THE EVOLUTION OF STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN NEW JERSEY*

Robert F. Williams†

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> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.[1]

Although this famous passage refers to federal-state sharing of power as providing "double security" for Americans, the point applies equally to

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† Distinguished Professor of Law, Rutgers Law School.

1. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

the federal-state systems of rights guarantees. The current picture concerning constitutional rights in New Jersey reflects a complex interrelationship of federal and state guaranteed rights: a "double security." This twenty-first century constitutional rights landscape has evolved over the more than two centuries since Independence. There were, in fact, important Pre-Independence colonial rights as well.[2] Julian Boyd, a leading scholar of colonial New Jersey, noted that New Jersey's colonial documents included the concepts of limited government and peoples' rights that could be traced through English legal history to Magna Carta. The 1665 "'Concessions and Agreement of the Lords Proprietors of the Province of New Caesarea or New-Jersey' . . . began three centuries of fundamental law in New Jersey."[3] A major figure in New Jersey's colonial history was William Penn,[4] who had relied on Magna Carta in his famous trial and continued to do so in his impact on colonial Pennsylvania and New Jersey.[5] As coauthor of the *1676 Fundamental Laws of West New Jersey*, he articulated the concepts of constitutional supremacy, and by implication judicial review and due process, as well as many others.[6]

I. NEW JERSEY'S FIRST STATE CONSTITUTION

New Jersey adopted its first state constitution, interestingly, on July 2, 1776, two days before the Declaration of Independence.[7] This constitution, which was drafted hurriedly, did not contain a separate declaration of rights, as did many other early state constitutions.[8]

It did, however, contain several important rights embedded in the body of the constitution. The right to a jury trial, voting rights (blacks

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2. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, at 3–4 (2011).

3. JULIAN P. BOYD, FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY 1664–1964, at 9 (1964); *see also* GERBER, *supra* note 2, at 226–27.

4. BOYD, *supra* note 3, at 11–13, 17.

> Such was the age of William Penn in the seventeenth century when a new spirit of freedom, of toleration, of rational inquiry, and of religious diversity began to challenge the old absolutes of the royal prerogative, the alliance of church and state, and the hierarchical ordering of the social structure.

Id. at 2.

5. A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 78–98 (1968). On Penn's influence in New Jersey, see *id.* at 85–87.

6. *Id.* at 85–86; *see also* BOYD, *supra* note 3, at 11–12.

7. ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 7 (2d ed. 2012).

8. *Id.* at 8.

and women voted in New Jersey between 1790 and 1807),[9] rights of accused criminals, an early statement of religious freedom, and a prohibition on discrimination against *Protestants* were included.[10]

New Jersey's first constitution provided that the "Common Law of England . . . shall still remain in Force . . . such Parts only excepted as are repugnant to the Rights and Privileges contained in this charter."[11] Therefore, from the beginning, New Jersey constitutional law included the *concepts* and *attitude* from Magna Carta that had evolved over the centuries in England to become central features of its common law. As Professor Donald Lutz, a state constitutional scholar, has observed: "In England the common law was the primary means of limiting governmental power, whereas in America the means was different. The *idea* of limited government does in part derive from it. But in the American constitutional tradition, what *replaced* common law was a new political technique, the written constitution."[12]

Still, the 1776 New Jersey Constitution drafters' decision to adopt the English common law as, among other things, a source of rights, appears to have been an intentional alternative to the more-common declarations of rights adopted by other states. In the words of Charles R. Erdman Jr., the leading expert on the 1776 New Jersey Constitution:

> On the other hand the New Jersey lawyers may have considered that these fundamental rights were protected by the principles of the common law since the author failed to include in the new constitution the provisions of the famous 39th Article of the Magna Charta, the substance of which had been part of the "Fundamental Laws of West Jersey," the "Fundamental Constitution of East Jersey" and the "Instructions" to Lord Cornbury. The inhabitants of New Jersey had been living for a century under charter which contained provisions protecting them as to their life, liberty and property; and the omission, under these circumstances, of the "law of the land" clause would appear strange unless we take the view that the authors of the

