

DUAL CONSTITUTIONALISM IN PRACTICE AND PRINCIPLE

JUDITH S. KAYE

THE FORTY-FIRST BENJAMIN N. CARDOZO LECTURE DELIVERED BEFORE THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK

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The forty-first Benjamin N. Cardozo Lecture was delivered at the House of the Association on February 26, 1987. The honorable Judith S. Kaye is an Associate Judge of the Court of Appeals of the State of New York.

Introduction by Fern Sussman

Welcome to the 41st Annual Cardozo Lecture. I am grateful to the President, Bob Kaufman, for giving me the opportunity to speak to you briefly before turning over the evening to our speaker, Judge Judith Kaye, for what I know will be a wonderful talk. I want to also especially welcome and thank Chief Judge Sol Wachder, who arranged for the exciting historical exhibit that is now on display in the Reception Room, only for this evening.

It is hard to believe that Judith was appointed to the New York State Court of Appeals more than three years ago. Even more surprising to some of you may be the fact that she has already become the second most senior associate judge on that court.

When appointed, she had previously served on the Executive Committee of this Association, and had just been appointed chair of the Committee on Lectures and Continuing Education. As you know, she was a partner at Olwine Connelly after having earlier in her career been associated with Sullivan and Cromwell.

Her breadth and scope of legal, community and research activities has been remarkable. I was particularly interested in the depth of her commitment to organizations which fight for improved selection of judges.

What a wonderful series of events and decisions brought Judith to commit years of her public service time, to, among others, this Association, the American Bar Association and the American Judicature Society—three organizations that have for so many years been in the forefront of those that have advocated merit selection of judges; and then to be the fifth judge chosen by that very process to New York's highest court.

As some of you may know, at the first organization meeting in 1870 of what became The Association of the Bar of the City of New York, Samuel Tilden's major speech railed against the incompetence and venality of some members of the judiciary. He also decried the excesses of Tammany Hall; with its control over the judiciary and the subsequent entanglement of politics, patronage and the legal system. Mr. Tilden concluded his speech by pointing out the importance of honest judges and an uncompromised administration of justice to each New York citizen as well as to the financial and commercial growth of the City.

The recent scandals in county political leadership and inevitably, in the politics and patronage involved in the election of judges nominated by such county leaders, have once again made clear that our commitment must be to

merit selection of all of the judges of New York.

In 1976, the efforts of Chief Judge Charles Brietel, and the commitment of Governor Hugh Carey to "take the clubhouse out of the courthouse" led to the first passage of the constitutional amendment that provided a merit selection process only for the State's highest court.

Some opponents of that reform pointed out that Judge Cardozo himself was elected to the Court of Appeals. I can think of no better authority to cite on that issue (or almost any matter affecting our profession) than Whitney North Seymour.

When Whitney gave the 25th Cardozo Lecture in 1968, he made the following observations:

after almost half a century in the courts, I am satisfied that a main present obligation of the bar to the public and to the profession is to try to eliminate political considerations from their continued excessive role in the choice of our judges...

After mentioning the fine judges who had been elected, including Judge Cardozo, he stated:

The elective system is by no means entitled to credit for all, or even most of our outstanding judges; all that can be said is that some outstanding judges slip through the present far too political system.

He concluded his appeal for the bar's support of improved selection of judges this way:

This matter is one of the most pressing concerns of the bar of our country. If, as no doubt will happen, our urban problems multiply and our institutions are increasingly challenged and questioned, it is our particular duty to see that the administration of justice is not open to attack. Routine, inconsiderate treatment of those brought into court breeds disrespect for law and our institutions which can spread like an infection...The best administration of justice is provided by the best judges...

Judge Kaye could not be a better example of that standard. Her credentials in the law and the community were certainly impressive; but more than that is the kind of person she is.

When this Cardozo lecture series was established in 1940, the Association dedicated it with a resolution which described Judge Cardozo as: "A rare character that radiated goodness; that was inspired by a love for the law, a passion for justice and sympathy for humanity." I am pleased to introduce to you another such "rare character" Judge Judith Kaye.

JUDITH S. KAYE

In this year of celebration of the federal Constitution's 200th anniversary, we appropriately also focus attention on our state Constitution, adopted ten years earlier. Given that we have both a state and federal Constitution, a state and federal Bill of Rights, and state and federal courts that are sworn to uphold them, the relation and accommodation between the two is naturally a subject of interest.

Of particular concern are provisions that are parallel if not identical in both constitutions, including, for example, such significant protections of the Bill of Rights as the right of free speech; the right to counsel, due process and equal protection of the law; and the protection against unreasonable searches and seizures. Should state courts decide such common issues on a state or federal basis? Should they read their own constitutions to provide greater protection than found under the equivalent provisions of the federal charter, or should they simply conform to federal precedents? I would like to explore these questions both as a matter of history and as a matter of theory.

I

Much has been written on the recent emergence of state constitutional law.^[1] The literature indicates that, more often now, state courts are deciding that standards set by the United States Supreme Court under the federal Constitution do not satisfy the more rigorous requirements of similar provisions of state constitutions, as to which state courts are in general the final arbiters.^[2] Some describe this as a new judicial federalism; others, more pejoratively, as an unprincipled reaction to particular criminal law decisions and perceived directions of the Supreme Court.

