STATE COURTS AND CONSTITUTIONAL RIGHTS IN THE DAY OF THE BURGER COURT*

A. E. Dick Howard **

INTRODUCTION .............................................. 874

I. ECONOMIC REGULATION ................................ 879

II. CRIMINAL PROCEDURE ...................................... 891
   A. ADMISSIBILITY OF A DEFENDANT’S STATEMENTS ... 895
   B. SEARCH AND SEIZURE .................................. 897
   C. RIGHT TO COUNSEL ................................... 900
   D. TRIAL BY JURY ........................................ 902
   E. OTHER AREAS .......................................... 904
   F. SUMMARY .............................................. 905

III. RELIGION .................................................. 907

IV. ENVIRONMENT ............................................. 912

V. EDUCATION .................................................. 916

VI. AUTONOMY AND LIFESTYLES .............................. 923
   A. HAIR LENGTH .......................................... 927
   B. MOTORCYCLE HELMET LAWS ........................... 929
   C. SEXUAL CONDUCT BETWEEN CONSENTING ADULTS .. 930
   D. MARIJUANA ............................................. 931
   E. SUMMARY ............................................... 933

CONCLUSION .................................................... 934

** White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law; former Executive Director of the Virginia Commission on Constitutional Revision. The author wishes to express his warm appreciation to Christopher J. Barry, a 1976 graduate of the University of Virginia School of Law, both for his indefatigable assistance in research and for his lively and perceptive role as sounding board for the ideas developed in this article.
**Introduction**

WHEN former President Nixon had the fortune of filling four vacancies on the Supreme Court, there were dire predictions from civil libertarians and others about the path the new majority on the Court would pursue. The passage of time has revealed a Court that, while temperamentally different from its predecessor of the 1960's, has not been the wrecking crew that some thought it would be. The landmarks—school desegregation, legislative reapportionment, the nearly wholesale application of the Bill of Rights to the states—remain and will remain. Nevertheless, this is a Court increasingly willing to lay down its own view of the Constitution, of the judicial process, of the role of the Court as the guardian of individual liberties. In many areas of the Court's work—criminal procedure, the First Amendment, equal protection, and others—the difference between where we are today and where we were at the close of the Warren era is marked and inescapable.

Those who have resisted the new directions have had to fight a rearguard action. In one respect it has taken a curious form—the invocation of a kind of states' rights by people for whom that philosophy might seem alien. During the Warren Court's period of greatest activism, Justice Brennan joined wholeheartedly as the Court in case after case imposed new and tougher standards on the states in criminal procedure, reapportionment, and other areas. Now that the Burger Court has brought a new order, Justice Brennan has begun a campaign to invite state courts to go further in protecting individual liberties than he finds his brethren willing to go. In one of a series of cases that may be read as undermining the *Miranda* ¹ ruling, Justice Brennan declared in dissent:

> In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.²

Since writing that dissent, Justice Brennan, in several other cases,

---

has renewed his plea to the state courts to make creative use of their state constitutions.\(^3\)

There are risks in counsel relying solely on federal constitutional law and neglecting available state constitutional claims when arguing a case.\(^4\) As the Burger Court has adjusted the reach of federal constitutional doctrine, there have been a number of instances in which the Court has struck down state decisions that, resting on the Federal Constitution, the justices find have gone too far. For example, the Court has overturned state rulings finding violations of the Sixth Amendment’s confrontation clause\(^5\) and the Fifth Amendment’s privilege against self-incrimination,\(^6\) giving retroactivity to *North Carolina v. Pearce*,\(^7\) and using *Miranda* to keep out statements that the Supreme Court decided were admissible under *Miranda*.\(^8\) The Court made the point explicit in *Oregon v. Hass*: \(^9\) “But, of course, a State may not impose such greater restrictions [on police activity] as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.”\(^10\)

Finding their interpretations of the Federal Constitution under close Supreme Court review, state courts that want to go beyond bounds acceptable to the high Court may decide to accept Justice Brennan’s plea to look to their state constitutions. In California, Justice Stanley Mosk has taken up the refrain. Taking the “New States’ Rights” as his theme, he has called attention to the willingness of the Supreme Court of California to rest decisions upon state constitutional grounds, saying that there is “not the slightest

---


\(^4\) For a humorous colloquy illuminating some of those risks, see United States v. Miller, 96 S. Ct. 1619, 1629 n.4 (Brennan, J., dissenting).


\(^10\) Id. at 719 (emphasis in original). Justice Marshall remarked uneasily in *Hass* on the Court’s “increasingly common practice of reviewing state court decisions upholding constitutional claims in criminal cases.” Id. at 726 (Marshall, J., dissenting).
impropriety when the highest court of a state invalidates state legislation, state administrative action, or the conviction of a defendant in a state prosecution as being violative of the state Constitution."  

The basis for state courts taking such action lies in the adequate state grounds doctrine: "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."  

Under this doctrine, federal courts cannot review decisions resting either exclusively on state law or on both federal and state law if the consideration of federal issues was unnecessary in light of the state law conclusion.  

The coming of the Burger Court appears not to have made the adequate state ground doctrine any less available as a means of insulating state court judgments from federal review. In Oregon v. Hass, the Court, although denying a state the power to interpret the Federal Constitution more strictly than the Supreme Court will allow, observed that "a State is free as a matter of its own law to impose greater restrictions on police activity than

---


14 It may be, however, that the Court will require state courts to be more explicit in resting on the state ground. See, e.g., Ohio v. Gallagher, 96 S. Ct. 1438 (1976) (per curiam), where the Court remanded to the Supreme Court of Ohio for it to say whether its opinion rested on the Federal or the Ohio Constitution. Three dissenting justices of the Supreme Court thought it clear that the Ohio judgment rested on both constitutions; that being so, certiorari should have been dismissed as improvidently granted. Id. at 1439-40 (Stewart, J., dissenting).

those the Court holds to be necessary upon federal constitutional standards.”