9. This example of New Jersey's early, expansive voting rights is traced thoroughly in Judith Apter Klinghoffer & Lois Elkis, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUBLIC 159, 159–60 (1992); Mary Philbrook, *Woman's Suffrage in New Jersey Prior to 1807*, 57 PROC. N.J. HIST. SOC'Y 87 (1939); Marion Thompson Wright, *Negro Suffrage in New Jersey, 1776–1875*, 33 J. NEGRO HIST. 168, 171–72 (1948). An important new assessment is provided in Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776–1807*, 63 RUTGERS L. REV. 1017 (2011).

10. WILLIAMS, *supra* note 7, at 2–3.

11. *Id.* at 10; *see also* HOWARD, *supra* note 5, at 242.

12. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 63 (1988).

> fundamental law of 1776 considered these provisions established, beyond fear of usurpation, in the principles of the common law.[13]

Importantly, the jury trial right in the 1776 New Jersey Constitution gave rise to a very important, early example of constitutional litigation with *Holmes v. Walton*[14]—a case that is now generally acknowledged to be the first example of judicial review (a court declaring a law unconstitutional) in the history of our country.[15] In this 1780 case, the New Jersey court declared a statute unconstitutional because it provided for only a six-man jury (instead of twelve) in prosecutions for trading with the British.[16]

The 1776 New Jersey Constitution did not contain a process for its amendment. This proved to cause a number of problems, leading to this first constitution staying in effect until 1844.

II. THE FEDERAL CONSTITUTION AND BILL OF RIGHTS

New Jersey had ratified the proposed Federal Constitution in December 1787, with virtually no opposition.[17] Anti-Federalists had opposed its adoption in other states, complaining, among other criticisms, that it did not include a bill of rights. This argument concerning the

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13. CHARLES R. ERDMAN JR., THE NEW JERSEY CONSTITUTION OF 1776, at 47 (1929) (citing E.Q. KEASBEY, THE EARLY CONSTITUTIONS OF NEW JERSEY 42 (1916)).

14. Holmes v. Walton (N.J. 1780), *described in* Austin Scott, Holmes v. Walton: *The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899).

15. ERDMAN, *supra* note 13, at 90–92; GERBER, *supra* note 2, at 243–45; Scott, *supra* note 14, at 461–463. For studies of the early development of judicial review under state constitutions, see Edward S. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 108–18 (1911); William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1800*, 120 U. PA. L. REV. 1166 (1972); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 902–24 (1978); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1894); William Michael Treanor, *The* Case of the Prisoners *and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 491–500 (1995); William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 456–60 (2006); *see also* H. Jefferson Powell, *The Uses of State Constitutional History: A Case Note*, 53 ALB. L. REV. 283, 283–85 (1989); Theodore W. Ruger, *"A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 827–34 (2004); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1063–70 (2010); Emily Zackin, *Kentucky's Constitutional Crisis and the Many Meanings of Judicial Independence*, 58 STUD. L. POL. & SOC'Y 73 (2012).

16. Scott, *supra* note 14, at 460.

17. Eugene R. Sheridan, *A Study in Paradox: New Jersey and the Bill of Rights*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 246, 246 (Patrick T. Conley & John P. Kaminski eds., 1991).

necessity for a bill of rights arose from the number of other states' early constitutions that did contain such declarations or bills of rights. Obviously, that was not an argument that would be likely to surface in New Jersey because it was one of the few states where the constitution did not contain a separate bill of rights.

