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STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

Justice William J. Brennan, Jr.

Excerpt:

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 [FN61]] ***499** 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." [FN62]

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. [FN63] 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,* [FN64] 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. [FN65] 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. [FN66] 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." [FN67] 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 ***500** 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." [FN68]

Among other instances of state courts similarly rejecting United States Supreme Court decisions as unpersuasive, the Hawaii [FN69] and California [FN70] 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; [FN71] the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure; [FN72] and the South Dakota [FN73] and Maine [FN74] Supreme Courts have held that there is a right to trial by jury even for petty offenses. [FN75]

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. [FN76] 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....” [FN77] 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. ***501** 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; [FN78] thereafter the United States Supreme Court ruled that federal law was to the contrary. [FN79]

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. [FN80] This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision, [FN81] 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. [FN82] And prior to the adoption of ***502** 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. [FN83] 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. [FN84] Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated [FN85] and systematic [FN86] 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 ***503** rights, [FN87] 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, [FN88] 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." [FN89] 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" [FN90] in the body of the Constitution. There *504 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." [FN91]

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." [FN92] 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...." [FN93]