Petitioners sometimes have sought to persuade the Burger Court that state decisions resting on state constitutional grounds—especially where the comparable state and federal provisions are identical—should be viewed as evasive and the Supreme Court should take jurisdiction of the cases. These arguments have generally been unsuccessful. The Court has even denied certiorari in a case where, after it had vacated and remanded a state decision that might have rested on either state or federal grounds, the state court asserted the state ground as foreclosing federal review.

If one takes the historical view, he finds an early tradition of state court innovation. For example, long before Chief Justice John Marshall decided Marbury v. Madison, state courts had begun fashioning the doctrine of judicial review. George Wythe, Thomas Jefferson’s law teacher, wrote the famous 1782 dictum in Commonwealth v. Caton on the power of the Court of Appeals of Virginia to declare an act of the legislature unconstitutional, and at least three state courts, in New Hampshire, North Carolina, and Rhode Island, did exercise such power even before the drafting of the Federal Constitution. These are but early examples of a long

---

16 Id. at 719 (emphasis in original).
19 5 U.S. (1 Cranch) 137 (1805).
20 Nay more, if the whole legislature, an event to be deprecated, should attempt to overlap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.
21 The “Ten Pound Cases” (N.H. 1786), discussed in 2 W. Crosskey, Politics and the Constitution 968-70 (1958); Bayard v. Singleton, 1 N.C. 42 (1787), discussed in C. Haines, The American Doctrine of Judicial Supremacy 112-20 (2d ed. 1959); Trevett v. Weeden
and honorable tradition of state tribunals acting to protect the rights of their own citizens.

During the activist Warren years, it was easy for state courts, especially in criminal cases, to fall into the drowsy habit of looking no further than federal constitutional law. But with the new directions of the Burger Court, the idea of an independent use of state constitutional law looms larger. The opportunity exists, and the doctrinal basis—the adequate state ground doctrine—is available. The questions to be asked, therefore, are: What are the state courts actually doing? To what extent are they developing a body of state constitutional law that grants rights beyond those the Supreme Court finds to exist under the Federal Constitution? In asking these questions, it is also well to inquire what justifications may be advanced for pursuing an independent course and what the implications, including the risks, are in going that way.

In undertaking this analysis, six areas have been chosen—economic regulation, criminal procedure, religion, education, environment, and autonomy and lifestyles. These areas have been


22 Study of other areas would, of course, throw further light on the subject. In the past five years or so, thirteen states have amended their state constitutions to ban sex discrimination. For a discussion of the effect and interpretation of state "equal rights" amendments, see Howard, States Seek Sex Equality Without ERA, Virginia Law Weekly, Dicta, XXVIII, No. 11 (1976).

In 1951 Monrad Paulsen considered state court handling of First Amendment freedoms and concluded:

Although state constitutions contain full statements of our civil liberties, ... only occasionally do state cases concerned with freedom of press, speech, assembly and worship take a position protecting the freedoms beyond what has been required by the United States Supreme Court.


In recent libel cases, courts in Colorado and Indiana have ruled that where a matter is of "general or public concern" one who publishes is liable to a person thereby defamed only if the publisher knew the statement to be false or made the statement with reckless disregard for its truth. Walker v. Colorado Springs Sun, Inc., — Colo. —, 538 P.2d 450 (1975); Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc., — Ind. App. —, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976). In so doing, those courts have consciously given a greater degree of protection to expression than is required by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and have opted instead for
chosen in part for their diversity, in order to test better the thesis of this article. Some, such as economic regulation, are traditional areas of state court activity; others, such as autonomy and lifestyles, have a more contemporary flavor. They represent a range of underlying values and interests, including some that might be labelled "conservative" and some "liberal." Almost never is one state supreme court activist in all these areas. Some courts are aggressive in their defense of one value, while others pursue another. The picture that follows goes far in giving empirical vindication to the textbook portrait of the states in the Federal Union as vehicles for experimentation, with their achievements and their mistakes available for others to study.

I. Economic Regulation

Attempts to resort to the federal courts for the protection of economic enterprise from government regulation began shortly after the adoption of the Fourteenth Amendment. They came at a time when many states, such as those that passed the Granger Laws,\(^2\) were beginning to be more active regulators of business. At first it appeared that the Fourteenth Amendment's due process clause would be confined to questions of procedure, but pressures to make substantive decisions soon arose. In 1877 Justice Miller complained that the Supreme Court's docket was "crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law." He thought this "abundant evidence" of a "strange misconception" about the Fourteenth Amendment.\(^2\) And a few years later the Court commented that the Court was "not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."\(^2\)

Yesterday's strange misconceptions have a way of becoming tomorrow's law. It was not many years before the Court was to be-

---

\(^2\) These were laws passed by certain midwestern states in the early 1870's attempting through rate reform to regain control over the railroads operating in those states. They provoked a major constitutional crisis over state interference with private enterprise. See C. Miller, Railroads and the Granger Laws (1971).

\(^2\) Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

come just the sort of refuge it said it would not be. In 1897 the Court for the first time struck down a state law on substantive due process grounds, speaking through Justice Peckham of Fourteenth Amendment "liberty" as including the right to live and work where one chooses, earn a livelihood "by any lawful calling," pursue "any livelihood or avocation," and enter into contracts for those purposes. In 1905 the Court used the due process clause to strike down a New York statute limiting employment in bakeries to ten hours a day, stating that statutes limiting the hours in which "grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . . ." For the next thirty years the Court used the due process clause to invalidate minimum wage laws, statutory standardization of bread loaf weight, and other state social and economic legislation.

The so-called "Constitutional Revolution" of the 1930's, occasioned in part because of the pressing need to use state police power to deal with the crisis of a severe depression, brought a new order supportive of economic regulation. Since then, the Supreme Court has overruled many of the old substantive due process decisions, taking the view that as far as economic questions are concerned, it will "not sit as a super-legislature" to weigh the wisdom of state legislation. The point is made most directly in Ferguson v. Skrupa, where Justice Black—long one of the most bitter foes of the old uses of substantive due process—declared: "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."