New Jersey then became the first state to ratify the ten amendments to the Federal Constitution, presented as the Bill of Rights, in November 1789.[18] Once again, there was no discernable opposition.[19] The Federal Bill of Rights, of course, had been copied mainly from the rights guaranteed in state constitutions that had separate bills of rights, together with rights provisions suggested by the states during the process of ratifying the Federal Constitution itself.[20] "If we look at the rights protected by the Federal Bill of Rights, we find that virtually all are protected in the state constitutions and bills of rights adopted during the Revolutionary period."[21] Justice William J. Brennan, Jr. noted that James Madison, the primary drafter of the Federal Bill of Rights, did not consider the state constitutions to be perfect models. In Congress in 1789, Madison stated:

> [S]ome states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing [rights] in the full extent which republican principles would require, they limit them too much to agree with common ideas of liberty.[22]

Here again, of course, New Jersey's first constitution could not serve as a model because of the absence of a separate declaration of rights.

According to the basic political and legal understanding of that time, the Federal Bill of Rights limited only the *federal* government. In other words, people in the states could not invoke the federal rights guarantees against actions of their *state* or *local* governments. Therefore, in a state like New Jersey which did not have a separate declaration of rights, it would seem as though there were, literally, *no*

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18. *Id.* at 249

19. *See id.*

20. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 53–54, 85–86, 90–91 (1977); Donald S. Lutz, *The States and the Bill of Rights*, 16 S. ILL. U. L.J. 251, 251 (1992).

21. SCHWARTZ, *supra* note 20, at 86.

22. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 536 (1986) (quoting 1 ANNALS OF CONG. 439 (J. Gales ed., 1789)).

constitutional rights! In fact, however, recent research has indicated that many state courts, including New Jersey's, did in fact apply the Federal Bill of Rights in litigation where state and local actions were challenged in court.[23] Further, as noted earlier, there were a few rights embedded in the body of the 1776 New Jersey Constitution—together with the adoption of English common law—and these were enforced by the courts.[24]

III. NEW JERSEY'S 1844 CONSTITUTION

After many decades of agitation for a new state constitution in New Jersey, the legislature acted in 1844, without any specific constitutional authorization, to call a constitutional convention and permit the people to vote for delegates.[25] This constitutional convention led to the adoption of the 1844 New Jersey Constitution, which did contain a separate declaration of rights.[26] This catalog of rights formed the basis of our state constitutional declaration of rights today. Interestingly, however, it did not guarantee the right to bear arms or provide protection against self-incrimination. It did include an "unenumerated rights clause," often referred to as a "savings clause." This currently reads: "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."[27]

After 1844, a very important year in the constitutional history of New Jersey, the state constitution's declaration of rights was available for people in New Jersey to rely upon directly in litigation. Still, according to the common understanding of the function of the Federal Constitution, the Federal Bill of Rights was not available directly to protect state citizens from their state and local governments; it was thought only to provide a shield against *federal* deprivation of rights.[28]

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23. *See* Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 40–41, 55 (2007).

24. ERDMAN, *supra* note 13, at 4.

25. WILLIAMS, *supra* note 7, at 15.

26. NEW JERSEY WRITERS' PROJECT OF THE WORK PROJECTS ADMINISTRATION, PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 170 (1942).

27. WILLIAMS, *supra* note 7, at 48–49 (quoting N.J. CONST. art. I, § 21).

28. Barron v. Baltimore, 32 U.S. 243, 250–51 (1833).

IV. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In 1868, the states ratified the Fourteenth Amendment to the United States Constitution. This extremely important post-Civil War step accomplished a fundamental rearrangement of the relationship between the federal government and the states. Of particular importance was the Due Process Clause of the Fourteenth Amendment: "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."[29] This clause provided a direct, textual guarantee of *federal* constitutional rights for people against their own states. This, it must be remembered, was not the original understanding of the Federal Bill of Rights. Soon questions began to arise as to what constituted "due process of law."[30] Was it just up to the federal and state judges who enforced the United States Constitution to figure out on their own what was required? Against this possibility, the United States Supreme Court began to engage in a process of "selective incorporation" of the Federal Bill of Rights against the states.[31] In other words, the United States Supreme Court began to "fill in" the definition of "due process of law" by relying on what was already in the Federal Bill of Rights. After a long period of years, virtually all of the rights guaranteed in the Federal Bill of Rights have now been deemed to apply to the states and to local government, including, most recently, the Second Amendment.[32] The only exception to this date is the Seventh Amendment right to jury trial in civil cases.[33]

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29. U.S. CONST. amend. XIV, § 1 (emphasis added).

30. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 65 (2008).

31. For an argument that the Due Process Clause's concept of rights "deeply rooted in American history and tradition" includes those recognized in state constitutions in 1868, see *id.* at 112–19; Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1543–50 (2012); Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685, 718 (2015).

32. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

33. The Seventh Amendment right to a jury trial in civil cases has not been applied to the states, thus leaving this issue to state constitutions, statutes, and common law. *See* DiCentes v. Michaud, 719 A.2d 509, 512–13 (Me. 1998); Nielson v. Spanaway Gen. Med. Clinic, Inc., 956 P.2d 312, 318–19 (Wash. 1998). The same is true of the Eighth Amendment's Excessive Fines Clause. *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989); State v. Good, 100 P.3d 644, 649 (Mont. 2004).

V. THE NEW JERSEY CONSTITUTIONAL COMMISSION, 1873–1875

In 1873, as an alternative to a constitutional convention, the New Jersey Legislature established an appointed, blue-ribbon *commission* to study the state constitution and make recommendations for change to the Legislature.[34] "This two-year period stands behind only three others in significance for the state constitutional development of New Jersey: 1776, 1844, and 1947."[35] Although all twenty-eight of the constitutional changes recommended by the Commission and submitted by the Legislature were approved by the voters in 1875, the only "rights" provision was the "Thorough and Efficient Education Clause."[36] This has, of course, proved to be very important in the last several generations.[37] The Commission's work, as well as that of the Legislature, is analyzed in depth in an online collection of its documents, newspaper coverage of debates, and editorial comment.[38]

VI. FEDERAL BILL OF RIGHTS CASES IN NEW JERSEY

A number of famous cases in the United States Supreme Court under the Federal Bill of Rights have come from New Jersey. The Court has ruled both for and against rights. One of the most important cases was the 1939 decision in *Hague v. Committee for Industrial Organization*.[39] In this decision, the United States Supreme Court struck down a ban imposed by the famous Mayor Frank Hague of Jersey City against union informational picketing as an arbitrary suppression of free speech in violation of the First Amendment.[40]

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34. *See generally* Peter J. Mazzei & Robert F. Williams, *"Traces of Its Labors": The Constitutional Commission, the Legislature, and Their Influence on the New Jersey State Constitution, 1873–1875*, 33 RUTGERS L.J. 1059 (2002).

35. WILLIAMS, *supra* note 7, at 19.

36. WILLIAMS, *supra* note 7, at 187 (citing N.J. CONST. art. VIII, § 4, ¶ 1).

37. Litigation over the adequacy of funding for public schools, based on this clause, began in the 1970s and continues today. The New Jersey Supreme Court has rendered numerous decisions in this area. WILLIAMS, *supra* note 7, at 187–88.

38. *See, e.g.*, PETER J. MAZZEI & ROBERT F. WILLIAMS, "TRACES OF ITS LABORS": THE CONSTITUTIONAL COMMISSION, THE LEGISLATURE, AND THEIR INFLUENCE ON THE NEW JERSEY CONSTITUTION, 1873–1875 (2012), http://dspace.njstatelib.org:8080/xmlui/handle/10929/18741; Peter J. Mazzei, *New Light on New Jersey's "Thorough and Efficient" Education Clause*, 38 RUTGERS L.J. 1087 (2007).

39. 307 U.S. 496 (1939). *See generally* Benjamin Kaplan, *The Great Civil Rights Case of* Hague v. CIO*: Notes of a Survivor*, 25 SUFFOLK U. L. REV. 913 (1991).

