FOREWORD: STATE CONSTITUTIONAL LAW: DOING THE RIGHT THING

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Fifteen years after a prominent American jurist urged a revitalization of state constitutional law,[1] a somewhat less prominent American legal scholar announced that state constitutional law was "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[2] In the two years since that pessimistic pronouncement, scholars have debated with renewed fervor the appropriate role that state courts, and state constitutions, should play in our federalist system.

My own view is that this debate is a waste of ink.

State courts, of course, are free to interpret state constitutions as more protective of liberty than the Federal Constitution. Indeed, when Justice Brennan first suggested that lawyers turn to state courts and state constitutions, he did so in the context of fears that an increasingly conservative federal judiciary would decline to protect liberty as vigorously as in the past.

The debate has moved well beyond narrow political concerns, however, and now focuses on whether it is accurate or advisable to consider state constitutions as significantly different and independent from the Federal Constitution. When faced with a claim that some government action is unconstitutional because it invades a protected liberty, what should state courts do?

Some advocates of the New Federalism, as it has come to be called, would have judges look first to the state constitution and consult the Federal Constitution only if it becomes necessary. Others, including Justice Pollock of the New Jersey Supreme Court,[3] adopt a more interstitial approach, suggesting that state constitutions ought to be used to fill in the gaps left by crabbed interpretations of federal rights. Either

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

2. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

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

way, proponents of a vibrant state constitutionalism suggest that state courts should look to the unique history, values, and needs of their individual states when interpreting the state constitution.

Those who are less enthusiastic about the New Federalism, on the other hand, question whether truly independent state court interpretation of state constitutions has occurred, whether it is possible, and whether it is a good idea. Whether state courts are actually engaging in independent interpretation is a matter of counting and analyzing state decisions on constitutional questions, and opinions differ on whether New Federalism has been a successful venture. Whether independent state court interpretation is possible depends largely on whether the people of the various states are actually sufficiently different in their history and their values to justify departing from the national consensus. Again, opinions differ. Finally, at least one scholar makes the argument that independent state constitutional interpretation is inadvisable because by emphasizing more local communities, it poses a threat to our national community.[4] Clearly, on that score, opinions *really* differ.

My own view is that both sides are asking the wrong question. When we are exploring how state constitutions ought to be interpreted, the real question is not the relationship between state courts and federal courts, but rather how courts in general ought to approach constitutional questions. New Federalism becomes crucial only if one's approach to constitutional interpretation is so narrow that minor differences in text or history matter. But if you believe, as I do, that the function of a court, especially in constitutional cases, is to do justice, then there is no relevant difference between state and federal constitutions or state and federal courts. This is not to say that text and history are irrelevant, simply that they are not dispositive. Judging is a craft, not a science; it requires judges to weave persuasively together the text, history, culture, morality, and consequences. Thus both state and federal judges are engaged in a common enterprise, which some may do more or less well at any given time. State courts can, and have, done justice by ignoring federal interpretations of the Federal Constitution as well as by following those interpretations. What matters most is not the constitutional theory but the constitutional answer.

This substantive approach to the role of state courts is in fact consistent with their history. State court independence has ebbed and flowed in the last two centuries, often as a consequence of the willingness or ability of the federal courts to make just decisions. In the beginning, of course, state courts—and state constitutions—were all there were. So state courts worked to establish justice, often by ignoring

4. Gardner, *supra* note 2, at 763.

their own written constitutions. State court judges, like most Americans at the time, viewed the written constitution, at least those portions which protected individual rights, as declarative; its purpose was to declare pre-existing natural rights, which would exist and be enforced even in the absence of written bills of rights. The United States Constitution reflects this vision in its preamble, which notes that the Constitution is designed to "establish justice." The New Jersey Constitution, like many other state constitutions, provides that "[a]ll men are by nature free and independent, and have certain natural and inalienable rights."[5] Incidentally, one might be interested to learn that one of the inalienable rights listed in the New Jersey Constitution is the right of "pursuing *and obtaining* happiness."

