*, 908 A.2d at 218; *Planned Parenthood*, 762 A.2d at 633.
68. *Planned Parenthood*, 762 A.2d at 638.
69. 908 A.2d at 212.
70. *Id.*
71. *Id.* at 215.

benefits accorded same-sex couples with those provided heterosexual couples, and found that substantial "economic and financial inequities [were] borne by same-sex . . . partners [and] their children too."[72] Unmoved by the state's argument that almost all of the states have rejected equality of benefits for same-sex couples, Justice Albin explained that the New Jersey Supreme Court has "never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people."[73] Because it could discern no "legitimate public need" for "the legal disabilities that . . . afflict" same-sex couples, the Court held that "under the equal protection guarantee of Article I, paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples."[74] Like Vermont and Massachusetts, our court found that the New Jersey Constitution, interpreted in the light of New Jersey traditions, required more.[75]

V

Although equal protection and due process claims have been raised in some of the court's most controversial cases and pique our interest for that reason alone, any discussion of state constitutional adjudication should include cases brought under the Fourth Amendment to the Federal Constitution and under article I, paragraph 7 of the New Jersey Constitution. Both provisions protect "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"; it is, however, the New Jersey provision that has been broadly interpreted and applied.[76] I have spoken of *State v. Hunt*, wherein our court refused to defer to federal precedent and required a search warrant for the seizure by law enforcement of telephone toll billing records.[77] In *Hunt*, you will recall, the court based its divergence from the

72. *Id.* at 216.

73. *Id.* at 220. (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("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.")).

74. *Id.* at 217-18, 220-21.

75. *See id.* at 219-20; *see also* Baker v. State, 744 A.2d 864 (Vt. 1999); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Following the presentation of this lecture, the Supreme Court of California decided *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), wherein the court determined that same-sex couples were guaranteed the right to marry under the California constitution.

76. *See* U.S. CONST. amend. IV; N.J. CONST. art. 1, para. 7.

77. 450 A.2d 952, 957 (N.J. 1982).

federal paradigm on New Jersey's "established policy of providing the utmost protection for telephonic communications."[78]

Eight years after *Hunt*, in 1990, the court decided *State v. Hempele*,[79] a case involving the suppression of evidence obtained from a warrantless search and seizure of defendants' garbage.[80] In *California v. Greenwood*,[81] a six-to-three decision, the United States Supreme Court had held that the Fourth Amendment warrant requirement does not apply to garbage left for collection by homeowners[82] based on the rationale that persons in this country have not "manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."[83] The Court commented, again, that individual states could, if they wished, construe their own constitutional provisions to provide for greater constraints on the police.[84]

"Persuaded that the equities . . . strongly favor protection of a person's privacy interest," the New Jersey Supreme Court applied its own standard.[85] Our court observed that New Jersey precedents interpret the state warrant requirement strictly and that in New Jersey there is a speedy warrant application procedure based on probable cause that the police can use whenever necessary.[86] In short, using criteria that distinguished interpretation of the New Jersey State Constitution from interpretation of the Federal Constitution, even in the face of a similarity in language, the court reached its own conclusion. The court dealt with normative judgments about expectations of privacy and restraints on government action and decided that a reasonable expectation of privacy included requiring a warrant when the police want to rummage through the garbage of New Jersey residents. Justice Brennan might have said that state courts could, and should, diverge from federal precedent when the dissenters have the better of the argument.

Last fall, I spoke about state constitutional rights to a first-year class at a law school in Massachusetts. The students were at first amused by the idea of a reasonable expectation of privacy in garbage, that is, until I told them that Massachusetts followed federal law and that the police could, without a warrant, search their garbage after

78. *Id.* at 955.
79. 576 A.2d 793 (N.J. 1990).
80. *Id.* at 796-97.
81. 486 U.S. 35 (1988).
82. *Id.* at 40.
83. *Id.* at 39.
84. *Id.* at 43.
85. State v. Hunt, 450 A.2d 952, 955 (N.J. 1982).
86. *See id.* at 968-69 (Handler, J., concurring).

they left it at the curb. I do not know what those students throw in the trash, but they did not like that idea at all.

More recently, in *State v. Carty*, the New Jersey Supreme Court considered the Fourth Amendment rights of a passenger in a motor vehicle involved in a routine traffic stop on the New Jersey Turnpike.[87] After the driver signed a standard New Jersey State Police consent to search form, the trooper asked the driver and his passenger to consent further to a pat-down for the officer's safety, and both men agreed.[88] Although the pat-down of the driver produced no incriminating evidence, the passenger was found with cocaine on his person.[89]

The history of *Carty* is worth noting. The trial court in *Carty* had denied a suppression motion by the passenger after deciding that the search with the driver's consent satisfied the "voluntary and knowing" standard found in *State v. Johnson*, a case in which the New Jersey Supreme Court had rejected the federal voluntary consent standard and, instead, had adopted a more stringent approach under article I, paragraph 7 of the New Jersey Constitution.[90] The appellate division reversed the trial court, holding that the greater protection provided by paragraph 7 required "articulable suspicion" as a necessary prerequisite to a request for consent to search a vehicle after a routine traffic stop.[91]

In affirming the appellate division, our court again framed the argument around the "higher level of scrutiny" afforded consent searches under the New Jersey Constitution.[92] Observing "three decades" of legal precedent to that effect, the court turned to the standard that should be imposed "for an officer seeking consent to search incident to a lawful stop of a motor vehicle for violation of traffic laws."[93] The question was one of first impression and the court followed its usual practice in such cases, surveying both federal and state case law and reviewing the scholarly commentary on the general subject.[94] Also, the justices considered factual information pertinent to the broad general questions raised, specifically in this case, data on individual responses to requests for consent from authority figures and data compiled by the New Jersey State Police

87. 790 A.2d 903, 905-06 (N.J. 2002).