History tells us that, whether in civil or criminal matters the dependent protection of individual rights under state constitutions is not new, nor is it an illegitimate assumption of authority by state courts. Ironically, in this bicentennial year the emergence of state constitutional law is in many respects a return to a philosophy of federalism similar-though admittedly not identical-to that of the framers.

When the framers gathered in Philadelphia each of the Colonies already had adopted a constitution setting out the fundamental terms by which it was to be governed. In New York, our Constitution, drawn up under the stress of war and revolution, was adopted on April 20, 1777.

The state charters for many years were the sole protection against governmental overreaching. Indeed, when the federal Constitution was first drawn up, a Bill of Rights was viewed as unnecessary, in part because state constitutions already safeguarded the rights of citizens. And when the Bill of Rights was later added, it was taken from and actually mirrored corresponding state enactments.^[3] Despite this deliberate duplication, there was no thought that state constitutions were thereby superseded or their Bills of Rights rendered redundant. To the contrary, the contemplation was that the states would remain the principal protectors of individual rights-the "immediate and visible guardian of life and property"^[4]-with the powers of the nation government principally directed to external objects such as war, peace and foreign commerce.^[5]

The framers designed a system of dual federalism-that the federal government and the states constituted separate sovereignties, each supreme within its sphere. For the first century of our history, the federal Bill of Rights was a protection solely in relation to federal authorities; state constitutions protected the People from abuse by state authorities.^[6] *Barron v. Mayor of Baltimore*,^[7] decided by the United States Supreme Court in 1833, exemplifies this design. By a series of ordinances, the City of Baltimore had redirected the course of several streams so that they ran into a harbor near a wharf owned by Barron, Barron proved to the satisfaction of the trial court that the soil and debris carried down by the streams made the harbor so shallow that his pier became unusable. After losing before a Maryland court of appeals, Barron appealed to the United States Supreme Court, arguing that the City of Baltimore had taken his property without just compensation in violation of the fifth amendment. In a unanimous decision written by Chief Justice Marshall, himself a great federalist, the Court dismissed the appeal for want of jurisdiction. The fifth amendment-and by analogy, the entire Bill of Rights-in Chief Justice Marshall's words, "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."^[8] As the Court wrote:

Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

* * *

In their several constitutions, [the states] have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively....^[9]

The state courts, by the same token, understood that they were the arbiters of their own constitutions. In New York, as early as 1856, in *Wynehamer v. People*,^[10] the New York State Court of Appeals struck down a statute as violative of the due process clause of the state Constitution. That case involved an 1855 "Act for the prevention of intemperance, pauperism and line," which made unlawful the possession and sale of "intoxicating liquors." The Court found that the Act constituted a deprivation of property without due process of law, writing that it was:

not insensible to the delicacy and importance of the duty [it assumed] in overruling an act of the legislature, believed by so many intelligent and good men to afford the best remedy for great and admitted evils in society; but we cannot forget that the highest function intrusted to us is that of maintaining inflexibly the fundamental law. And believing...that the prohibitory act transcends the constitutional limits of the legislative power, it must be adjudged to be void.^[11]

In the wake of the Civil War and in a spirit of nationalism, the fourteenth amendment was adopted. Although its full reach was not immediately manifest, the fourteenth amendment eventually changed half of the *Barron* formula. After a false start in the *Slaughter-House Cases*,^[12] the Supreme Court began repeatedly suggesting that the due process clause of the fourteenth amendment applied to and limited the exercise of power by the states.

As the federal Constitution marked its centennial, the Supreme Court had occasion to consider whether a Kansas statute barring the manufacture and sale of "intoxicating liquors" constituted a denial of due process.^[13] Despite counsel's reliance on that leading New York State case-*Wynehamer v. People*, seemingly right on point-the Supreme Court held that it did not. The Court, however, made clear its belief that the fourteenth amendment applied to the states, specifically noting that state legislation would "come within" the amendment if "it is apparent that [the legislation's] real object is not to protect the community, or to promote the general wellbeing,

but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."^[14]

By the end of the century the Supreme Court's oft-repeated suggestion^[15] ripened into a holding. The Court struck down, as violative of the federal due process clause, a Louisiana statute regulating the issuance of marine insurance, ushering in the "*Lochner* era" of substantive due process.^[16] Although that era ended dramatically in 1937,^[17] two legacies remain viable to this day. *First*, the federal due process clause applies to the states and sets a floor below which state conduct may not fall. And *second* one of the tasks of the Supreme Court is to establish where that floor should be set. To this extent, the fourteenth amendment modified the vision of two independent sovereigns described by Chief Justice Marshall in *Barron v. City of Baltimore*. However, for present purposes, it is more important to recognize what the fourteenth amendment did not do: it did not alter the other half of the *Barron* formula, that each state by its own constitution may limit and restrict its own powers as its wisdom suggests.

In short, as a historical matter, state constitutions exist and function independently of the federal Constitution. As the New York Court of Appeals concluded in 1911, Supreme Court interpretations of the fourteenth amendment are simply not controlling of our construction of our own Constitution.^[18] Decades after the adoption of the fourteenth amendment, state and federal courts continued to function as a partnership of equals in the protection of constitutional rights.

While dual federalism remained theoretically intact, one of the two partners thereafter began to play a more dominant role. This trend may, for convenience, be dated to 1938-when the Supreme Court suggested in *Caroline Products*^[19] that the specific prohibitions of the first ten amendments might be embraced within the fourteenth amendment and apply to the states.^[20] The process of incorporation accelerated sharply during the 1960s, until by 1969 all or part of the first,^[21] fourth,^[22] fifth,^[23] sixth,^[24] and eighth^[25] amendments were applied to the states.

