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ARTICLES

JUSTICE BRENNAN: A TRIBUTE TO A FEDERAL JUDGE WHO BELIEVES IN STATE'S RIGHTS

BY ANN LOUSIN*

In the United States, constitutional law has come to mean almost exclusively the case law interpreting the United States Constitution. Few law schools teach about state constitutions in basic constitutional law courses, let alone offer separate courses on state constitutions. In the last decade, however, there has been a resurgence of interest in state constitutions. The United States Supreme Court, lower federal courts, state courts, law schools and even law review writers have discovered that the fifty state constitutions are an integral part of both the framework of American government and the constitutional protection of individual liberties.

Justice William J. Brennan is greatly responsible for this renaissance. Since 1977, when he wrote "State Constitutions and the Protection of Individual Rights,"¹ Justice Brennan has led the fight to increase the role of state courts and state bills of rights as guardians of liberties above and beyond those liberties protected by the United States Constitution. Through his articles, speeches and judicial opinions, he has steadily advanced the view that each state can and should protect its own citizens to a greater degree than the United States Constitution does.

In his 1977 article, Justice Brennan observed that by 1969 the United States Supreme Court had incorporated most of the guarantees in the Bill of Rights into state law. As a result, state courts found themselves relying upon the federal guarantees and virtually ignoring their own state bills of rights. This situation changed dur-

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1. 90 HARV. L. REV. 489 (1977).

ing the 1970's when the federal courts, particularly the United States Supreme Court, ceased expanding federal protection. At that point, some state courts discovered that their own state bills of rights provided alternative sources of protection of individual liberties. "Equal protection," "due process" and "rights of the accused," all federal rights in the decade of the sixties, became state rights with new and broader meanings than those articulated by the United States Supreme Court of the seventies.

Justice Brennan "salute[d] this development in our state courts,"² and called upon state courts to fill the gap created by the retreat of the Supreme Court. He urged them to interpret the federal bill of rights more broadly than the Supreme Court did and to search their state constitutions for guarantees of individual liberty superior to, or at least different from, those in the Federal Constitution.

This one law review article, almost by itself, created the renaissance of state constitutionalism. Its influence can be seen in its frequent appearance in law review citations.³ Moreover, Justice Brennan's other writings and speeches have also influenced the current reassessment of the role of state courts in protecting liberty.⁴

As Justice Brennan realizes, there are a number of practical obstacles to the successful realization of making state constitutions the equal partner of the Federal Constitution. The first obstacle is the changed interpretation of the "adequate and independent state grounds" doctrine. If a state supreme court bases a decision regarding individual liberty upon state constitutional grounds that are independent of federal constitutional grounds and adequate to sustain the decision, the federal courts will not entertain an appeal based upon an argument that the state court had misconstrued the federal bill of rights. This "adequate and independent state grounds" doctrine prevents needless appeals in federal court and protects the integrity of state court decisions based upon state bills of rights.

2. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

3. It is one of the most frequently cited law review articles of modern times. See Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985), which found Brennan's article to be the nineteenth most-frequently-cited law review article of those published in the last forty years. Brennan's article had amassed a total of 176 law review citations and 112 court opinion citations by that time.

4. See, e.g., Justice Brennan's "Remarks at the New York University School of Law" (April 15, 1982) (transcript available from the Office of Public Information, United States Supreme Court). This speech was also mentioned in Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 416 n.164 (1984). See also ABA Speech in New York (August 8, 1986), cited in "State Constitutional Law," a special section of *The National Law Journal*, Volume 9, no.3, September 29, 1986, pages S-1 to S-20, at S-1.

*Michigan v. Long*⁵ is the most significant recent United States Supreme Court case on the role of state constitutions in federal question appeals. The issue was one of search and seizure, and the Michigan Supreme Court had decided in favor of the accused on both state constitutional and federal constitutional grounds. The Court, speaking through Justice O'Connor, reversed on the federal grounds. Because the state court had not "made clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purposes of guidance, and do not themselves compel the result that the court has revealed"⁶, the state court's decision on the state bill of rights did not constitute an adequate and independent state ground sufficient to preclude a federal appeal.