Thus, early state court judges frequently measured the constitutionality of state statutes not merely against the text of the written constitution, but also against natural law. Between 1776 and 1900, state judges invalidated or threatened to invalidate state statutes that conflicted with "the law of nature,"[6] "natural rights,"[7] "natural justice,"[8] "natural right and justice,"[9] "a fundamental principle of right and justice,"[10] "the principles of civil liberty and natural justice,"[11] "the dictates of moral

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5. N.J. CONST. art. I, § 1. The 1776 New Jersey Constitution did not contain that provision (indeed, it contained almost no protections of individual rights), but it was added to the next constitution, adopted in 1844. *See* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2599, 2599 (Francis N. Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

6. *See, e.g.*, Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784), *reprinted in* JULIUS GOEBEL JR., THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393, 400, 404 (1964); Page v. Pendleton (Va. Ch. Ct. 1793), *reprinted in* GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY 211, 216 n.(e) (B.B. Minor ed., 1852).

7. *See, e.g.*, *In re* Albany Street, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834).

8. *See, e.g.*, Elliot's Ex'r v. Lyell, 7 Va. (3 Call) 268, 283, 285 (1802); *see also* Dash v. Van Kleeck, 7 Johns. 477, 493-94, 502, 505 (N.Y. Sup. Ct. 1811) ("justice"); Lemuel Shaw, *Profession of the Law in the United States*, 7 AM. JURIST & L. 56, 68 (1932) (reprinting 1827 speech by Massachusetts Chief Justice Lemuel Shaw, referring to "natural justice").

9. *See, e.g.*, Bradshaw v. Rodgers, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822), *rev'd on other grounds*, 20 Johns. 735 (N.Y. 1823); *see also* Dunn v. City Council, 16 S.C.L. (Harp.) 189, 200 (1824) ("immutable principles of justice and common law").

10. *See, e.g.*, Regents v. Williams, 9 G. & J. 365, 408 (Md. 1838).

11. *See, e.g.*, Holden v. James, 11 Mass. 396, 405 (1814); City of Janesville v. Carpenter, 46 N.W. 128, 132 (Wis. 1890).

justice,"[12] "common right [and] reason,"[13] "principles of reason, justice, and moral rectitude,"[14] and the "inherent and inalienable rights of human nature."[15]

Early state courts did not confine their pursuit of justice to constitutional cases. In civil and criminal cases, most state courts followed the English tradition and the common law in the absence of statutory guidance. But state judges also looked to Roman and Continental civil law, especially where they believed that the common-law answer was incompatible with justice.[16] New Jersey Supreme Court Justice William Rossell explained that the civil law was a useful supplement to the common law because it was "founded on the broad basis of immutable reason and justice."[17]

Historically, then, state court judges have seen their role as implementing the principles of a just society. Thus, whether a state court should follow federal constitutional principles or instead consult its own constitution varies with the justice or injustice of federal interpretation. And indeed, throughout our history, courageous state court judges have sometimes stepped into the breach when the federal courts were unwilling or unable to do justice. This essay will explore four examples of state independence, two historical and two more modern.

As is well-known and documented, the United States Supreme Court has a rather sorry history in dealing with the problem of slavery. The Federal Constitution obviously contemplated that slavery would continue to exist in at least some states, so the Court never confronted a claim that slavery was unconstitutional. Nevertheless, the Court decided a number of important cases involving slavery, and the unfortunate consequence of those decisions was to limit the power of state and federal legislatures to curtail slavery. In 1842, in *Prigg v. Pennsylvania*,[18] the Court made it nearly impossible for northern free states to protect blacks—even free blacks—within their borders from southern slavecatchers. Fifteen years later, the Court became even more

12. *See, e.g.*, Turpin v. Locket, 10 Va. (6 Call) 113, 150 (1804).

13. *See, e.g.*, Ham v. M'Claws, 1 S.C.L. (1 Bay) 93, 98 (1789).

14. *See, e.g.*, Robinson v. Barfield, 6 N.C. (2 Mur.) 391, 421-22 (1818).