At the same time-and expressing dissatisfaction with many state courts' discharge of their "front-line responsibility for the enforcement of constitutional rights"^[26]-the Supreme Court began actively widening and raising the federal floor. Individual rights became increasingly federalized. The broadening application of provisions of the federal Bill of Rights to the states "made U.S. Supreme Court law the touchstone for much of the nation's constitutional decision making, concerning individual rights."^[27] These are the years in which many of us received our professional education and training. As lawyers, we have acquired an easy familiarity with the federal Bill of Rights and have grown accustomed to controlling federal precedents in the adjudication of constitutional rights of the citizens of this State, even though this is in fact a relatively new development in our nation's history.

In our dual system, the Supreme Court's growing dominance necessarily affected constitutional law as applied by state courts. While state courts have at all times been important contributors to the body of constitutional law, they too became involved in the application of federal law. So long as the federal floor, or national minimum, was satisfied, state courts could have imposed ceilings in the form of greater rights applicable within their own borders under their own constitutions, and these judgments would then have been conclusive, beyond Supreme Court review.^[28] But as a practical matter, the federal guarantees as then interpreted by the Supreme Court in general not only satisfied but often exceeded their view of the requirements of comparable state provisions.^[29]

This same fundamental dualism has more recently sparked the heightened interest in state constitutional law, but now it is the state courts that are expressing dissatisfaction with the Supreme Court's role in the enforcement of constitutional rights.^[30] While state courts interpreting parallel provisions of their charters may have been satisfied in particular cases that the federal floor also established their own ceiling, reformulation of the floor cannot help but bring the rest of the structure into question. The point to be drawn from history, however, is that in a system of government that is founded upon dual sovereignties, independent state court adjudications based on state constitutions-two layers of constitutional protection-are hardly revolutionary or illegitimate.

This heightened interest in state constitutional law has gained impetus from other developments in the United States Supreme Court, not the least of which have been the writings of individual Justices.^[31] Of the past few years, to my mind a most significant development in this regard has been the 1983 Supreme Court decision in *Michigan v. Long*.^[32]

The question of when a state court judgment is subject to Supreme Court review, and the source of such authority, is not easily answered, except we know that as a matter of policy a state judgment will not be reviewed if it rests on a nonfederal pound which is independent of the federal question in the case and adequate to support the judgment.^[33] What is an "adequate and independent" state ground has itself remained elusive, and appears to have been determined by any of several techniques applied on an *ad hoc* and largely unexplained basis. Until *Michigan v. Long*, however, it was safe to assume that any lack of clarity as to the basis of a state court judgment would be resolved in favor of the state court as the final arbiter, and against further review. *Michigan v. Long*, of course, reversed this historical presumption. As a result, more state court judgments extending the rights of its citizens will, for the time being, be brought under Supreme Court scrutiny.

However much one might be discomfited by this shift or by the new methodology, *Michigan v. Long* has sharply focused the issue; it has staked out the state courts' sphere of autonomy; and it has given the state courts the ability to assure that they remain the ultimate arbiters of state law decisions. Where a state court makes clear that its judgment rests on bona fide separate, adequate and independent grounds, the Supreme Court has declared that it will not review that decision. As Justice O'Connor wrote: "We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law."^[34]

Justice Stevens has added a further ingredient: that it is not only fundamental that state courts be left free to develop their own jurisprudence but also, from the federal perspective, desirable and important that they do so. Justice Stevens in a recent concurrence took the Massachusetts Supreme Court to task for premising a decision on federal grounds, needlessly inviting Supreme Court review and ultimately a remand for decision on the state ground, when it might have finally resolved the issue in the first instance under its own constitution.^[35] In charging the Massachusetts court with "a misconception of our constitutional heritage and the respective jurisdiction of state and federal courts,"^[36] Justice Stevens echoed a sentiment found in our earliest history, that the states in our federal system are the primary guardian of the liberty of the people. This is a premise of our constitutional system.

As a matter of history, therefore, it is hardly a novel doctrine that underlies contemporary interest in independent state court adjudication of concurrent constitutional provisions.

II.

Against this background, I would like to turn to New York State in particular.

As an expression of inviolable principle and fundamental law, the New York Constitution is a curious document—particularly when laid against the United States Constitution. I mean this in two respects.

First, the state Constitution is long and filled with detail, like a volume of miscellaneous statutes, specifying even—as a matter of constitutional dimension—the width of certain ski trails. The article dealing with local finances (article VIII) is alone longer than the entire federal Constitution. Since its enactment 210 years ago, it has swelled in size and scope, particularly in the aftermath of the depression, as part of the amendments of 1938. Provisions relating to barge canals, elimination of railroad grade crossings, social welfare and returning veterans reflect paramount concerns at given moments in the rich history of this State, alongside the abiding concern in our extensive Bill of Rights and throughout the Constitution for fundamental rights and individual liberty.

Second, while the federal Constitution has been amended only 26 times in its entire history, the state Constitution has been amended often, for the most part in isolated fragments initiated by the legislature and thereafter approved by the People at a general election.^[37] The Constitution has also been extensively revised, most recently in 1938, as the consequence of constitutional conventions. The last proposed new constitution of 1967 was resoundingly defeated at the polls, as were the proposed new constitutions of 1869 and 1915. Additionally, as the Constitution itself directs, every 20 years, and whenever the legislature provides, the People are asked at a general election, "Shall there be a convention to revise the Constitution and amend the same?" The combination of high detail and accessibility of the amendment process gives our Constitution a distinctive New York character; it is a product and expression of this State.

