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STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

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During the 1960's, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.

REACHING the biblical summit of three score and ten seems to be the occasion — or the excuse — for looking back. 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.

In my days at law school, Felix Frankfurter had taught administrative law in terms of the operations of the Interstate Commerce Commission — because that was the only major federal regulatory agency then existing. But then came in rapid succession the National Labor Relations Board, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and a host of others. In addition, laws such as the Fair Labor Standards Act, administered by the Labor Department, also began to require practitioners to master new, and federal, fields of law in

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order to serve their clients. And, of course, those laws and agencies did not disappear with the end of the Depression — rather a procession of still more federal agencies and federal laws has followed. Only recently, for example, Congress created the Environmental Protection Agency and the Equal Employment Opportunity Commission — new major sources of concern for today's clients keeping lawyers everywhere very federal law-minded.

In the beginning of this legal revolution, however, federal law was not a major concern of state judges. Judicial involvement with decisions of the new federal agencies was the business of federal courts. I have tried to recall how often in my years on the New Jersey courts from 1949 to 1956 issues of federal law were relevant to cases tried before me as a trial judge in Paterson and Jersey City, or were addressed by me on the appellate division or in the supreme court. I can remember only three cases out of the hundreds with which I was involved over those years that turned on the resolution of a federal question, and in all three that question was statutory. Two were cases tried before me in Jersey City, one a railroad worker's suit under the Federal Employers Liability Act and the other a case that implicated the Immigration and Naturalization Act. Undoubtedly the reason they are still fresh in my memory is that I had frantically to dig up the federal statutes and federal cases that bore on their disposition because both presented federal questions of first impression in my experience. The third instance was a labor injunction case in which I first circulated an opinion to my brethren on the supreme court sustaining a chancery injunction against peaceful picketing, only to have to withdraw the opinion and set aside the injunction when the United States Supreme Court held that federal law preempted state regulation of such picketing.

In recent years, however, another variety of federal law — that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty — has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment — that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their per-

sonal economic beliefs for the judgments of our democratically elected legislatures,[1] Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system — state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.

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The decisions of the Supreme Court enforcing the protections of the fourteenth amendment generally fall into one of three categories. The first concerns enforcement of the federal guarantee of equal protection of the laws. While the best known, of course, are *Brown v. Board of Education*[2] and *Baker v. Carr*,[3] perhaps even more the concern of state bench and bar in terms of state court litigation are decisions invalidating state legislative classifications that impermissibly impinge on the exercise of fundamental rights, such as the rights to vote,[4] to travel interstate,[5] or to bear or beget a child.[6] Equally important are decisions that require exacting judicial scrutiny of classifications that operate to the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination — racial minorities[7] and aliens[8] are two examples.

The second category of decisions concerns the fourteenth

[1] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[2] 347 U.S. 483 (1954) (invalidating state laws requiring public schools to be racially segregated).

[3] 369 U.S. 186 (1962) (invalidating state laws diluting individual voting rights by legislative malapportionments). *See also* Reynolds v. Sims, 377 U.S. 533 (1964).

[4] Harper v. Virginia State Bd., 383 U.S. 663 (1966).

[5] Shapiro v. Thompson, 394 U.S. 618 (1969).

[6] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[7] Brown v. Board of Educ., 347 U.S. 483 (1954).

[8] Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

amendment's guarantee against the deprivation of life, liberty or property where that deprivation is without due process of law. The root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant "liberty" or "property" interest. Our decisions enforcing the guarantee of the due process clause have elaborated the essence of that "liberty" and "property" in light of conditions existing in contemporary society. For example, "property" has come to embrace such crucial expectations as a driver's license [9] and the statutory entitlement to minimal economic support, in the form of welfare, of those who by accident, birth or circumstance find themselves without the means of subsistence.[10] The due process safeguard against arbitrary deprivation of these entitlements, as well as of more traditional forms of property, such as a workingman's wages [11] and his continued possession and use of goods purchased under conditional sales contracts,[12] has been recognized as mandating prior notice and the opportunity to be heard. At the same time, conceptions of "liberty" have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity, so that prison regulations and parole procedures must provide some form of notice and hearing prior to confinement in solitary [13] or the revocation of parole.[14] Moreover, the concepts of liberty and property have combined in recognizing that under modern conditions tenured public employees may not have their reasonable expectation of continued employment,[15] and school children their right to a public education,[16] revoked without notice and opportunity to be heard.