15. Billings v. Hall, 7 Cal. 3, 16 (1857) (Burnett, J., concurring); *see also* Foster v. Essex Bank, 16 Mass. 245, 270 (1819) ("the rights of the subject"). For further exploration of the role of natural law in state constitutional adjudication, see Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).

16. *See* R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649 (1992).

17. Den v. Urison, 2 N.J.L. 197, 203 (1807).

18. 41 U.S. (16 Pet.) 539 (1842).

complicit in the institution of slavery when it held, in *Dred Scott v. Sandford*,[19] that Congress itself had no power to abolish slavery in the territories.

Some state constitutions, however, were more protective of liberty. The Vermont Constitution explicitly outlawed slavery.[20] The Massachusetts Constitution simply declared that "all men are born equally free and independent," and a series of cases in the early 1780s interpreted this provision to abolish slavery.[21]

Even when it came to the difficult questions of the relationships between free and slave states, the state constitutions were often more generous than the Federal Constitution. In *Prigg*, the United States Supreme Court invalidated a Pennsylvania kidnapping law because it made it too difficult for slavecatchers to remove fugitive slaves. In 1836, the highest court of New Jersey invalidated a law almost identical to Pennsylvania's law on the ground that it made it too *easy* for slavecatchers.[22] The New Jersey court essentially held that a black claiming to be free was constitutionally entitled to a full jury trial in New Jersey to determine whether he was free or slave before he could be removed from the state as a fugitive slave. Similarly, although the United States Supreme Court avoided the question in *Dred Scott*, state courts were frequently faced with the question of what should happen to a slave who was taken to a free state—did he thereby become free? Between 1830 and 1860, courts in Massachusetts, Connecticut, and New York each held that a slave brought into their respective states became free.[23] In the New York case, the slaveowners were in New York only to change ships, as there was no direct sea passage between their native Virginia and their new home in the slave state of Texas. Nevertheless, the New York Court of Appeals freed the eight slaves

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19. 60 U.S. (19 How.) 393 (1856).

20. VT. CONST. of 1786, ch. I, art. I, *reprinted in* FEDERAL AND STATE CONSTITUTIONS at 3749, 3751. Vermont's 1777 Constitution, which failed when Vermont's first attempt to become an independent state failed, contained an identical provision. *Id.* at 3739.

21. Quock Walker Cases (unreported); *see* WILLIAM WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICAN, 1760-1848, at 45-48 (1977).

22. State v. Sheriff of Burlington (N.J. 1836). The case is unreported but is described and analyzed in detail in Paul Finkelman, *State Constitutional Protections of Liberty and the Antebellum New Jersey Supreme Court: Chief Justice Hornblower and the Fugitive Slave Law*, 23 RUTGERS L.J. 753 (1992). The best report of the case in existence was published in the *New York Evening Post* on August 1, 1851. This report has been reprinted as *Opinion of Chief Justice Hornblower on the Fugitive Slave Law* in Series II, 1 SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM (Paul Finkelman ed., 1988). *Id.* at 754 n.8.

23. Jackson v. Bulloch, 12 Conn. 38 (1837); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836); Lemmon v. People, 20 N.Y. 562 (1860).

they had brought with them on the journey.[24] The courts of all three free states relied on the doctrine that slavery is against natural law, and can therefore exist only where it is sanctioned by positive law. Thus, natural law in some states and both natural and positive law in others operated to free any person brought into the state in bondage.[25]

Less well-known even than the history of slavery in the state courts is the history of school integration in the state courts. Although in 1849 the Supreme Judicial Court of Massachusetts refused to declare segregated schools invalid under the Massachusetts Constitution,[26] later in the century, other state courts were more enlightened. On April 14, 1868, two months *before* the Fourteenth Amendment was ratified, the Supreme Court of Iowa struck down segregated schools as a violation of the Iowa Constitution.[27] In keeping with the natural law traditions of state courts, the Iowa court based its decision not only on that part of the written constitution which provided "[t]he board of education shall provide for the education of *all the youths of the State*,"[28] but also on "the principle of equal rights to all, upon which our government was founded,"[29] and "the spirit of our laws."[30]