---

32 Id. at 732.
In this area the Burger Court has adhered to the "hands-off" doctrine that its predecessors have followed since 1937. For example, in 1973 the Supreme Court reversed a North Dakota decision striking down a regulatory statute concerning the licensing of pharmacies. In its decision the state court had relied on *Liggett Co. v. Baldridge*, a 1928 Supreme Court decision grounded in substantive due process. The Burger Court condemned *Liggett* as a "derelict in the stream of the law" and overruled it. The North Dakota judgment was remanded so that state courts and agencies could proceed free "from what the State Supreme Court deemed to be the mandate of *Liggett."

There have been suggestions that the Burger Court is more sympathetic to business than was the Warren Court. The Antitrust Division of the Department of Justice, having savored an unbroken string of successes in the Supreme Court in the 1950's and 1960's, has seen the Burger Court rule against its efforts under Section 7 of the Clayton Act to force divestiture of United Electric Coal Companies by General Dynamics Corporation and has lost several important bank merger cases. Business has also been the beneficiary of decisions both making it more difficult to bring class action suits, and tightening up on Section 10 (b) actions under the Securities Exchange Act of 1934. But whatever the philosophical assumptions underlying these decisions, they do not seem to have undercut the Court's refusal to revive the old uses of substantive due process in economic cases.

Long before the adoption of the Fourteenth Amendment, state

---

33 278 U.S. 105 (1928).
courts had begun to develop a body of substantive due process law, drawing on state constitutional due process or "law of the land" provisions.\footnote{See generally A. Howard, The Road from Runnymede (1988); Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 460 (1911).} And notwithstanding the Supreme Court's post-1937 "hands-off" posture in the economic sphere, studies of state court decisions have made it clear that substantive due process has lived on in the states. Two such studies were written in the 1950's. One concluded that "it is not surprising that just as the doctrine of substantive due process was finding expression in the states before 1890, so also the principle should continue to enjoy a vigorous life in some states after it has fallen into disuse on the national level."\footnote{Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91, 93 (1950) (emphasis in original).} The other study expressly approved of this activity by state courts. Noting that pressure groups are often able to secure legislation distinctly not in the public interest, the commentator thought the problem of abuse of the police power "real and important" and argued for state courts using state constitutions "to strike a balance between the economic freedom of the individual and the power of government."\footnote{Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 Nw. U. L. Rev. 226, 248-51 (1958). See also Note, Counterrevolution in State Constitutional Law, 15 Stan. L. Rev. 309 (1963).}

Old habits die hard, and it is not surprising that state court judges in the 1950's were still thinking in substantive due process terms. That generation of judges had completed their legal education well before even the Supreme Court had begun to reject the premises of the cases decided early in the twentieth century. One might expect, however, that by the 1970's, with the Supreme Court's renunciation of substantive due process in economic cases so clear and so widely known, state courts would have fallen in line, and limited their own review of legislative judgments touching social and economic questions.

A look at state court decisions of the 1960's and 1970's shows that this has not happened. Substantive due process continues to live in at least some state courts. The picture, one hastens to say, is quite mixed. Many courts defer to legislative judgments in terms similar to those used by the United States Supreme Court. For
example, the Supreme Court of Ohio has stated that it is "not concerned with the wisdom" of legislation,44 and the Supreme Judicial Court of Massachusetts has determined that all it requires is that there be "any rational basis of facts that reasonably can be conceived" to sustain the legislation.45

A number of state courts, however, prefer a more searching inquiry into the justification for state regulation of economic activity. Cases reviewing challenges to fair trade laws, regulation of prices, and business and professional licensing schemes and other barriers to entry into a business or profession are illustrative.

Fair trade law cases are especially interesting because they reveal an instance in which, precisely at the same time the federal trend has been towards the "hands-off" view, state courts have been increasingly willing to strike down such laws.46 As of 1956, seventeen states had upheld these statutes as valid under their state constitutions; only four states had declared them unconstitutional.47 Today, the tide has turned markedly in the other direction; far more states have struck down fair trade laws than have upheld them.48 The state courts overturning these laws have used various grounds, including invalid delegation of legislative power, violation of due process of law, limits of the police power, and state constitutional provisions against price fixing or monopolies.

A notable illustration is the Supreme Court of North Carolina's 1974 decision in Bulova Watch Co. v. Brand Distributors, Inc.49 There the court concluded that the state fair trade provision was unconstitutional under the North Carolina Constitution, both because it delegated legislative power to a private corporation and because it deprived a nonsigner of "liberty" contrary to the "law of the land" (a state constitutional provision equivalent to

48 See 2 CCH TRADE REG. REP. ¶ 6,041 (Mar. 15, 1976).
due process of law). The court rendered this decision in spite of its knowledge that in 1939 it had upheld the fair trade law and that the United States Supreme Court had upheld another state’s law which, including its nonsigner provision, was essentially the same as that of North Carolina.

The North Carolina court expressly observed that even where the provisions of the Federal and North Carolina Constitutions are identical, a decision of the United States Supreme Court, while persuasive, is not binding upon the state court in interpreting its state constitution. In construing "liberty" in the North Carolina Constitution, the court adopted the meaning given that term by Justice Peckham in Allgeyer v. Louisiana. The court employed a balancing approach to exercises of state police power: there must be some reasonable basis for the belief that "the benefit to the public" from a statute forbidding one who has lawfully acquired goods to sell them at whatever price he likes "outweighs the infringement upon the owner’s liberty of contract." The court concluded that it could not find a public interest or a property right of the plaintiff seeking to invoke the fair trade statute that was sufficient to justify the state’s interference with the defendants' freedom of contract.

State court reactions to price-fixing vary. The Supreme Court of New Jersey was willing to take judicial notice of that state’s “almost chronic price war” among retail gasoline dealers in upholding a statute prohibiting a dealer from giving rebates that would bring the price of gasoline below the price posted. On the other hand, the Supreme Court of Alabama, using the requirement that a business be shown to be "affected with the public interest" before the legislature may regulate prices, has struck down statutes governing barbering, operating gasoline stations, and "scalping" football tickets.