I suppose, however, that it is mostly the third category of decisions by the United States Supreme Court during the last twenty years — those enforcing the specific guarantees of the Bill of Rights against encroachment by state action — that has required the special consideration of state judges, particularly as those decisions affect the administration of the criminal justice system. After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr*, because he believed that if each of us has an

[9] Bell v. Burson, 402 U.S. 535 (1971).
[10] Goldberg v. Kelly, 397 U.S. 254 (1970).
[11] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
[12] Fuentes v. Shevin, 407 U.S. 67 (1972).
[13] Wolff v. McDonnell, 418 U.S. 539 (1974).
[14] Morrissey v. Brewer, 408 U.S. 471 (1972).
[15] Perry v. Sindermann, 408 U.S. 593 (1972).
[16] Goss v. Lopez, 419 U.S. 556 (1975).

equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraints of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

Before the fourteenth amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action.[17] In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action.[18] The break-through came in 1897 when the prohibition against taking private property for public use without payment of just compensation was held embodied in the fourteenth amendment's proscription, "nor shall any state deprive any person of . . . property, without due process of law."[19] But extension of the rest of the specific restraints was slow in coming. It was 1925 before it was suggested that perhaps the restraints of the first amendment applied to state action.[20] Then in 1949 the fourth amendment's prohibition of unreasonable searches and seizures was extended,[21] but the extension was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available. It was not until 1961 that the Court applied the exclusionary rule to state proceedings.[22]

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law. The eighth amendment's prohibition of cruel and unusual punishment was applied to state action in 1962,[23] and is the guarantee under which the death penalty as then administered was struck

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[17] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[18] *See* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); McElvaine v. Brush, 142 U.S. 155, 158–59 (1891); *In re* Kemmler, 136 U.S. 436, 446 (1890); Presser v. Illinois, 116 U.S. 252, 263–68 (1886); Hurtado v. California, 110 U.S. 516 (1884); United States v. Cruikshank, 92 U.S. 542, 552–56 (1875); Walker v. Sauvinet, 92 U.S. 90 (1875).

[19] Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).

[20] *Compare* Gitlow v. New York, 268 U.S. 652, 666 (1925), *with* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

[21] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949).

[22] Mapp v. Ohio, 367 U.S. 643 (1961).

[23] Robinson v. California, 370 U.S. 660 (1962).

down in 1972.[24] The provision of the sixth amendment that in all prosecutions the accused shall have the assistance of counsel was applied in 1963, and in consequence counsel must be provided in every courtroom of every state of this land to secure the rights of those accused of crime.[25] In 1964, the fifth amendment privilege against compulsory self-incrimination was extended.[26] And after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police to give warnings to a suspect before custodial interrogation.[27]

The year 1965 saw the extension of the sixth amendment right of an accused to be confronted by the witnesses against him; [28] in 1967 three more guarantees of the sixth amendment — the right to a speedy and public trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses — were extended.[29] In 1969 the double jeopardy clause of the fifth amendment was applied.[30] Moreover, the decisions barring state-required prayers in public schools,[31] limiting the availability of state libel laws to public officials and public figures,[32] and confirming that a right of association is implicitly protected,[33] are significant restraints upon state action that resulted from the extension of the specifics of the first amendment.

These decisions over the past two decades gave full effect to the principle of *Boyd v. United States*,[34] the case Mr. Justice Brandeis hailed as "a case that will be remembered so long as civil liberty lives in the United States." [35] That principle, stated by Mr. Justice Bradley, was ". . . constitutional provisions for the security of person and property should be liberally construed . . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [36]

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[24] Furman v. Georgia, 408 U.S. 238 (1972). *But see* Gregg v. Georgia, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976).