Iowa was not alone. In 1881, seventy-three years before the United States Supreme Court struck down Topeka's segregated schools in *Brown v. Board of Education*, the Supreme Court of Kansas prohibited a different Kansas school board from maintaining segregated schools.[31] Justice Valentine's stirring rejection of segregation is startlingly similar to Chief Justice Warren's later reminder that education is the foundation of citizenship. Valentine declared for his court:

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24. Although the Massachusetts and Connecticut cases involved somewhat longer sojourns in the state, all of the slaveowners intended to return to their homes in states which permitted slavery.

25. Both cases rested in part on Somerset v. Stewart, Loft 98 Eng. Rep. 449 (K.B. 1772) 20 Howell St. Tr. (G.B.) 1 (1772). For a thorough discussion of the American implications of *Somerset*, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

26. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

27. Clark v. Board of Directors, 24 Iowa 266 (1868).

28. IOWA CONST. of 1857, art. 9, § 12, *quoted in Clark*, 24 Iowa at 271 (emphasis added).

29. *Clark*, 24 Iowa at 269.

30. *Id.* at 276.

31. Board of Educ. v. Tinnon, 26 Kan. 1 (1881). The court ruled that the municipal attempts at segregation violated state statutory authority, rather than the state constitution, but the language is unusually broad for a purely statutory case. For example, the court suggested that "[n]o good reason" could be given for segregated schools. *Id.* at 21.

> [P]ersons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem better that all should be taught in the same schools.[32]

Unfortunately, the Kansas Supreme Court changed its views two decades later, upholding segregated schools in 1903[33] and ultimately leaving to the United States Supreme Court the task of desegregating public schools in Kansas.

Turning now from the dusty pages of nineteenth-century law reports to today's national developments about abortion and gay rights, state courts have also been in the forefront of both issues. In 1969, four years before the United States Supreme Court decided *Roe v. Wade*, the Supreme Court of California invalidated a law prohibiting abortions, finding the statute in violation of both the federal and state constitutions.[34] The court did not cite particular provisions of either constitution, noting instead that the absence of an enumerated right of privacy "is no impediment to the existence of the right."[35]

The California Constitution may have been a useful tool for doing justice in the abortion context, but, as with slavery and school segregation, it was ultimately unnecessary. The Federal Constitution was eventually interpreted to protect the same rights that the state constitution did. In some contexts, however, the state constitution remains the only bulwark against injustice.

In 1977, the United States Supreme Court held that state and federal governments could legitimately refuse to pay for abortions for indigent women, even if the government paid the substantially greater cost of childbirth.[36] They reaffirmed that holding three years later—permitting the government to eliminate funding even for abortions necessary to the woman's health—and have not wavered since.[37] The Federal Constitution thus protects the right to obtain an abortion, but only for women who can afford one.

The New Jersey Constitution, on the other hand, protects a somewhat broader right. In 1982, Justice Pollock held that the "natural and inalienable rights" provision of the New Jersey Constitution prohibited the government from simultaneously funding childbirth and

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32. *Id.* at 19.
33. Reynolds v. Board of Educ., 72 P. 274 (Kan. 1903).
34. People v. Belous, 458 P.2d 194 (Cal. 1969).
35. *Id.* at 200.
36. Maher v. Roe, 432 U.S. 464 (1977).
37. Harris v. McRae, 448 U.S. 297 (1980).

denying funding for medically necessary abortions.[38] In that case, the New Jersey court rejected not only the specific holdings of the earlier United States Supreme Court cases, but also questioned the latter's narrow approach to equal protection law. Justice Pollock noted that "the conflicting individual and governmental interests do not easily fit into [the] rigid analytical structure" of two-tiered equal protection analysis.[39] Instead, "'a court must weigh the nature of the restraint or denial against the apparent public justification, and decide whether the State action is arbitrary.'"[40] While Justice Pollock's modern language is not as mellifluous as the natural rights rhetoric of the older cases, it reflects the same inclination to pursue fairness and justice.