50 Id. at 477-78, 206 S.E.2d at 148-49.
51 Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939).
53 165 U.S. 578 (1897).
54 285 N.C. at 474-80, 206 S.E.2d at 146-51.
Shades of Justice Peckham also are evident in Nebraska, where that state's supreme court has articulated a rule that a statute that tends to "stifle legitimate business by creating a monopoly or trade barrier" invades property rights in violation of the Nebraska Constitution's due process clause.\(^6\) The Nebraska court used that rule in a 1974 decision to invalidate a statute that prescribed a formula for setting minimum prices for dairy products. The court concluded that other existing regulations were sufficient to assure the wholesomeness of dairy products and that the only effect of the price fixing was "to promote the welfare of inefficient dairy processors." The act was therefore "an unnecessary and unwarranted interference with individual liberty."\(^5\) The court laid down a stringent test for price-fixing legislation; to be constitutional it must involve (1) "devotion to a public use" and (2) the need for "a monopoly to exist in order to prevent costly duplication of facilities at the expense of the ultimate consumer"—in effect, a natural monopoly.\(^9\) A dissenting justice read the majority opinion as judging "not the constitutionality of the legislation, but its wisdom," and as resting on the "a priori acceptance of certain economic views as to what type of competition is desirable in the milk processing and distributing industry . . . ."\(^6\)

Some state courts find constitutional vices in state statutes that operate to create barriers to entry into a business or profession, or are seen by the court as tending to stifle competition and create a monopoly, or the judges find operating for private advantage rather than the public good. A remarkable example is a 1973 North Carolina opinion holding that a statute requiring a certificate of need from the state's medical care commission to construct and operate a private hospital violated three provisions of the North Carolina Constitution by denying due process of law, establishing a monopoly, and granting exclusive privileges.\(^6\) The statute declared a policy aimed at the orderly development of medical facilities, but the court, extolling the virtues of competition,

---

\(^{67}\) Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 786, 104 N.W. 2d 227, 233 (1960).


\(^{59}\) Id. at 98, 219 N.W.2d at 220.

\(^{60}\) Id. at 102-04, 219 N.W.2d at 222-23 (Clinton, J., dissenting).

held that the legislature cannot forbid the construction of a hospital with private funds simply because it may endanger the ability of other existing hospitals to keep all their beds occupied. Indeed, the court went so far as to say that denying one the right to engage in an otherwise lawful business "is a far greater restriction" upon one's liberty than to regulate the prices charged in that business, and therefore that such a denial would require a "substantially greater likelihood of benefit to the public" in order to survive attack under the North Carolina Constitution.\(^2\)

Courts sharing the North Carolina tribunal's skepticism about the use of the police power to restrain competition have, under varying theories, struck down a Nebraska statute giving the state liquor commission wide discretion in regulating the establishment and termination of beer and liquor distributorships, a Nebraska regulation prohibiting the sale of milk that did not meet "Grade A" requirements, and a Pennsylvania ban on advertising the price of dangerous drugs.\(^3\)

Making generalizations about state courts' use of substantive due process is not easy. For one thing, the grounds of decision are often unclear. Some opinions explicitly invoke provisions of the state constitution, while others simply speak of the limits of the police power or of actions that are arbitrary or capricious, or use other language that forces the reader to infer the precise rationale of the decision. Moreover, most state courts are unquestionably influenced by the United States Supreme Court's withdrawal from its one time role as superlegislature in economic matters, and in many states substantive due process hovers in the wings, to be used only in cases that the state tribunal finds especially offensive. Nevertheless, a few comments may usefully be made about those cases, samples of which have been discussed previously, in which state courts have shown a willingness to be active in reviewing legislative judgments about business and economic matters.

State courts that play a more activist role in economic matters than the United States Supreme Court are not unaware of their

\(^2\)Id. at 550, 193 S.E.2d at 735. See Note, Hospital Regulation After Aston Park: Substantive Due Process in North Carolina, 52 N.C.L. Rev. 763 (1974).

divergence from that tribunal. In 1973 the Court of Appeals of Maryland commented:

... [I]t is readily apparent that whatever may be the current direction taken by the Supreme Court in the area of economic regulation, as distinguished from the protection of fundamental rights, Maryland and Pennsylvania adhere to the more traditional test formulated by the Supreme Court [in pre-1937 cases].

And throughout the state cases are statements recalling that, in the construction of a state constitution, "the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding" on the state court.

Most state courts do not explore the justifications for their creation of a body of substantive due process law independent of federal constitutional law. An exception is the Supreme Court of Pennsylvania's 1971 decision in Pennsylvania State Board of Pharmacy v. Pastor, in which that court struck down a statute prohibiting the advertising of prices of "dangerous drugs." While recognizing the United States Supreme Court's distaste for substantive due process, the Pennsylvania court declared that "the same cannot be said with respect to state courts and state constitutional law." This difference represents, in that court's view, a "sound development," one that takes into account the fact that "state courts may be in a better position to review local economic legislation than the Supreme Court."

State courts unwilling to adopt the United States Supreme Court's deferential approach have fashioned several tests to measure exercises of the state's police power. A few decisions of recent

---

67 The United States Supreme Court has since held that users of prescription drugs have a First Amendment right to receive truthful, nondeceptive advertising of prescription drug prices. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 96 S. Ct. 1818 (1976).
68 441 Pa. at 190, 272 A.2d at 490, quoting Hetherington, supra note 43, at 250.
years have referred to a “standard of reasonableness,” but most courts seem to prefer a more concrete standard, such as the “less restrictive alternative principle.” In the Pennsylvania decision striking down the prohibition on advertising drug prices, the court answered the state’s contention that the ban was justified by the desire to discourage pharmacists from buying drugs in bulk, which results in deterioration of quality due to aging in storage, by pointing to strict criminal and civil penalties as being adequate for that purpose, making the ban on price advertising “patently beyond the necessity of the case.”