[25] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

[26] Malloy v. Hogan, 378 U.S. 1 (1964).

[27] Miranda v. Arizona, 384 U.S. 436 (1966).

[28] Pointer v. Texas, 380 U.S. 400 (1965).

[29] Klopfer v. North Carolina, 386 U.S. 213 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Washington v. Texas, 388 U.S. 14 (1967).

[30] Benton v. Maryland, 395 U.S. 784 (1969).

[31] School Dist. v. Schempp, 374 U.S. 203 (1963).

[32] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[33] NAACP v. Alabama, 377 U.S. 288 (1964).

[34] 116 U.S. 616 (1886).

[35] Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).

[36] 116 U.S. at 635.

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 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. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

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Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy,[37] as well as laws that impose special burdens on those of our citizens who are of illegitimate birth.[38] The Court has also found uncompelling the claims of

[37] Geduldig v. Aiello, 417 U.S. 484 (1974); *cf.* General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (decided under Title VII).

[38] *Compare* Mathews v. Lucas, 96 S. Ct. 2755 (1976), *with* Weber v. Aetna

those barred from judicial forums due to their inability to pay access fees,[39] and has further handicapped the indigent by limiting their right to free trial transcripts when challenging the legality of their imprisonment.[40]

Under the due process clause, the Supreme Court has found no liberty interest in the reputation of an individual — never tried and never convicted — who is publicly branded as a criminal by the police without benefit of notice, let alone a hearing.[41] The Court has recently indicated that tenured public employees might not be entitled to any more process before deprivation of their employment than the government sees fit to give them.[42] It has approved the termination of payments to disabled individuals who are completely dependent upon those payments, prior to an oral hearing, a form of hearing statistically shown to result in a huge rate of reversals of preliminary administrative determinations.[43] And it has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored.[44]

The same trend is repeated in the category of the specific guarantees of the Bill of Rights. The Court has found the first amendment insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers;[45] and at the same time has found the amendment's prohibitions insufficient to invalidate a system of restrictions on motion picture theaters based upon the content of their presentations.[46] It has found that the warrant requirement plainly appear-

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Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (". . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."). Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in employment and education. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

[39] *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), *and* United States v. Kras, 409 U.S. 434 (1973), *with* Boddie v. Connecticut, 401 U.S. 371 (1971).

[40] United States v. MacCollom, 96 S. Ct. 2086 (1976).

[41] Paul v. Davis, 424 U.S. 693 (1976).

[42] Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 96 S. Ct. 2074 (1976).

[43] Mathews v. Eldridge, 424 U.S. 319 (1976).

[44] *Compare* Meachum v. Fano, 96 S. Ct. 2532 (1976) (finding no liberty interest implicated in the transfer of a prisoner to a maximum security facility), *with* Wolff v. McDonnell, 418 U.S. 539 (1974).

[45] Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[46] *Compare* Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976), *with* Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975).

ing on the face of the fourth amendment does not require the police to obtain a warrant before arrest, however easy it might have been to get an arrest warrant.[47] It has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction.[48] The Court has held permissible police searches grounded upon consent regardless of whether the consent was a knowing and intelligent one,[49] and has found that none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our knowledge or consent.[50] Even when the Court has found searches to violate fourth amendment rights, it has — on occasion — declared exceptions to the exclusionary rule and allowed the use of such evidence.[51]

Moreover, the Court has held, contrary to *Boyd v. United States*, that we may not interpose the privilege against self-incrimination to bar government attempts to obtain our personal papers, no matter how private the nature of their contents.[52] And the privilege, said the Court, is not violated when statements unconstitutionally obtained from an individual are used for purposes of impeaching his testimony,[53] or securing his indictment by a grand jury.[54]

The sixth amendment guarantee has fared no better. The guarantee of assistance of counsel has been held unavailable to an accused in custody when shuffled through pre-indictment identification procedures, no matter how essential counsel might be to the avoidance of prejudice to his rights at later stages of the criminal process.[55] In addition, the Court has countenanced a state's placing significant burdens — in the form of a "two-tier"

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[47] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 96 S. Ct. 2406 (1976) (holding that in a *Watson*-like situation, police may pursue a suspect into his or her home).