40. NELSON JOHNSON, BATTLEGROUND NEW JERSEY: VANDERBILT, HAGUE, AND THEIR FIGHT FOR JUSTICE 109–11 (2014).

In 1947, the United States Supreme Court ruled, in *Everson v. Board of Education of Ewing Township*,[41] that it was not a violation of the First Amendment's clause barring government establishment of religion to provide school bus transportation to Catholic schools.[42] In 1976, the Supreme Court upheld a ban on anti-war picketing on a military base in New Jersey by the famous pediatrician, Benjamin Spock.[43] In 1981, the Court made clear that the First Amendment's freedom of expression guarantee permitted topless dancing in Mount Ephraim.[44] Then, in 1985, it ruled that it was not an unconstitutional search and seizure under the Fourth Amendment for school officials to search a student's pocketbook without "probable cause."[45]

In 2000, the Court ruled that the Boy Scouts of America's First Amendment freedom of association rights permitted them to discriminate against gay scout officials.[46] That same year, the Court made a very important ruling that any enhanced sentence to be imposed in a criminal case based on facts (such as hate crimes) had to be included in the criminal charge and found beyond a reasonable doubt by a jury.[47]

A number of other important federal constitutional law cases, based on the Bill of Rights to the United States Constitution, have come from New Jersey. Those I have listed, however, give a flavor of the kinds of cases that have both won and lost at the national level, thereby providing building blocks for the body of federal constitutional law applicable everywhere in our country.

VII. THE 1947 NEW JERSEY CONSTITUTION AND MODERN RIGHTS GUARANTEES

The 1947 New Jersey Constitutional Convention produced a thoroughly updated constitution for the state.[48] Not only did it provide reformed and modernized judicial and executive branches, but it further updated the state constitution's declaration of rights. First, the wording of article I, paragraph 1 was revised to change the reference

41. 330 U.S. 1 (1947).

42. This led to the 1947 provision in the New Jersey Constitution specifically authorizing such public support of private and religious school transportation. WILLIAMS, *supra* note 7, at 190 (citing N.J. CONST. art. VIII, § IV, ¶ 3).

43. Greer v. Spock, 424 U.S. 828 (1976).

44. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

45. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

46. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

47. Apprendi v. New Jersey, 530 U.S. 466 (2000).

48. WILLIAMS, *supra* note 7, at 27.

to the inalienable rights of all "men," to all "persons."[49] This provision has been acknowledged by the New Jersey Supreme Court as a state constitutional equal rights amendment,[50] and although not commonly recognized as such, it placed New Jersey among the earliest states to adopt such an amendment.[51]

Further, through the efforts of Oliver Randolph, the single African American delegate to the 1947 Constitutional Convention, article I, paragraph 5 was adopted, barring segregation in public education and the militia.[52] This clause, of course, predated by seven years the famous United States Supreme Court ruling in *Brown v. Board of Education*, which outlawed segregated public education in the United States.[53]

Finally, the convention proposed, and the voters accepted, the new article I, paragraph 19, which guaranteed the right to collective bargaining for persons in private employment and the right to collective negotiation by public employees.[54] This provision has been enforced by the courts in litigation by private employees even in the absence of implementing legislation.[55]

In much more recent years, these "new" state constitutional rights have been supplemented by another modern rights provision—a 1991 guarantee of victims' rights.[56] This provision has also had an important influence on state constitutional law in New Jersey.[57]

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49. Karen J. Kruger, *Rediscovering the New Jersey E.R.A.: The Key to Successful Sex Discrimination Litigation*, 17 RUTGERS L.J. 253, 270 (1986); Maxine Lurie, *The Twisted Path to Gender Equality: Women and the 1947 Constitution*, N.J. HIST., Spring/Summer 1999, at 39, 44; Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. REP. 69, 70 (1994).