88. *Id.*

89. *Id.* at 906.

90. *Id.*; State v. Johnson, 346 A.2d 66-68. *See generally* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (articulating the federal voluntary consent standard).

91. State v. Carty, 753 A.2d 149, 150 (N.J. Super. Ct. App. Div. 2000).

92. State v. Carty, 790 A.2d 903, 907 (N.J. 2002).

93. *Id.*

94. *Id.* at 907-10.

on the percentage of drivers who consented to "voluntary" searches (ninety-five percent) and under what conditions.[95] As in the other cases I have discussed, New Jersey facts were used to support a New Jersey response. The court concluded that, under the New Jersey Constitution, "consent searches following a lawful stop of a motor vehicle should not be deemed valid . . . [absent a] reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity."[96]

Although *Carty* is premised on the New Jersey experience, as in *Hempele*, normative judgments about the right of privacy drive the result. Like the law students who realized that they actually did believe their garbage was private, most of us who drive the roads of New Jersey believe that if we are stopped for a minor traffic violation we should not feel that we must consent to be searched.

Justice Stein agreed with the court's disposition in *Carty*, but urged restraint in the use of the state constitution. He would have imposed the court's requirement of reasonable and articulable suspicion as a "prophylactic rule of law adopted by [the] court for the purpose of preventing abuses of the power of law enforcement officers to request motorists to consent to searches of their motor vehicles."[97] That approach is a theme that runs throughout the case law—when and under what circumstances should a decision be based in the constitution, federal or state, as opposed to some other means of disposition such as a statute or the common law or even a prophylactic rule.[98]

Carty was decided in 2002. I would be remiss in my presentation if I did not consider *State v. Eckel*, decided unanimously just last year and written by Justice Long.[99] In *Eckel*, the court held that a police officer's warrantless search of an automobile incident to an arrest, but conducted after the occupants had been removed from the vehicle and secured in police custody, violated article I, paragraph 7 of our state constitution.[100]

Eckel is a model case for this discussion. Justice Long follows the somewhat tortuous "history of the search incident to arrest exception

95. *Id.* at 910-11.

96. *Id.* at 912.

97. *Id.* at 917 (Stein, J., concurring).

98. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (establishing prophylactic rule that certain warnings must be given before a custodial interrogation to protect the Fifth Amendment privilege against self-incrimination); State v. Hartley, 511 A.2d 80, 90 (N.J. 1986) (concluding that the failure to honor a defendant's right to silence is a constitutional and state common law violation of the privilege against self-incrimination, not a violation of *Miranda*'s prophylactic rule).

99. 888 A.2d 1266 (N.J. 2006).

100. *Id.* at 1277.

to the warrant requirement under the Federal Constitution,"[101] a history I will not recount here. Suffice it to say that the rationale articulated for the exception—the officer's safety and the possibility that evidence within reach could be destroyed by the person arrested—had, in the context of the arrest of an occupant of an automobile, been expanded by the United States Supreme Court to the entire passenger compartment as within reach and then, finally, to the entire passenger compartment even after the occupant had been removed and arrested.[102] That departure was justified in *Thornton v. United States* by "[t]he need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment."[103] Thus, "[o]nce an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment."[104]

The United States Supreme Court's approach had been sharply criticized, as Justice Long notes.[105] Further, she observes that although some states have simply followed the Federal Court's bright-line rule, others have rejected it, relying on their respective state constitutions to reach a different result.[106] In her opinion, Justice Long walks the reader through the relevant New Jersey precedents, which, she points out, consistently adhere to the dual concerns of officer safety and evidence preservation as the basis for the exception to New Jersey's warrant requirement.[107]

Although commenting on the similarity between the language of article I, paragraph 7 of the New Jersey Constitution and the Fourth Amendment, our court focuses on the line of precedent demonstrating the justices' willingness to afford New Jersey citizens greater protection under paragraph 7 and reaffirming their authority to do so.[108] Here, the facts are less significant; rather, the question turns on a judgment whether the erosion of the warrant requirement reflected in the United States Supreme Court's rule is acceptable in New Jersey. Our court finds that *Belton* has "detached itself from the theoretical underpinnings that initially animated the search incident to arrest exception" and that the benefit of providing police with a bright-line rule is outweighed by citizens' rights under the New

101. *Id.* at 1269-74.
102. *Id.*
103. 541 U.S. 615, 622-23 (2004).
104. *Id.* at 623.
105. *Eckel*, 888 A.2d at 1272-73.
106. *Id.* at 1273-74.
107. *Id.* at 1274-75.
108. *See id.* at 1275-76.

Jersey Constitution to be free from unreasonable searches and seizures.[109] In essence, the justices view the United States Supreme Court as having expanded the exception to the warrant requirement to the point where it no longer has any recognizable basis in reasoned argument, and they decline to follow.[110]

Justice Long's opinion closes with a metaphor from *Hempele*:

> [A]lthough [the United States Supreme Court] may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.[111]

And then: "In charting a course distinct from *Belton*, that is what we have done."[112]

VI

What I have tried to demonstrate here, tonight, is that in New Jersey, state constitutional decision making rests on principles derived from a long line of New Jersey cases that both debate the theoretical bases for this body of law and apply the constructs that have evolved over the thirty-plus years that the court has focused on our constitution. In this arena, from the beginning, the New Jersey Supreme Court has been a "leadership court."

Thank you.

109. *Id.* at 1276 (citing New York v. Belton, 453 U.S. 454 (1981)).

110. *See id.* at 1277.

111. *Id.* at 1277 (quoting State v. Hempele, 576 A.2d 793, 800 (N.J. 1990).

112. *Id.* at 1277.