[48] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Court has also declined to read the amendment to prohibit warrantless searches of the glove compartments of automobiles impounded for mere parking violations. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

[49] United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[50] United States v. Miller, 96 S. Ct. 1619 (1976).

[51] *E.g.*, United States v. Janis, 96 S. Ct. 3021 (1976).

[52] Andresen v. Maryland, 96 S. Ct. 2737 (1976); Fisher v United States, 96 S. Ct. 1569 (1976).

[53] Harris v. New York, 401 U.S. 222 (1971).

[54] United States v. Calandra, 414 U.S. 338 (1974).

[55] *Compare* Kirby v. Illinois, 406 U.S. 682 (1972), *with* United States v. Wade, 388 U.S. 218 (1967).

trial system — on the constitutional right to trial by jury in criminal cases.[56] And in the face of our requirement of proof of guilt beyond a reasonable doubt, the Court has upheld the permissibility of less than unanimous jury verdicts of guilty.[57]

Also, a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make.[58] At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment.[59] And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.[60]

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights — the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out even-handed justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

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Some state decisions have indeed suggested a connection between these recent decisions of the United States Supreme Court and the state court's reliance on the state's bill of rights. For example, the California Supreme Court, in holding that statements taken from suspects before first giving them *Miranda* warnings are inadmissible in California courts to impeach an accused who testifies in his own defense, stated: "We . . . declare that [the decision to the contrary of the United States Supreme Court[61]]

[56] Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) (approving trial de novo system).

[57] Apodaca v. Oregon, 406 U.S. 404 (1972).

[58] Rizzo v. Goode, 423 U.S. 362 (1976); Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974).

[59] Hicks v. Miranda, 422 U.S. 332 (1975).

[60] Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976).

[61] Harris v. New York, 401 U.S. 222 (1971).

is not persuasive authority in any state prosecution in California. . . . We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution." [62]

Enlightenment comes also from the New Jersey Supreme Court. In 1973 the United States Supreme Court held that where the subject of a search was not in custody and the prosecution attempts to justify the search by showing the subject's consent, the prosecution need not prove that the subject knew he had a right to refuse to consent to the search.[63] The Court expressly rejected the contention that the validity of consent to a non-custodial search should be tested by a waiver standard requiring the state to demonstrate that the individual consented to the search knowing he did not have to, and that he intentionally relinquished or abandoned that right. In *State v. Johnson*,[64] Mr. Justice Sullivan, writing for New Jersey's high court, first acknowledged that the United States Supreme Court decision was controlling on state courts in construing the fourth amendment and was therefore dispositive of the defendant's federal constitutional argument.[65] But Mr. Justice Sullivan went on to consider whether the identically phrased provision of the New Jersey Constitution, Art. 1, para. 7, "should be interpreted to give the individual greater protection than is provided by" the federal provision.[66] Counsel had not made this argument either to the trial court or on appeal, but the supreme court, *sua sponte*, posed the issue and afforded counsel the opportunity for argument on the question. Mr. Justice Sullivan held for the court that, while Art. I, para. 7 was *in haec verba* with the fourth amendment and until then had not been held to impose higher or different standards than the fourth amendment, "we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." [67] That meaning, he went on to hold, was "that under Art. I, par. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state

[62] People v. Disbrow, 16 Cal. 3d 101, 113, 114–15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). The Hawaii and Pennsylvania Supreme Courts have taken similar positions. *See* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975).

[63] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[64] 68 N.J. 349, 346 A.2d 66 (1975).

[65] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

[66] 68 N.J. at 353, 346 A.2d at 67–68.