50. Peper v. Princeton Univ., 389 A.2d 465, 477 (N.J. 1978).

51. Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 (2005).

52. Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267, 1268 (2004).

53. 347 U.S. 483 (1954).

54. N.J. CONST. art. I, ¶ 19.

55. Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 733–34 (1987); *see also* Comite Organizador de Trabajadores Agricolas v. Molinelli, 552 A.2d 1003 (N.J. 1989).

56. N.J. CONST. art. I, ¶ 22.

57. State v. Muhammad, 678 A.2d 164 (N.J. 1996) (finding that the victims' rights amendment supports the use of victim impact evidence at sentencing).

VIII. THE WARREN COURT'S FEDERALIZATION OF CONSTITUTIONAL RIGHTS

In the 1950s, beginning with *Brown v. Board of Education*, the United States Supreme Court, under the direction of Chief Justice Earl Warren, aggressively continued the selective incorporation of the rights contained in the Federal Bill of Rights into the Due Process clause of the Fourteenth Amendment, thereby making them applicable to the states. This period of the "liberal" United States Supreme Court lasted well into the 1960s and resulted in a "nationalization" or "federalization" of rights litigation.[58] Almost all advocates of constitutional rights were mesmerized by, and relied upon, the expanding federal constitutional rights guaranteed by the Supreme Court. One scholar at the beginning of this era said: "If our liberties are not protected in Des Moines the only hope is in Washington."[59]

IX. THE NEW JUDICIAL FEDERALISM

In the 1968 presidential campaign, Republican candidate Richard Nixon based part of his platform on a promise to change the direction of the United States Supreme Court.[60] Upon winning, he moved in this direction by appointing Chief Justice Warren Burger.[61] This perceived conservative redirection of the Supreme Court led rights advocates to begin to look to their state constitutions as possible sources of protection beyond the national minimum—and likely reduced—standards guaranteed by the Supreme Court's interpretations of the Federal Constitution.[62] State courts could, literally, disagree with the Supreme Court if their rulings provided rights that were *more protective* than the national minimum standards or "floor."[63] Justice William J. Brennan, Jr., formerly of the New Jersey Supreme Court, wrote an influential 1977 article in the Harvard Law Review urging state courts to take their state constitutions seriously and not necessarily follow the increasingly

58. RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS: THE FOURTEENTH AMENDMENT AND THE NATIONALIZATION OF CIVIL LIBERTIES 173, 177 (1981).

59. Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

60. *See generally* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913 (1995).

61. *Id.* at 915.

62. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 113–232 (2009).

63. *Id.* at 111–14.

conservative direction of the United States Supreme Court.[64] Justice Brennan (as well as Justice Thurgood Marshall) also expressed this view in dissenting opinions during that era.[65]

Importantly, New Jersey has been a leader in this reemergence of state constitutional law.[66] A few of the many examples of the New Jersey Supreme Court's cases interpreting the state constitution to provide rights beyond the national minimum were the "Mount Laurel" exclusionary zoning decisions,[67] adequate funding for education of poor public school students,[68] death with dignity,[69] abortion funding for poor women,[70] search and seizure protections,[71] free speech on

64. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan had deep experience with the New Jersey Constitution. *See* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 773–83 (1998).

65. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

66. WILLIAMS, *supra* note 7, at 27–28; *see also* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 184–85 (1988); Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553 (2006); Deborah T. Poritz, *The New Jersey Supreme Court: A Leadership Court in Individual Rights*, 60 RUTGERS L. REV. 705, 713 (2008); Gerald J. Russello, *The New Jersey Supreme Court: New Directions?*, 16 ST. JOHN'S J. LEGAL COMMENT. 655, 655–56 (2002); John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 701–10 (1998). The New Jersey Supreme Court is among the most frequently cited in the country. *See* Jake Dear & Edward Jessen, *"Followed Rates" and Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 697 (2007).