While current interest centers on the common provisions of our two Constitutions, to proceed right to that issue ignores the fact that the People of this State have chosen to "constitutionalize" a great number of other matters in the Bill of Rights and throughout the state Constitution. Fortuitously, the heightened interest in concurrent provisions has drawn attention as well to the many matters uniquely part of the state charter.

I will not linger long on a recitation of the provisions of the state Constitution that have no specific analogue or counterpart in the federal document. No one would question that, though other considerations such as due process or equal protection may also be implicated, these singular provisions must at some point be analyzed as a matter of state law.

Our Constitution provides, for example, the right to a free education^[38] and declares that the aid, care and support of the needy are public concerns.^[39] It directs that provision be made for the protection and promotion of public health, and it recognizes that the legislature in its discretion may provide for low-rent housing and nursing home accommodations for persons of low income.^[40] It specifies that environmental conservation is a policy of this State, and mandates that adequate provision be made for abatement of pollution and noise.^[41] As a matter of constitutional directive, certain executive rules and regulations cannot be enforced until they have been

publicly filed.^[42] The benefits of membership in a state pension or retirement system may not be impaired;^[43] and the jurisdiction of the Appellate Division to hear appeals may not be diminished.^[44] The Bill of Rights bars the abrogation of a cause of action for wrongful death; it guarantees the right of workers to the prevailing wage, and to organize and bargain collectively; and it provides for workers' compensation.^[45]

Given its laborious detail, our Constitution may not in every phrase ring with the majesty of Chief Justice Marshall's declaration: "it is a constitution we are expounding."^[46] But it is a constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude. To borrow former Chief Judge Breitel's eloquent words, in overturning the moratorium on enforcement of City obligations as violative of the State constitutional requirement of a pledge of faith and credit: "But it is a Constitution that is being interpreted and as a Constitution it would serve little of its purpose if all that it promised, like the elegantly phrased constitutions of some totalitarian or dictatorial Nations, was an ideal to be worshipped when not needed and debased when crucial."^[47]

One cannot help but wonder, reading our Constitution, why some seemingly everyday matters were elevated to a place in that document of fundamental law and, even beyond, enshrined in its Bill of Rights. Many of these matters were and are the subject of state statutes, some additionally the subject of federal statutes. They were nonetheless purposefully placed in our state Constitution-within an ambit of special deference and protection-in many instances to declare the existence of a right and correlative commitment by the State; to put them beyond repeal by the legislature; and to insure that derivative legislation involving the expenditure of state money and credit would not be cast out as unconstitutional by the judiciary. The People have declared to the courts and others that, as part of the Constitution, these matters stand above the miscellaneous statutes as their expression of what they consider to be particularly important and not subject to revision except by them.

This being so as to the provisions that have no federal analogue or counterpart, no less can be said of the provisions of our state Constitution that do have a parallel in the federal Constitution. These provisions have obviously also been placed, and retained, our Constitution as an expression of the significance they have to the People of this State.

III.

Where the text of the state Constitution deals with matters not enumerated federally there is obviously basis-indeed necessity-for independent interpretation. Similarly, where there are material textual differences between the state Constitution and a corresponding provision of the federal Constitution, there is little difficulty concluding that something different may have been intended. Does the absence of textual difference in comparable provisions preclude principled independent analysis under the state Constitution?

History itself answers this question. The federal Constitution was, after all, taken from state models; provisions of our state Constitution have been drawn from the federal document; and many of the same individuals - notably John Jay - had their hand in both. Common objectives, common drafters and common models naturally engender common texts. Yet it is most significant that, as a political act, two separate constitutions were adopted, neither expressly superseding the other, and two have endured. As a judicial act, therefore, constitutional analysis by state courts cannot stop with a mechanical matching of texts; significant protections of a state constitution are otherwise relegated to redundancy. ^[48]

In this State, in fact, there is a long tradition of reading the parallel clauses independently and affording broader protection, where appropriate, under the state Constitution. One commentator, having studied the New York cases between 1960 and 1978, has concluded that the courts of this State have consistently recognized the independent value of their own constitutional traditions, a recognition that "is not a recent phenomenon brought about by the Burger Court's retrenchment in criminal procedure." ^[49] In this connection, a substantive area that springs to mind is the right of an accused to the assistance of counsel, found in similar words in both Bills of Rights. The right to counsel was first set out in the state Constitution of 1777; from earliest times it has been insisted upon in our case law, and given wider scope than the corresponding federal right. The New York State decisions upholding the right to counsel have been characterized as "the strongest protection of right to counsel anywhere in the country," and cited as "a striking illustration of a constitutional tradition that has developed on its own terms and, thus, was not susceptible to the vagaries of changing Supreme Courts." ^[50]

The reasons why separate interpretation and broader protection under the state Constitution may be appropriate are perhaps best shown by two additional examples of parallel provisions: the due process clause, and the protection against unreasonable searches and seizures.

Our due process clause, enacted before the fourteenth amendment, concludes: "No person shall be deprived of life, liberty or property without due process of law." The fourteenth amendment to the federal Constitution provides: "nor shall any state deprive any person of life, liberty, or property without due process of law." Does due process under the state Constitution mean whatever the Supreme Court says due process means under the federal Constitution?