[67] *Id.* at 353 n.2, 346 A.2d at 68 n.2.

seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." [68]

Among other instances of state courts similarly rejecting United States Supreme Court decisions as unpersuasive, the Hawaii [69] and California [70] Supreme Courts have held that searches incident to lawful arrest are to be tested by a standard of reasonableness rather than automatically validated as incident to arrest;[71] the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure;[72] and the South Dakota [73] and Maine [74] Supreme Courts have held that there is a right to trial by jury even for petty offenses.[75]

Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.[76] As the Supreme Court of Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . . ." [77] Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are therefore resting decisions solely on state law grounds.

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[68] *Id.* at 353–54, 346 A.2d at 68.

[69] State v Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[70] People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

[71] *Compare* cases cited notes 69 & 70 *supra, with* United States v. Robinson, 414 U.S. 218 (1973).

[72] *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), *with* United States v. Ash, 413 U.S. 300 (1973).

[73] Parham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972).

[74] State v. Sklar, 317 A.2d 160 (Me. 1974). *See also* Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

[75] *Compare* cases cited notes 73 and 74 *supra, with* Baldwin v. New York, 399 U.S. 66 (1970), *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

[76] For a listing of such examples, see the cases collected in the following articles: Falk, *The Supreme Court of California 1971–1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 437–43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

[77] State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

For example, the California Supreme Court held, as a matter of state constitutional law, that bank depositors have a sufficient expectation of privacy in their bank records to invalidate the voluntary disclosure of such records by a bank to the police without the knowledge or consent of the depositor;[78] thereafter the United States Supreme Court ruled that federal law was to the contrary.[79]

And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.[80] This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision,[81] which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.[82] And prior to the adoption of

[78] Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

[79] United States v. Miller, 96 S. Ct. 1619 (1976).

[80] The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). One reason for the refusal to review such decisions, even where the state court also decides a federal question erroneously, was explained by Mr. Justice Jackson in Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945):

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[81] Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (invalidating town's exclusive zoning ordinance), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[82] *See generally* Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS (E. Cahn ed. 1963).

the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.[83] Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

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Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered.[84] Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated [85] and systematic [86] violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual

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[83] The Court has made this point clear on a number of occasions. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (". . . a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); Cooper v. California, 386 U.S. 58, 62 (1967).

[84] *See* Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).

[85] *See* Paul v. Davis, 424 U.S. 693 (1976); cases cited note 84 *supra*.

[86] *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

rights,[87] the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law,[88] state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved. We tend to forget that Madison proposed not ten, but, in the form the House sent them to the Senate, seventeen amendments. The House approved all seventeen including Number XIV — a number prophetic of things to come with the adoption of Amendment XIV seventy-nine years later — for Number XIV would have imposed specific restraints on the states. Number XIV provided: "No State shall infringe the right of trial by Jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press." [89] Madison, in a speech to the House in 1789, argued that these restrictions on the state power were "of equal, if not greater, importance than those already made" [90] in the body of the Constitution. There

[87] *See* Stone v. Powell, 96 S. Ct. 3037, 3051 n.35 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

[88] *See* p. 496 & notes 41–42 *supra.*

[89] *See* E. DUMBAULD, THE BILL OF RIGHTS 215 (1957); Brennan, *supra* note 82, at 69–70.

[90] 1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).

was, he said, more danger of those powers being abused by state governments than by the government of the United States. Indeed, he said, he "conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments." [91]

But Number XIV was rejected by the Senate, and Madison's aim was not accomplished until adoption of Amendment XIV seventy-nine years later. The reason that Madison placed such store in the effectiveness of the Bill of Rights was his belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." [92] His reference was, of course, to his proposed Bill including Number XIV, but we may be confident that he would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice "will be naturally led to resist every encroachment upon rights expressly stipulated for. . . ." [93]

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[91] *Id.* at 755. *See* Brennan, *supra* note 82, at 69–70.

[92] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789). *See* United States v. Calandra, 414 U.S. 330, 356–57 (1974) (Brennan, J., dissenting).

[93] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).