I am not necessarily a critic of the result in *Michigan v. Long*. I think the result will be to compel those state supreme courts honestly considering a state constitutional claim to state a full and cogent analysis of that claim. During the years of expansion of federal rights, state supreme courts became accustomed to citing only federal decisions even while they were analyzing state constitutional rights. One former supreme court clerk (not in Illinois) told me that he was instructed to add a "boilerplate footnote" mentioning, but not fully discussing, the comparable state constitutional provision into drafts of opinions certain to be appealed on federal grounds. His justice hoped, he said, that the boilerplate would provide an adequate and independent state ground for a federal court disinclined to reverse or even to hear the case. Rarely, however, was this hope realized.

Presumably *Michigan v. Long* will discourage "boilerplate" treatment of state constitutional bills of rights. It is interesting, however, that the Supreme Court of the 1980's has rediscovered "state's rights" in such a limited, one might even say peculiar, fashion. While seeming to defer to state constitutions, the Court has increased the burden upon a state supreme court seeking to prove that it is relying upon the state constitution. As a practical matter, the adequate and independent state ground doctrine is rarely important except in questions of individual liberties. The Court, therefore, makes it more difficult — how much more difficult we do not yet know — for a state to assert the predominance of its own bill of rights in deciding a question involving one of its citizens. This is indeed a strange form of "state's rights."

The second obstacle to the advancement of state constitutions is the reluctance of many state judges to forego their habit of relying upon the United States Constitution and virtually ignoring their

5. 463 U.S. 1032 (1983).

6. *Id.* at 1041.

state charters. The California Supreme Court has received great attention — some might even say notoriety — for its willingness to interpret phrases common to both the United States and California bills of rights more “liberally” when used in the California charter.⁷ One reason California receives so much attention, however, is because it is so exceptional. Moreover, there is a strong minority on the California Supreme Court who oppose this trend; the changes in the membership of that court caused by the electorate’s rejection of three justices in November, 1986, could reverse this exceptional view.⁸

Another way that some states expand the rights of their citizens is by relying upon the differences in wording — and presumably therefore also of meaning — between the federal and state provisions. The California Bill of Rights has a particularly large number of linguistic differences from its federal counterpart, differences that have provided a foundation for rights of Californians that are independent of federal rights.⁹ Here again California may well be in the minority. Many state bills of rights are identical or virtually identical to the federal bill of rights. In those states there is less leeway for the state supreme court to interpret a clause, for instance, “equal protection,” differently because it appears in the state charter, as opposed to the federal one.¹⁰ Even if the framers of a state constitution have deliberately inserted specific new language to create a separate state right, there is no guarantee that the state supreme court will view the state right as any different from the federal right. For example, the 1969-70 Illinois Constitutional Convention created a specific “right to privacy,”¹¹ but the Illinois Supreme Court has held, in the face of that precise language and the constitutional history, that this is simply the federal right to privacy¹² and nothing

7. For Justice Brennan’s discussion of California’s attitude, see, 90 HARV. L. REV. 489, 498-99 (1977) and Note, *People v. Pettengill: The Independent State Ground Debate in California*, 67 U. CALIF. L. REV. 768 (1979).

8. Chief Justice Rose Bird of the California Supreme Court and two of her colleagues, Associate Justices Joseph R. Grodin and Cruz Reynoso, were denied retention in office by the California electorate on November 4, 1986. Quite probably their successors will not seek ways to afford Californians any civil liberties they do not already enjoy as United States citizens.

9. See discussion of California cases in Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENVER U. L. REV. 85, 104-05 (1985).

10. Justice Brennan, however, did cite several instances of such different interpretations of equal protection. 90 HARV. L. REV. at 495-96. *But see* Gibbs v. Estate of Dolan, 100 Ill. Dec. 61, 496 N.E.2d 1126 (1986) (Illinois Appellate Court, relying upon Illinois Supreme Court decision and secondary authority, held that “the constitutional guarantees of due process are viewed as generally the same under both the Illinois and federal constitutions.”)

11. ILL. CONST. ART. I § 6 (1970).

12. See, e.g., *People v. Tisler*, 103 Ill. 2d 226, 469 N.E.2d 147 (1984) (Illinois Supreme Court “reject[ed] defendant’s contention that State protection . . . was in-

more.