Early in its history, in the *Ives* case, ^[51] our due process clause became the basis for striking down the Workmen's Compensation Act of 1910, a statute requiring employers, irrespective of fault, to contribute to an insurance fund to benefit employees injured in the course of employment. That unanimous opinion of the Court of Appeals was immediately and immensely unpopular. It was publicly declaimed by Theodore Roosevelt, then

planning his Progressive political movement; it led to amendment of the state Constitution specifically to include workers' compensation in no less than the Bill of Rights; it was rejected nationally; and it cost the author of the offending opinion the chief judgeship of the Court of Appeals in the next election. That decision has, moreover, earned a permanent place in the study of jurisprudence, as an example of how a court's choice of methodology can dictate the outcome of a case. ^[52]

But apart from its historical, political and jurisprudential interest *Ives* is also relevant to the present discussion in that two proffered decisions of the United States Supreme Court which supported the validity of the statute were rejected by the Court of Appeals our own as "not controlling of our construction of our own Constitution." The Court wrote: "All that it is necessary to affirm in the case before us is that in our view of the Constitution of our state, the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of without due process of law, and the statute is therefore void." ^[53] *Ives* thus stands as a declaration of the independence of the state court in construing the due process clause of the state Constitution. A statute possibly valid as a matter of federal due process was nonetheless upset as a matter of state due process.

Since *Ives*, the state courts have drawn on the state's constitutional history as well as its judicial history in having accorded the due process clause wider scope than its federal counterpart. *Sharwk v. Dell Buick-Cadillac, Inc.*, ^[54] for example, involved a challenge under the state and federal due process clauses to the statutory lien enabling garagemen to foreclose for delinquent repair and storage charges. Two months earlier, the Supreme Court had made clear that a private sale of property subject to a warehouseman's possessory lien did not constitute "state action" for purposes of the fourteenth amendment, ^[55] a holding which might have been dispositive. The New York Court of Appeals, however, recognized that it could, and should in this instance, give a broader reading to the "state action" requirement because the state due process clause-unlike its federal counterpart-contains no reference to "state." The material factors cited by the Court of Appeals in invalidating the statute were the difference in constitutional text, the history of the clause within the State, the long record of due process protections particularly afforded our citizens, and fundamental principles of federalism. ^[56]

Thus, the due process example shows that any difference between texts may become significant in particular cases as a point of departure from federal precedents. Moreover, how a concurrent provision arrived in our charter, as well as how it has been interpreted within the State, may signal whether, in certain cases, greater rights should be afforded under the state Constitution. ^[57]

As a further example, the state protection against unreasonable searches and seizures has neither this textual nor historical distinction from the federal Constitution. ^[58] Indeed, article 1, § 12, taken word-for-word from the fourth amendment, did not become part of the state Constitution-we were possibly the last state to adopt it-until 1938. The protection against unreasonable searches and seizures itself generated little dispute at the 1938 convention-that very protection had for a decade already been contained in the Civil Rights Law-but there were heated exchanges regarding the exclusionary rule. The Supreme Court had held that the exclusion of evidence in federal courts was essential to meaningful protection against intrusive searches, ^[59] but the New York Court of Appeals chose not to accept that holding as a matter of state law. Writing for the New York court, Judge Cardozo observed that state courts were not bound to interpret their own statutes in the same manner as the federal courts had interpreted the federal Constitution, and concluded that the public policy of this State favored rejection of the exclusionary rule. ^[60] Ultimately, the protection against unreasonable searches and seizures was added to the state Constitution but an explicit exclusionary rule was not, thus leaving open the issue whether the exclusion of evidence was to follow implicitly, as it did under the federal scheme, and the courts have held that it does. ^[61]

Faced with this history and text, during many years the Court of Appeals in considering state search and seizure arguments chose to follow a policy of uniformity with the federal courts.^[62] This meant that the State in general followed fourth amendment precedents, recognizing as a valued consequence that police officers and reviewing courts would thereby have but one bright-line rule to guide them.^[63] Two significant factors of course attended that policy. First, as in all things, continuing a policy of conformity necessarily depends upon the continuation of that to which one has chosen to conform. And second, a policy of having a single workable rule can as readily be served by imposing a higher state standard as by conforming to the federal standard. As the Court of Appeals recently noted, the interest of uniformity is only "one consideration to be balanced against other considerations that may argue for a different State rule. When weighed against the ability to protect fundamental constitutional rights, the practical need for uniformity can seldom be a decisive factor."^[64] Where the text and history of a provision point to uniformity-and without addressing whether a state court should first consider the federal precedents or its own state law, itself a subject of lively difference^[65]-what other factors have nonetheless motivated the conclusion that greater protection should be afforded under state law?