67. S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 725 (N.J. 1975); *see also* DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 32–50 (2013); Robert C. Holmes, Southern Burlington County NAACP v. Township of Mount Laurel *(1975): Establishing a Right to Affordable Housing Throughout the State by Confronting the Inequality Demon*, *in* COURTING JUSTICE: TEN NEW JERSEY CASES THAT SHOOK THE NATION 48 (Paul L. Tractenberg ed., 2013).

68. Abbott v. Burke, 575 A.2d 359, 408 (N.J. 1990); Robinson v. Cahill, 303 A.2d 273, 297–98 (N.J. 1973); *see also* Paul L. Tractenberg, *New Jersey's School Funding Litigation*, Robinson v. Cahill *and* Abbott v. Burke *(2011): The Epitome of the State Supreme Court as an Independent, Progressive Voice in Guaranteeing Constitutional Rights*, *in* COURTING JUSTICE, *supra* note 67, at 195.

69. *In re* Quinlan, 355 A.2d 647, 662–64 (N.J. 1976); *see also* Robert S. Olick & Paul W. Armstrong, In Re Karen Ann Quinlan *(1976): Establishing a Patient's Right to Die in Dignity*, *in* COURTING JUSTICE, *supra* note 67, at 79.

70. Right to Choose v. Byrne, 450 A.2d 925, 934–35, 937 (N.J. 1982); *see also* Louis Raveson, Right to Choose v. Byrne *(1982): Establishing a State Constitutional Right to Publicly Funded Abortions*, *in* COURTING JUSTICE, *supra* note 67, at 114.

71. State v. Hunt, 450 A.2d 952, 994–97 (N.J. 1982); *see also* Robert F. Williams, State v. Hunt *(1982): Protecting Privacy from Unwarranted Searches amid a National Road Map to Independent State Constitutional Rights Cases*, *in* COURTING JUSTICE, *supra* note 67, at 127.

privately-owned regional shopping mall premises,[72] and rejection of required parental notification for minors' abortions.[73]

Decisions such as these in New Jersey, as well as similar rulings in virtually all of the other states, have truly reflected a "New Judicial Federalism."[74] Well into this important jurisprudential development in which state courts are achieving parity with federal courts in rights protection, another scholar aptly noted: "For if our liberties are not protected in Washington, the only hope is in Des Moines."[75]

Another important feature of the New Judicial Federalism was the recognition that state court decisions based on state constitutions could be "overrule[d]" by the electorate voting to adopt a proposed amendment to the constitution.[76] In New Jersey, to date, there has only been one example of an amendment to the state constitution that was adopted to overturn a decision of the New Jersey Supreme Court recognizing rights above the federal, minimum standards. In 1988 the New Jersey Supreme Court had ruled in *State v. Gerald* that capital punishment could not be imposed on a defendant for "felony murder" unless there was evidence of intent to kill.[77] In 1992, article I, paragraph 12 of the New Jersey Constitution was amended to permit the imposition of capital punishment in such circumstances.[78]

X. ADEQUATE AND INDEPENDENT STATE GROUNDS

State-court decisions that are based on "adequate and independent" state-law grounds cannot be reviewed by the United States Supreme Court.[79] Quite simply, where such a *state*-law basis for the decision exists, there is no *federal* question of law to be reviewed. Under these circumstances, it is very important that such state-court decisions clearly indicate that they are based on state-law grounds. Where this is not made clear, the Supreme Court has indicated that it has the ability to exercise its jurisdiction because federal and state law are intertwined in a way

72. N.J. Coal. Against the War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760–62 (N.J. 1994).

73. Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 622 (N.J. 2000).

74. *See, e.g.*, Kincaid, *supra* note 60, at 913.

75. Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article I, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9, 29 (1988–89).

76. WILLIAMS, *supra* note 62, at 29.

77. 549 A.2d 792, 817–18 (N.J. 1988), *superseded by constitutional amendment*, N.J. CONST. art. I, ¶ 12, *as recognized in* State v. Cruz, 749 A.2d 832, 836–37 (N.J. 2000).