Finally, we should not expect state supreme court justices, who are frequently deeply -imbedded in the political processes of their states, to be bolder than their fellow-citizens will allow. While Mr. Dooley may or may not have been right when he said that the United States Supreme Court follows the election returns, his observation is certainly true of most state supreme courts. As the 1986 California judicial retention election clearly shows, few justices can afford the luxury of striking out boldly for rights and liberties beyond the consensus of the justices' constituency.

This is not to say that I consider the future of constitutional rights in state supreme courts totally bleak. The renewal of interest in state court views on rights and liberties, limited though it may prove to be, is still a renaissance.¹³ While the state courts may not proceed apace in interpreting the federal constitution more broadly than the United States Supreme Court does, they may well come to rely upon separate state constitutional provisions as adequate and independent grounds for adjudicating rights and liberties in their states. Unless the United States Supreme Court of the 1990's interprets *Michigan v. Long* to impose a ridiculously heavy burden upon state supreme courts,¹⁴ these state decisions upon state grounds may truly become a viable source of constitutional protection.

There may well be more separate state constitutional rights for the courts to interpret because a number of states are reconsidering their state constitutional provisions. The Illinois Constitution of 1970, for example, contains several provisions intended to establish new rights¹⁵ above and beyond the federal rights. Even in 1969-70 the members of the convention were sensitive to the role of a state bill of rights. Future conventions, whether in Illinois or elsewhere,

tended to be more extensive than provided at the Federal level.").

13. "State Constitutional Law," a special section of *The National Law Journal*, Volume 9, no.3, September 29, 1986, pages S-1 to S-20 contains an excellent recent discussion of the cases and secondary authorities.

14. For discussions of the effect of *Michigan v. Long* besides the articles already mentioned, see *Trends in the Law*, 72 A.B.A.J. 84 (September 1986); Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A.J. (March, 1984); and "State Courts Move Beyond U.S. Bench in Rights Rulings," *The New York Times*, May 4, 1986, at 1, col. 1 & at 16, col. 1.

15. See, e.g., ILL. CONST. Art. I, § 17 (1970) (general antidiscrimination provision). For a further discussion of this section, see Gertz, *The Unrealized Expectations of Article I, Section 17*, 11 J. MARSHALL J. of Practice & Procedure 283 (1978). Art. I, § 18 (1970) contains a "little E.R.A." designed to prohibit gender discrimination. For a further discussion of this section, see Recent Development, "Sex As A Suspect Classification under the Illinois Sex Equal Protection Clause," 1977 U. ILL. L.F. 153-66 (Illinois Supreme Court Review). Art. I, Sec. 19 (1970) contains a provision intended to combat discrimination against the handicapped. For a further discussion of this section, see Connor, *Recent Development in Employment Discrimination Law*, 31 DEPAUL L. REV. 323, 340-45 (1982).

will be even more sensitive to that role, thanks to the recent attention paid to the role of the states in protecting individual liberty.

The road to recognition of state constitutional rights is a long and treacherous one. Only four years ago, before the peak of the current interest, Justice Brennan asked the question, "What Can Be Done?"¹⁶ And he answered with a story. He said

I feel like the mountain climber who slipped from the face of a very steep mountain. He was falling to what looked like certain death on the rocks below. At the last minute he was able to grab and hold onto an outcropping bush. While hanging there, he looked up at the top of the mountain, and at the top of his voice he desperately yelled: "Is anybody up there?" There was no answer. "Is anybody up there? Someone please save me!" After a while, a voice boomed out: "I'm up here." "Who are you?: The mountain climber asked. "Save me, save me." "I am the Lord, your God, and I can save you. Do you believe in me?" The man cried out: "I believe, I believe." The voice replied: "Then let go of the bush." The man waited a moment, and then shouted: "Is there anybody else up there?" What can be done? Well, I ask you. "Is there anybody else up there?"¹⁷

Obviously, the federal judiciary has not "been there." It has been up to the state judiciary to help the mountaineer, incomplete as that help may be. For their help, for the renewal of interest in state constitutions, we can thank Justice Brennan.

16. Justice Brennan's "Remarks at the New York University School of Law" (April 15, 1982) (transcript available from the Office of Public Information, United States Supreme Court).

17. *Id.*