Finally, state courts are interpreting state constitutions to provide to gays and lesbians the protections denied them by the United States Supreme Court's ruling in *Bowers v. Hardwick*, which held that Georgia could criminalize homosexual sodomy. Using stirring natural law rhetoric, the Kentucky Supreme Court recently invalidated a Kentucky law prohibiting "deviate sexual intercourse with another of the same sex."[41] The court relied on such sources as John Stuart Mill's *On Liberty* to hold that "it is not within the competency of the government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned."[42] Thus, according to Justice Leibson's majority opinion, "[i]n Kentucky [Equal Justice Under Law] is more than a mere aspiration. It is part of the 'inherent and inalienable' rights protected by our Kentucky Constitution."[43] Justice Combs declared in a concurring opinion that "[t]he [Kentucky] Constitution does not create any rights of, or grant any rights to, the people. It merely recognizes their primordial rights, and constructs a government as a means of protecting and preserving them."[44] Other states have also

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38. Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982). Other state courts have reached similar conclusions. *See* Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Hope v. Perales, 571 N.Y.S.2d 972 (Sup. Ct. 1991), *aff'd*, 595 N.Y.S.2d 948 (App. Div. 1993), *rev'd*, 634 N.E.2d 183 (N.Y. 1994).

39. *Byrne*, 91 N.J. at 308, 450 A.2d at 936.

40. *Id.* at 309, 450 A.2d at 936 (quoting Robinson v. Cahill, 62 N.J. 473, 492, 303 A.2d 273, 282, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973)).

41. Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992) (quoting KY. REV. STAT. ANN. § 510.100 (Baldwin 1992)).

42. *Id.* at 494 (quoting Commonwealth v. Campbell, 117 S.W. 383, 385 (Ky. 1909)).

43. *Id.* at 501.

44. *Id.* at 502 (Combs, J., concurring).

invalidated penalties against homosexual conduct,[45] and the Hawaii Supreme Court has recently declared that the ban on homosexual marriage will be struck down unless the state can show a compelling reason for it.[46]

In these cases, state courts used state constitutions to achieve ends that the Federal Constitution at the time did not, and much of their rhetoric suggests that their goal was to further the cause of justice. I suspect that not everyone will agree with my assessment that all of these cases were decided justly. Indeed, I am confident that while everyone will agree that state courts acted righteously and courageously in abolishing slavery and striking down segregated schools, there will be more controversy over the decisions involving abortion and homosexuality. But the lack of controversy over slavery and integration is a reflection of our current sensibilities, and the result of decades of national debate over those very issues. Indeed, both issues were originally so controversial that they could not be resolved without the use of federal troops. What I suggest is that when we evaluate cases like the abortion and gay rights cases, we should engage in that same kind of substantive debate, although I hope that federal troops will not be necessary this time.

We who have come of age during the Warren Court era—and now our students, on whom we are visiting our ahistorical prejudices—have a distorted view of the relationship between state and federal courts. Because the federal courts were so vigorous (some might say overly vigorous) in protecting liberty during the Warren Court era, there was little left for state courts to do. Two decades—virtually a generation—of federal dominance has now led us almost to forget that state courts can also protect liberty. When, in the wake of a federal abandonment of the goal of doing justice (a withdrawal that was justified in terms of judicial restraint and strict constructionism), we rediscovered state courts, we had apparently forgotten the natural law heritage they once shared with the federal courts.

The debate over state courts has been mistakenly focused on the implications of their status as *state* courts rather than on the role of state *courts*. We have substituted a sterile argument over the arcana of federalism for a robust debate over the meaning of our fundamental constitutional principles. If the Kentucky Constitution affords more protection to gays and lesbians or the New Jersey Constitution requires more public funding of abortion than the Federal Constitution does, I

45. *See* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980).

46. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

would rather discuss which rule is more just—and, by implication, which ought to be adopted by other jurisdictions—than whether it is possible or desirable for state courts to engage in truly independent constitutional review. Wouldn't you?