78. WILLIAMS, *supra* note 7, at 76.

79. Michigan v. Long, 463 U.S. 1032, 1038 (1983).

that makes it impossible to determine which was the basis for the decision. In 1983, the Supreme Court stated in *Michigan v. Long*:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[80]

Based on this approach, the United States Supreme Court granted certiorari, and reversed, the New Jersey Supreme Court's decision holding that school officials could not search a student's pocketbook without probable cause.[81] Had the New Jersey Supreme Court indicated clearly that its decision was based on the *state* constitution, the United States Supreme Court would not have had jurisdiction over the case. The New Jersey Court, however, based its decision on the *federal* constitution, thereby opening the way for United States Supreme Court review and reversal.[82]

On the other hand, the New Jersey Supreme Court's decision holding that the Boy Scouts had violated the New Jersey *statute* (not constitution) banning discrimination, and therefore seemingly based on a state-law ground, was reviewable by the United States Supreme

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80. *Id.* at 1040–41 (1983) (emphasis added). Of course, there is only a slim possibility that a state case including a federal question will actually be reviewed by the United States Supreme Court. For this reason, nearly all state-court interpretations of the federal constitution are effectively "final." *See* Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. 979, 994–1007 (2010).

A survey of over 500 decisions, from all fifty states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfield, Note, *Fulfilling the Goals of* Michigan v. Long*: The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1047, 1068 (1988). For a similar conclusion many years later, see Mathew G. Simon, Note, *Revisiting* Michigan v. Long *After Twenty Years*, 66 ALB. L. REV. 969, 969–71 (2003); *see also* Donna M. Nakagiri, Comment, *Developing State Constitutional Jurisprudence After* Michigan v. Long*: Suggestions for Opinion Writing and Systemic Change*, 3 DET. C.L. MICH. ST. U. L. REV. 807 (1998).

81. New Jersey v. T.L.O., 469 U.S. 325, 330–33 (1985).

82. *Id.*

Court, and reversed, because the Boy Scouts themselves asserted that their *federal* constitutional rights to freedom of association had been violated.[83]

XI. CONCLUSION

The "double security" of rights protections, based on both the Federal and New Jersey Constitutions, provides a beneficial form of redundancy that operates to provide complimentary, reinforcing guarantees in New Jersey.[84] I have said: "Shared responsibility for constitutional decision making under different constitutions or dual enforcement of constitutional norms is an element of American 'jurisdictional redundancy,' a term based on the use of redundant systems to protect against technological malfunction and to ensure reliability."[85]

In New Jersey cases where there are both federal and state constitutional arguments that might prevail, the New Jersey Supreme Court has not been consistent in the order in which it addresses these claims.[86] The Court announced in the early 1980s that it would follow the "criteria" or "factor" approach, adhering to federal interpretations of federal constitutional rights when it applies identical or similar state constitutional rights unless there is an objective criterion or factor supporting a more protective outcome. The Court, however, has not applied this approach consistently.[87]

Based on this brief sketch of the evolution of both state and federal constitutional rights in New Jersey, together with the interesting and somewhat complex interrelationship between these two sources of constitutional protections, it is clear that our federal system results in a rather complicated and not particularly efficient landscape of rights guarantees for the people. However, a basic understanding of the evolution, and interdependence, of these sources of rights is not beyond the understanding of New Jersey citizens. Hopefully, this brief survey will add to that level of understanding.

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83. Boy Scouts of Am. v. Dale, 530 U.S. 640, 643–44 (2000).

84. WILLIAMS, *supra* note 62, at 227–28.

85. *Id.* at 228 (citing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639–40 (1981)); *see also* Goodwin Liu, Brennan Lecture, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1335 (2017).

86. WILLIAMS, *supra* note 7, at 54–56.

87. *Id.* at 54.

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