A response to that question lies in the fact that the Supreme Court's role is to establish only the minimal level, the lowest common denominator of individual rights applicable throughout the nation while it is the role of state courts, in discharging their additional responsibility to uphold their own constitutions, to safeguard and supplement those rights where necessary.^[66] Sound policy considerations have therefore been cited as the basis for different interpretations of common provisions-such considerations as statutes or common law, traditions of the state, and distinctive public attitudes toward the scope, definition and protection of the right in question. An argument for a broader construction under the state Constitution than that established under the federal Constitution requires more than merely urging that some other result is preferred.^[67]

It has long been recognized that issues relating to free expression involve community standards and traditions; disputes regarding land use are another example raising policy concerns peculiar to the state.^[68] Considerations of policy have similarly led the Court of Appeals to depart from federal precedents in search and seizure cases.^[69] For example, by decisional law developed over the years, clear, definable standards had been established and consistently applied to probable cause determinations within this State. The New York Court in recent cases has continued to apply those standards as a matter of state constitutional law under article 1, § 12. Its departure from fourth amendment precedents has been expressly predicated on policy considerations, particularly the perception that the Supreme Court of late had changed the federal standards, muddying the rules and diluting judicial supervision of the warrant process, thereby heightening "the danger that our citizens' rights against unreasonable police intrusions might be violated."^[70]

Thus-despite perceived or even actual identity of texts-there may in particular instances be principled basis for broader protection within this State because of our history in adopting or applying a clause, or for other reasons. While language differences between the two constitutions may determine that there is a need for independent analysis, where our Constitution is at issue the fact that there is no language difference does not spell the end of state judicial review. It invites inquiry into matters of history, tradition, policy and other special State concerns.

IV.

I would like to shift the focus from the historical and practical to the theoretical by asking, is independent state court adjudication of parallel protections supported by a cohesive theory, or is this today indeed merely a passing disagreement with particular decisions of the United States Supreme Court?

You are of course familiar with the great debate raging in the law as to how a constitution should be interpreted.

[\[71\]](#) Some insist that it must be read by the intent of the framers; others assert that intent of the framers cannot be controlling, and that the document must be interpreted in light of prevailing attitudes and modern values. It occurs to me that this issue, as well as the one at hand, both propel us to an even more fundamental inquiry. We can answer the question of how to interpret a constitution, whether state or federal, only by understanding what, in a real sense, a constitution is.

The very word "constitution," in common understanding, means the most basic structure of a thing, how it is constituted. The English regarded themselves as having a constitution long before the Colonials began drawing up constitutions for themselves on paper, and the English constitution has never been written down in a single document. That the English can speak of their unwritten "constitution" helps to underscore exactly what a constitution means. A community's constitution is its basic make-up, the source, delineation and delimitation of rights and powers within that society, the collective assessment of the rules of the game under which the process of decision making and exercise of power within that community will proceed. As the very basis of a living community, a constitution is necessarily a thing of that community.

The essential difference between British and American constitutionalism is not that American constitutions are written. Rather, it is that the British constitution is founded upon a concept of parliamentary supremacy. Under British theory constitutional sovereignty resides in Parliament. The laws enacted by Parliament, though restrained by traditions and principles are perforce within the constitution. Our nation, by contrast, is rooted in a concept that sovereignty resides in the People. Thus it is possible that our designated lawmakers can at times enact laws that fall outside the basic law established by the People. Where the People are sovereign, their conception of their constitution exists apart from, and above, ordinary legislative enactments.

The day-to-day function of a constitution, however, goes further. It is a fact of human nature, and of the democratic process, that our actions-both as individuals and as a community-sometimes conflict with our most basic, or overarching, values. Therefore, what we set out to embody in a constitution are those values we do not wish to sacrifice to more transient choices. Our constitutional values can of course be explicitly changed, but amendments are accomplished only through extraordinary political processes-the approval of two successive legislatures followed by a popular referendum in the case of the state Constitution, [\[72\]](#) and the approval of two-thirds of both Houses of Congress and three-fourths of the states in the case of the federal charter. [\[73\]](#) The constitution, in short, is that set of values to which we have bound ourselves, the values that transcend even our currently made choice-or in the words of James Madison, the values that "counteract the impulses of interest and passion." [\[74\]](#)

This is no abstraction but rather a reflection of the most abiding reality of both our past and present. We talk a

great deal about the constitutional shield provided the People against the government, but in a democracy the threats to our values often have popular support. The Constitution throughout history has been called upon to protect long venerated values that are momentarily abandoned or neglected.

It is a function of constitutional law, then, to preserve a community's overarching values in the face of its transient choices. And it is a significant function of the courts to ascertain and identify these most basic values, and flag them when they are at risk. As Judge Cardozo aptly wrote in *The Nature of the Judicial Process*: "The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social need."^[75]

What many, many most notably Hugo Black, have sought in a original intent-the protection of civil liberties by fixing us to an *a priori* commitment to them-cannot realistically be achieved in that manner. The right to a fair trial or free speech does not exist today simply because a group of framers ago intended them to exist. They can and do exist today because we mean them to, even though at times we may otherwise. The overarching values of the past can and surely do in form our inquiry into what values make up our "constitution" today.^[76] We are, after all, *interpreting* a text, not *inventing* one. Moreover, we look to the past because our most basic values, when they change, tend to do so very slowly, and then by a process of evolution. But interpreting our Constitution cannot stop with values of the past. It necessarily involves as well the community's present values-identifying the values that this community has declared should limit the ordinary processes of its government.

All of this speaks with particular force, and has special relevance, to the subject of state constitutions.

Where a provision has been adopted into our Constitution from the federal charter, intent-based interpretation would be unusually difficult. When dealing with intentions of several distinct groups of framers and amenders, are we to look to the intent of the federal framers, or the intent that the framers believed-perhaps erroneously-the federal framers held? Or did the state trainers intend something altogether different? A text-based "contemporary values" approach fares no better. If we read the words of all the constitutions of this nation in terms of what those words mean to us today, it is hard to argue that the same words have any different meaning anywhere. Obviously, if there is any variation across this nation it is not in the meaning of words, it is in the concepts they embody.