Another standard articulated in many decisions requires the showing of a “real and substantial relation” between the measure under review and a legitimate legislative purpose. Depending on how it is applied, such a test can result in a substantially stricter review of economic regulations than the federal courts are willing to pursue.

A third way of limiting state police power is to require that a business be shown to be “affected with the public interest” before it can be subjected to either price control or restrictions on entry. The United States Supreme Court, in Nebbia v. New York, put an end to this gloss on the federal due process clause as it had been used in earlier cases such as Tyson & Brother v. Banton. But in

70 This principle has been defined as follows:

[A]n economic regulation violates due process if the government has a less restrictive alternative— that is, if the government can achieve the purposes of the challenged regulation equally effectively by one or more narrower regulations.


71 Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487, 494 (1971). The less restrictive alternative principle was one prong of a three-prong test, the other two being reasonableness and a real and substantial relation to a permissible governmental purpose. See id. at 191-92, 272 A.2d at 491. For other applications of the less restrictive alternative principle, although not by that name, see J & L Oil Co. v. City of Carrollton, 230 Ga. 817, 823, 199 S.E.2d 190, 193 (1973) (Undercofler, J., dissenting); In re Aston Park Hosp., 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973).


73 291 U.S. 502, 536 (1934).

74 273 U.S. 418 (1927).
some states, such as Alabama and Nebraska, courts still make active use of this doctrine to limit the reach of legislative power.75

Finally, state courts may use a balancing test. In Bulova Watch Co. v. Brand Distributors, Inc., the North Carolina fair trade case—in some ways perhaps the most remarkable of the recent economic regulation cases—the Supreme Court of North Carolina announced:

It is, however, the duty of this Court to declare invalid a statute which forbids one who has lawfully acquired an article of commerce to sell it at a price satisfactory to himself, unless there is some reasonable basis for the belief that the benefit to the public therefrom outweighs the infringement upon the owner's liberty of contract.76

Whatever the test, state courts that embrace notions of substantive due process in economic cases show a willingness to review legislative facts in a fashion that the United States Supreme Court has long since abandoned. In In re Aston Park Hospital, Inc., the North Carolina hospital case, the state's medical care commission advanced cogent arguments that in a time of escalating costs, excess hospital construction would result in more vacant rooms and beds, thus spreading the added costs among fewer patients in each hospital.77 Many might think the resolution of such a question best left to the legislature, but in deciding to let the forces of competition operate, the North Carolina court resolved the problem for itself.78

Courts undertaking to be activist in economic cases sometimes express a willingness to characterize the "real purpose" or motive behind a statute. When the Supreme Court of Nebraska struck down municipal Sunday closing ordinances, the court said that

---
75 See, e.g., Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973) (listing businesses that have been found to be affected with a public interest and those that have not); Gillette Dairy, Inc. v. Nebraska Dairy Prods. Bd., 192 Neb. 89, 219 N.W.2d 214 (1974).
78 Id. at 549, 193 S.E.2d at 734. For other decisions closely reviewing legislative facts, see, e.g., Reynolds v. Louisiana Bd. of Alcoholic Beverage Control, 249 La. 127, 170-78, 185 So. 2d 794, 809-12, cert. denied, 385 U.S. 946 (1966); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193-96, 272 A.2d 487, 491-93 (1971).
the "real purposes" of the ordinances were not to provide a uniform day of rest, promote family unity, or encourage religious observances. "Their real purposes," stated the court, "are to enlist the power of the state to protect business interests." 79 The Supreme Court of Washington, quoting a New Mexico opinion, showed a like cynicism about the real motives behind fair trade laws:

No matter what high-sounding terms are used, such as "free and open competition," "unfair competition," and "protection of good will," it is a matter of common knowledge that it is a price-fixing statute, designed primarily to destroy competition at the retail level. The high-sounding phrases used with respect to the trademark owners are simply excuses and not a reason for the law.80

The value judgments that state court judges bring to substantive due process cases are evident in many of the opinions. The Supreme Court of Nebraska has repeatedly reviewed state legislation from the standpoint that an exercise of the police power may not be for "the mere advantage of particular individuals," a posture that led the court in a 1974 decision to invalidate a statute giving the state liquor commission wide discretion in regulating the establishment and termination of beer and liquor distributorships.81 In another case, the same court has expressly assumed a responsibility to guard against "pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of police power regulations." 82

State substantive due process opinions are heavily flavored by commitments to the free enterprise system and the values of competition. For some state judges free enterprise appears to be enshrined as a constitutional mandate. In finding that the "scalping" of football tickets is not affected with a public interest, the Supreme Court of Alabama in 1973 declared that permitting govern-

82 Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 788, 104 N.W.2d 227, 234 (1960).
ment to set prices "would be practical socialism" and the end of "the American ideal of personal liberty." In a similar vein, the Supreme Court of Louisiana characterized a statute requiring a minimum markup in liquor prices as "an ignoble flight from competition," and the Supreme Court of South Carolina, in holding that fixing the retail price of milk violated the state constitution, declared that "such governmental intermeddling with business essentially private in nature is repugnant to the fundamental concept of free enterprise."

The rights that these state decisions protect are those familiar to Justice Peckham and other authors of the turn-of-the-century federal cases. The men of the "old" Court may have been repudiated in the federal forum, but in some state courts they still have their disciples.

II. CRIMINAL PROCEDURE

The rights of a criminal accused have long been one of the special concerns of Anglo-American constitutional law. The great "liberty" documents of England—Magna Carta, the Petition of Right, the Bill of Rights, the Habeas Corpus Act—all had provisions regarding procedures in criminal cases. Oft quoted is Justice Frankfurter's famous observation in Malinski v. New York: "The history of American freedom is, in no small measure, the history of procedure."

The drafters of the first American state constitutions had a like concern to spell out rights touching criminal procedure alongside other fundamental guarantees. When the Williamsburg convention approved Virginia's first Declaration of Rights in June 1776, they included the assurance of notice, confrontation, compulsory process, speedy trial, trial by jury, privilege against self-incrimination, due process of law, no excessive bail or fines, no cruel and unusual punishment, and no general warrants. Nearly all of the

---

86 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).
original thirteen states included some reference to criminal procedure in their first constitutions.88

The federalization of state criminal procedure was slow in coming. The notion of incorporation was not quickly accepted; instead, the Court asked whether a right was “implicit in the concept of ordered liberty” 89 or was a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 90 This fundamental rights standard made possible some federal overview of state criminal procedures, but many of the protections found in the Bill of Rights did not carry over to state trials. State procedures remained remarkably unchanged throughout the early twentieth century. Indeed, it is possible to say that at the time Earl Warren became Chief Justice in 1953, “a state criminal trial in the United States differed little from its predecessor of fifty or even a hundred years.” 91 The criminal trial was viewed as a truth-seeking process in which, whatever other social values might be involved, the essential question was to determine if the defendant at bar had committed the crime with which he was charged.

The coming of the Warren Court brought an explosion of the constraints of federal oversight on state criminal processes. Although Justice Black was unsuccessful in persuading the Court to accept wholesale incorporation of the provisions of the Bill of Rights,92 a series of holdings in the 1960’s undertook by way of “selective” incorporation under the Fourteenth Amendment to apply virtually all of the procedural guarantees of the Bill of Rights to the states.93 By the close of the Warren era, the Court had brought about a degree of uniformity in state and federal procedural rights unknown before that time.

Much of the criticism of the Warren Court’s activism was aimed at the Court’s criminal justice decisions. Summing up the Warren years, James J. Kilpatrick said:

90 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
93 See Benton v. Maryland, 395 U.S. 784 (1969) (Fifth Amendment double jeopardy
During the Warren years, the ends of justice, and the needs of society, thus disappeared into a rarefied gas of vaporized rhetoric. Newly fabricated rules on self-incrimination, on confessions, on jury trials, on rights to counsel, on post-conviction remedies, suddenly have been imposed on police and prosecutors. 94

Particularly controversial among Warren Court opinions was *Miranda v. Arizona*. 95 Reacting to this decision, the Senate Judiciary Committee aligned itself, according to the Committee, with the vast majority of judges, lawyers, and plain citizens of our country who are so obviously aroused at the unrealistic opinions such as the *Miranda* decision which are having the effect of daily releasing upon the public vicious criminals who have voluntarily confessed their guilt. 96

One legislative response to the Court’s criminal justice decisions was the Omnibus Crime and Safe Streets Act of 1968. 97

Another forum for attacks on the Warren Court’s criminal law decisions was the 1968 presidential campaign, during which former President Nixon made the Court a special target. His campaign pledge was to do something about decisions that had gone too far “in weakening the peace forces as against the criminal forces in our society.” 98 After attaining the presidency, Nixon attempted to redeem his pledge by appointing “judicial conservatives” to the court. 99 Nixon obviously hoped that the new men on the Court would do something about the Warren Court legacy in criminal justice.

Some of the Burger Court decisions, such as the abortion 100 and

---

99 Id.
impoundment cases and United States v. Nixon surely have not been what Nixon would have wanted. But in the criminal justice field, retrenchment undoubtedly is taking place. New Fourth Amendment cases demonstrate a variety of techniques for limiting the Amendment's application: redefining a "search" or "seizure," reviewing the sufficiency of a warrant, deciding when a warrantless search is permissible as incident to arrest, and reviewing automobile searches, among others.\(^\text{102}\) In right to counsel cases, the Warren Court's ruling that an accused is entitled to counsel at a post-indictment pretrial lineup\(^\text{104}\) has been limited by the Burger Court's holdings that there is no such right at a showup before the initiation of adversarial criminal proceedings or at a pretrial photographic array.\(^\text{105}\) The Miranda decision has been undermined by decisions such as Harris v. New York,\(^\text{106}\) permitting the use for impeachment purposes of a statement which, because obtained in violation of the Miranda rules, would have been inadmissible as part of the prosecution's case in chief. There certainly are Burger Court cases expanding protections accorded the criminal defendant—for example, the extension of the Sixth Amendment right to counsel to state "petty offense" prosecutions\(^\text{107}\) and the Court's rejection of the Federal Government's argument that the President has inherent power to conduct warrantless wiretaps in domestic security cases\(^\text{108}\)—but the general direction of Burger Court criminal justice opinions is markedly away from that of the Warren Court.

State courts did well to keep abreast of the Warren Court during its period of greatest activism. If a state court failed to adhere to a

---

\(^{102}\) E.g., Train v. City of New York, 420 U.S. 35 (1975).

\(^{103}\) 418 U.S. 683 (1974).


\(^{107}\) 401 U.S. 222 (1971).


Supreme Court position, typically it was because the court took a
more limited view of the constitutional right at issue. On review,
the Supreme Court would, of course, correct such a laggard posi-
tion. With the Burger Court's new and more conservative focus in
criminal cases, state courts have been presented with a wider range
of options. They may, as most tend to do, simply follow the Su-
preme Court's lead. Or they may look to their state constitutions
as the basis for doing more than the Supreme Court, an option
that is denied them, of course, when they would prefer to do less.

A comparison of Burger Court and state court decisions in
criminal cases may be had by looking at several areas in which
there are significant Burger Court departures from the trend of
Warren Court decisions. The admissibility of confessions (espe-
cially the *Miranda* doctrine), search and seizure, right to counsel,
and trial by jury are most illustrative.

**A. Admissibility of a Defendant's Statements**

The Burger Court's decision in *Harris v. New York* presents an
especially interesting opportunity to trace the extent to which
state courts follow the Supreme Court or, conversely, are willing
to chart their own course. Dictum in *Miranda* might have been
thought to foreclose any distinction between the use of statements
on direct and on cross-examination.\(^{100}\) Six federal courts of appeal
and state courts in fourteen states had thought so before *Harris*.
In only four states had state courts made the distinction subse-
quently adopted in *Harris*.\(^{110}\)

A majority of states that had previously prohibited the use for
impeachment purposes of statements taken in violation of *Mi-
randa* have now fallen in line with *Harris* and overruled their
earlier positions.\(^{111}\) Commonly these decisions do not debate the

\(^{100}\) The privilege against self-incrimination protects the individual from being compelled
to incriminate himself in any manner. . . . [S]tatesments merely intended to be
exculpatory by the defendant are often used to impeach his testimony at trial. . . .
These statements are inincriminating in any meaningful sense of the word and may
not be used without the full warnings and effective waiver required for any other
statement.