It should be immediately apparent that the Constitution established by this community under threat of British invasion in 1777, and painstakingly reviewed and amended throughout the ensuing centuries, reflects its own values, which may or may not be identical to those held elsewhere.

Indeed, the history that has shaped the values of this State is different in many respects from that which has shaped the consensus in other states, not to mention our nation as a whole. Many states today espouse cultural values distinctively their own; Alaska, for instance, is unique in its constitutional guarantee of the right to possess marijuana in one's home.^[77] If it is our duty to look at what our "constitution" represents in order to determine what it says, and if what a constitution represents is that community's most basic, overarching values, then it is only right to interpret our state Constitution independently of others, even where concepts are expressed in the same words. An independent interpretation of course does not mean that identical clauses will invariably be read differently, or more broadly, than their federal counterparts or those of sister states.^[78] The Supreme Court, in reading the federal Constitution, must lay out a minimal rule for a diverse nation, with due concern for principles of federalism. State courts, even when working with the same basic provisions, have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations.

Their solutions thus may at times be identical to the federal solutions, but they are not necessarily so.^[79]

Practical considerations support this theory. State courts are generally closer to the public, to the legal institutions and environments, within the state, and to the public policy process. This both shapes their strategic judgments, and renders any erroneous assessments they may make more readily redressable by the People. Moreover, building a coherent body of law—one that is not merely reacting to particular Supreme Court decisions on the Supreme Court to flesh out the contours of a developing right—has the advantage of furthering predictability and stability in our state law.^[80]

In short, the development of an independent body of state constitutional doctrine not only has deep historical roots but also is theoretically sound.

We have so far been concerned with the conditions under which state constitutional rights depend upon the delineation of federal constitutional rights. I think it's only proper to turn the tables and ask, are there conditions under which federal constitutional rights should depend upon the delineation of state constitutional rights?

Development of federal law through experimentation within the states of course has long tradition. Justice Brandeis in his famous *New State Ice* dissent^[81] described as one of the "happy incidents" of the federal system that a state, if its citizens chose, could serve as a laboratory for novel social and economic experiments without risk to the rest of the country.^[82] The Supreme Court implicitly recognized this process in *Mapp v. Ohio*,^[83] in giving the exclusionary rule national application, noting that since its own prior decision declining to recognize exclusionary rule as binding nationally, two-thirds of the state had themselves adopted the rule.^[84] Only last term the Supreme Court reversed its prior ruling on the discriminatory use of peremptory challenges.^[85] A few years earlier, in denying *certiorari* in a New York case, three Justices explicitly made known their interest in the issue, but said they preferred to allow it to percolate further in the state laboratories, to generate solutions upon which the Supreme Court might rely.^[86] The growing trend among the states ultimately led the Court to depart from its holding in *Swain v. Alabama*,^[87] and also provided content for the new rule.^[88]

This practice comports with the theory outlined earlier.^[89] As states may well have different constitutions from the national community, it logically follows that if a value is recognized by enough such communities, then that value has come to be so recognized by—and part of the "constitution" of—the larger community as well. In short, rights that come to be recognized as such by enough of the People acting through the states may become federal rights—values of national, constitutional importance.

Is there a place in our traditional constitutional structure for such a result? I suggest that there is—the ninth amendment, which reads: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage other rights retained by the People."^[90]

The ninth amendment is perhaps the one sentence in the federal Constitution that has never been figured out. "In sophisticated legal circles," John Hart Ely tells us, "mentioning the Ninth Amendment is a sure fire way to get a laugh. ('What are you planning to rely on to support that argument, Lester, the Ninth Amendment?')." ^[91] The ninth amendment has been dismissed as stating a mere truism: that all powers not delegated by the constitution to the federal government remain undelegated as a result of the Bill of Rights. But, as Dean Ely points out, the tenth amendment, added to the Constitution at the same time as the ninth, says this much more clearly. Thus, the ninth amendment becomes not only an unneeded truism but also a redundant unneeded truism. As a commonplace of constitutional interpretation, however, "[i]t cannot be presumed that any clause in the

Constitution is intended to be without effect.^[92]

In the case of the ninth amendment, then, what might that intended effect be? The amendment's relatively few boosters have been singularly unsuccessful at developing any content for it that would do more than license the federal judiciary to define new rights without providing any standards or mechanisms for so doing. Yet as the text must have been intended to mean something, the task must be to reason our way to some set of standards or mechanisms that make sense of it. Reasoning through what it must mean to say that the enumeration of rights in the original Bill of Rights does not "deny or disparage" other rights retained by the People, one might very well arrive at the point also reached from the opposite direction: approaching state constitutional values as the building blocks of federal constitutional values.^[93]

It makes sense that rights protected by the federal Constitution should be expandable by the People acting through the states. Under prevailing political theory when the Constitution was framed-particularly among the recalcitrant ratifiers at whose insistence the Bill of Rights was added-it was fundamental "that the powers granted under the Constitution, being derived from the people, may be resumed by them whenever perverted to their injury; that every power not therein granted remains in the people at their will; that no right of any denomination can be cancelled, abridged, restrained or modified except in the instances and for the purposes for which power is given; and that among other essentials, liberty of the press and of conscience cannot be abridged."^[94] As Chief Justice Marshall made clear in *Marbury*, "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."^[95]

Whatever other rights may have been contemplated by the framers of the ninth amendment, one of these "original" rights was clearly the right to establish, and to alter, the principles of government.