\(^{111}\) See, e.g., *Jorgenson v. People*, 174 Colo. 144, 482 P.2d 962 (1971); *State v. Retherford*,
270 So. 2d 353 (Fla. 1972), *cert. denied*, 412 U.S. 953 (1973); *State v. Bryant*, 280 N.C.
merits of Harris or explore the possibility that a different path might be taken under the state constitution. The typical opinion simply acknowledges the exception from Miranda carved out by Harris and brings the state’s rule in line.

Some state courts, however, have looked to their state constitutions to reject Harris. The Supreme Court of Hawaii, while recognizing that the United States Supreme Court is the “final arbiter” of the meaning of the Federal Constitution, emphasized that it has the final say as to the state constitution. “Nothing,” said the Hawaii court, “prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution.” 112 The court then proceeded to hold that the protections enumerated in Miranda have an independent source in the Hawaii Constitution’s privilege against self-incrimination and that the rationale underlying Miranda is sufficient to preclude the use for impeachment of an otherwise inadmissible statement. 113 Similarly, the Supreme Court of Pennsylvania has used that state’s constitution as the basis for refusing to follow Harris. 114 In rejecting Harris, these courts, like those supporting it, often give little explanation of the reasons for their decision. They tend simply to say which view they prefer and adopt it. In the Hawaii case, for example, the Supreme Court of Hawaii merely quoted at length from Justice Brennan’s Harris dissent and adopted that as the law in Hawaii. 115

The decision about what burden of proof—preponderance of the evidence or proof beyond a reasonable doubt—is required before admitting a confession as voluntary offers state courts another opportunity to decide whether they will follow the lead of the Burger Court or adopt stricter standards of their own. In Lego v.


113 Id. at 265-67, 492 P.2d at 664-65.


Twomey the Supreme Court held that the Federal Constitution requires only that the trial judge determine by a preponderance of the evidence that a confession is voluntary. Prior to Lego a minority of states had required the prosecution to prove voluntariness beyond a reasonable doubt. Since Lego several of these states have retained, without reference to their state constitutions, the reasonable doubt standard as the "better rule." In contrast, the Supreme Court of Minnesota, which in 1966 had adopted the reasonable doubt standard, followed Lego by deciding that a preponderance of the evidence test is sufficient. Two considerations moved the Minnesota court: the belief that the more relaxed standard was sufficient to assure a reliable determination by the trial court, and the advantage of having the same standard apply in both state and federal courts in Minnesota.

The Supreme Court of Maine has used the state constitution as the basis for requiring the higher standard for admitting confessions. The court said that not only are the arguments for requiring the reasonable doubt standard "better reasoned" than the Lego position, but also that the more stringent standard is constitutionally required. A later Maine opinion pointed to this decision as a reminder that Maine is free "to impose a standard under our own Constitution other than that described as the minimum necessary under a textually parallel provision of the Federal Constitution."

B. Search and Seizure

In United States v. Robinson, Justice Rehnquist, for a six-man majority, laid down a broad rule for reviewing challenges to searches incident to arrest. He declared that once there has been a custodial arrest based on probable cause, a search incident to that arrest requires no additional justification. The search can be a full one; it is not limited, for example, to a frisk of the suspect's outer clothing and removal of such weapons as the arresting officer

---

118 296 Minn. at 32, 206 N.W.2d at 3 (1973).
may, as a result of that frisk, reasonably believe the suspect has in his possession. The dissenters in *Robinson* objected to the decision as a departure from the tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment.\textsuperscript{122}

The vast majority of states that have addressed the issue have followed *Robinson*. Where state courts have chosen to construe their state constitutions as permitting the same scope of search incident to arrest as permitted by *Robinson* and its companion decision, *Gustafson v. Florida*,\textsuperscript{123} three rationales appear. An extreme approach is that of the Court of Criminal Appeals of Oklahoma, which, observing that the search and seizure provisions of the Federal and Oklahoma Constitutions are identical, said that it is "elementary that we must turn to the decisions of the Supreme Court of the United States in interpreting the Fourth Amendment of the Constitution in determining the legality of the search and seizure here involved, notwithstanding any prior decision of this Court."\textsuperscript{124} This approach puts the state constitution in lockstep with the Federal Constitution.

A less rigid approach would honor a presumption that United States Supreme Court decisions construing the Federal Constitution will be followed in interpreting similar state constitutional provisions. Prior to *Robinson* Oregon had a rule that a search incident to arrest was justified only for the safety of the arresting officer or because it was relevant to the crime for which the accused was arrested. After *Robinson* the Supreme Court of Oregon, although aware of the criticisms that had been leveled at *Robinson*, nonetheless chose to follow it.\textsuperscript{125} The simplicity of the *Robinson* rule was one reason for its acceptance; no one would have difficulties comprehending it. Moreover, the court felt a need for uniformity between state and federal law.\textsuperscript{126}

A third approach is to give independent consideration to the state constitutional claim on its own merits. Thus, a Maine judge,\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{122} *Id.* at 239 (dissenting opinion).
\item \textsuperscript{123} 414 U.S. 260 (1973) (fact of custodial arrest gives rise to authority to search).
\item \textsuperscript{125} *State v. Florance*, 270 Ore. 169, 527 P.2d 1202 (1974).
\item \textsuperscript{126} *Id.* at 184, 527 P.2d at 1209. The court stated that "[f]ederal and state law officers frequently work together and in many instances do not know whether their efforts will result in federal or state prosecution or both." *Id.* at 184, 527 P.2d at 1209. Without a uniform rule confusion supposedly would result.
\end{itemize}
recognizing that Maine could, if it chose, impose a higher standard under its constitution than required by the Fourth Amendment, explored the reasoning of Robinson and Gustafson and was satisfied that Maine ought not to have a different rule.\textsuperscript{127}