The conception that state-generated constitutional rights could at some point become binding nationally gives the ninth amendment substance without license. First, it allows for growth in the federal Constitution slowly and through cautious experimentation, subject to testing and confirmation, and provides the People the time and opportunity, acting through their state processes, to reject, expand or modify rights declared at the state level before they are taken as part of a national consensus. Second, this conception of the ninth amendment gives the federal judiciary a point of reference as to the overarching values embodied in our Constitution today, insuring that the Constitution grows to fit society, but in a way more accessible to the democratic process and less dependent on any individual judge's divination of "contemporary values." Finally, this view reinforces the role of the states as not only guarantors but also generators of individual rights.

V.

In summary, state constitutional law is significant historically; its independent development is sound today, both practically and theoretically, and it represents an avenue for the future delineation of constitutional rights nationally.

Footnotes

Footnote 1: See, e.g., Bamberger, *Recent Developments in State Constitutional Law* (P. L. I. 1985) (hereinafter *Recent Developments*); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (hereinafter *State Constitutions*); Collins, *State Constitutional Law*, NAT'L L. J., Supp., Sept. 29, 1986; Collins and Galie, *Models of Post Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CINN. L. REV. 317 (1986) (hereinafter *Judicial Review*); Collins, Galie and Kincaid, *State High Courts, State Constitutions and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 Publius 141 (1986); Countryman, *Why a State Bill of Rights?* 45 WASH. L. REV. 454 (1970) (hereinafter *State Bill*); *Developments in State Constitutional Law: The Williamsburg Conference* (West 1985) (hereinafter *Williamsburg*); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Note, *Developments in the Law-The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

Footnote 2: State court decisions interpreting the federal Constitution are subject to review by the United States Supreme Court. However, state court decisions-or for that matter, federal court decisions-interpreting state constitutions are subject to Supreme Court review only for federal law violations. See Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH L. REV. 583, 588 (1986).

Footnote 3: I: B. Schwartz, *The Bill of Rights: A Documentary History*, 199, 286, 383 (1971); II: Schwartz, *id.* at 1204; Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. REV. 911 (1979). See also Project Report: *Toward an Activist Role for State Bills of Rights*, 8 HARV. C. R.-C. L.L. REV. 271, 275 (1973) (hereinafter *Project Report*); Peters, *Remarks at the Second Court Judicial Conference-F.R.D.*- (Sept. 5, 1986) (hereinafter *Remarks*).

Footnote 4: The Federalist Papers, No. 17 (A. Hamilton).

Footnote 5: See e.g. , The Federalist Papers, Nos. 45 and 46 (J. Madison). See also Mosk, *State Constitutionalism: Both Liberal and Conservative* 63 TEX. L. REV. 1081, 1082 (1985) (hereinafter *Liberal and Conservative*).

Footnote 6: *Massachusetts v. Upton*, 466 U.S. 727, 738-39 (1984) (Stevens, J., concurring) Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. Rev. 799, 824, (1985) (hereinafter *State Ground*); Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 978 (1985) (hereinafter *State and Federal Courts*).

Footnote 7: 32 U.S. (7 Pet.) 243 (1833).

Footnote 8: *Id.* at 250.

Footnote 9: *Id.* at 247-48.

Footnote 10: 13 N.Y. 378 (1856).

Footnote 11: *Id.* at 405-06.

Footnote 12: In the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Supreme Court narrowly construed the fourteenth amendment's "privileges or immunities" clause, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Court held that "the entire domain of the privileges and immunities of citizens of the States...lay within the constitutional and legislative power of the States, and without that of the Federal government." *Id.* at 77.

Footnote 13: *Mugler v. Kansas*, 123 U.S. 623 (1887).

Footnote 14: *Id.* at 669.

Footnote 15: See *Railroad Commission Cases*, 116 U.S. 307 (1886); *Barbier v. Connolly*, 113 U.S. 27 (1885); *Hurtado v. California*, 110 U.S. 516 (1884); *Munn v. Illinois*, 94 U.S. 113 (1876).

Footnote 16: *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The "Lochner era" is of course named for *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court invalidated a New York law setting maximum working hours for bakers.

Footnote 17: Compare *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation) with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating similar legislation).

Footnote 18: *Ives V. South Buffalo Ry. Co.*, 201 N.Y. 271, 317 (1911).

Footnote 19: *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

Footnote 20: *But see Chicago, B. — Q.R. v. Chicago*, 166 U.S. 226 (1897) (due process clause protects right to just compensation); *Fiske v. Kansas*, 274 U.S. 380 (1927) (due process clause protects freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (*same*); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly). Justice Black's well-known view that the fourteenth amendment guaranteed the "no state could deprive its citizens of the privileges and protections of the *Bill of Rights*," *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting), did not prevail.

Footnote 21: See *Everson v. Board of Ed.*, 330 U.S. 1 (1947) (non-establishment of religion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion); *Hague v. CIO*, 307 U.S. 496 (1939) (right to petition); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of press); *Fiske v. Kansas*, 274 U.S. 380 (1927) (freedom of speech).

Footnote 22: See *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25 (1949) (unreasonable search and seizure).

Footnote 23: See *Benton v. Maryland*, 395 U.S. 784 (1969)(double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination).

Footnote 24: See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *In re Oliver*, 333 U.S. 257 (1948) (right to public trial).