At least two states, California and Hawaii, have construed their state constitutions as requiring more exacting standards than those of Robinson and Gustafson. People v. Brisendine,\textsuperscript{128} decided by the Supreme Court of California in 1975, is notable for making an effort—as so many state court opinions do not—to explore the rationale for an independent body of state constitutional law. Observing that Robinson and Gustafson were based on the “minimum” standards required under the Fourth Amendment, the California court instead relied exclusively on the “more exacting standard” of the California Constitution. Recalling that the first state bills of rights preceded the Federal Bill of Rights, the court declared that “the California Constitution is, and always has been, a document of independent force” and that a basic principle of federalism is that the several states are “independently responsible for safeguarding the rights of their citizens.”\textsuperscript{129} The three dissenters, however, saw nothing in the majority opinion pointing to conditions peculiar to California that would justify a departure from Robinson and Gustafson, particularly in light of the virtually identical nature of the California provision and the Fourth Amendment.\textsuperscript{130}

In refusing to follow Robinson,\textsuperscript{131} the Supreme Court of Hawaii used reasoning recalling its rejection of Harris v. New York.\textsuperscript{132} Referring to its earlier decision, the court said it had “not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purpose of those protections have so warranted.”\textsuperscript{133} Hawaii’s search and seizure

\textsuperscript{127} State v. DuBay, 338 A.2d 797, 799-802 (Me. 1975) (Pomeroy, J., concurring).
\textsuperscript{128} 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).
\textsuperscript{129} Id. at 549-50, 531 P.2d at 1113-14, 119 Cal. Rptr. at 329-30.
\textsuperscript{130} Id. at 553-58, 531 P.2d at 1115-19, 119 Cal. Rptr. at 331-35 (dissenting opinion). The Brisendine rationale was reaffirmed in People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975), and People v. Norman, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).
\textsuperscript{132} See notes 112-113 supra and accompanying text.
\textsuperscript{133} 55 Hawaii at 369, 520 P.2d at 58.
provision was held to be enforceable by a "rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances." 134 Fearing the dangers of abuse, the court rejected the notion that arrest alone gives rise to a right to search; each search must meet the test of necessity inherent in the concept of reasonableness.135

The concept of consent in search and seizure cases provides another area where state courts may differ with the Burger Court. In Schneckloth v. Bustamonte,136 the United States Supreme Court held that a state need not prove that the consenting subject of a search who was not in custody knew that he had a right to refuse consent. The Supreme Court of New Jersey, however, has imposed a higher standard through use of its own constitution. Consent in New Jersey, even where the subject of the search is not in custody, is to be measured in terms of waiver, a standard expressly rejected in Schneckloth.137 Hence, if the prosecution in New Jersey seeks to justify a search on the basis of consent, it must, to prove voluntariness, show that the person knew he had the right to refuse consent.138 It is noteworthy that the question of whether New Jersey's constitutional provision against unreasonable searches should be interpreted to give the individual greater protection than that afforded by the Fourth Amendment was raised sua sponte by the court.139

C. Right to Counsel

In United States v. Wade140 and Gilbert v. California,141 the Warren Court held that a post-indictment pretrial lineup at which
the accused is exhibited to identifying witnesses is a "critical stage" in a criminal prosecution, thereby affording the accused a right to counsel at such a lineup. To enforce that requirement the Court announced a per se exclusionary rule making in-court identifications inadmissible if they stemmed from a lineup conducted in violation of that constitutional standard.\textsuperscript{142}

The Burger Court has substantially limited the scope of the \textit{Wade-Gilbert} rule. In \textit{Kirby v. Illinois},\textsuperscript{143} the Court ruled that counsel is not required at a police station showup that takes place before the defendant has been indicted or otherwise formally charged with a criminal offense. A year later, in \textit{United States v. Ash},\textsuperscript{144} the Court held that a defendant is not entitled to have counsel present at a pretrial photographic display. Justice Brennan, dissenting in both cases, complained that \textit{Kirby} and \textit{Ash} were steps toward "the complete evisceration" of principles established only six years earlier by the Warren Court.\textsuperscript{145}

State courts, acting either under their state constitutions or in the exercise of their supervisory power over state judiciary proceedings, may decide that a right to counsel attaches at stages of the criminal process which the Supreme Court has chosen not to view as "critical" for the purposes of the Sixth and Fourteenth Amendments.\textsuperscript{146} For example, the Supreme Court of Pennsylvania has held, in an opinion subsequent to \textit{Kirby}, that the right to counsel attaches at arrest and not upon the bringing of formal criminal charges by indictment or arraignment.\textsuperscript{147} Similarly, Alaska requires counsel at the taking of handwriting exemplars.\textsuperscript{148}

The Supreme Court of Michigan's decisions dealing with this aspect of the right to counsel issue presents an interesting example of a state court comparing its own practices with the United States

\textsuperscript{142} 388 U.S. at 239-43; \textit{id.} at 272.
\textsuperscript{143} 406 U.S. 682 (1972).
\textsuperscript{144} 413 U.S. 300 (1973).
\textsuperscript{145} \textit{id.} at 326 (Brennan, J., dissenting).
Supreme Court's rulings. After Kirby but before Ash, the Michigan court in People v. Anderson decided that, subject to certain exceptions, identification by photograph should not be used where the accused is in custody, and that where there are legitimate reasons for using photographic identification, the accused has a right to counsel equivalent to that afforded him in corporeal identification procedures. After Ash the Michigan court decided People v. Jackson, which upheld the state rule. The court supported Anderson, declaring that it had been reached after an "extensive analysis of the competing considerations" and was "independent of any federal constitutional mandate." The Michigan decisions in Anderson and Jackson are based on the Michigan court's power to establish rules of evidence applicable to judicial proceedings in the state courts, a reminder that in many states the opportunity to go beyond what the Federal Constitution may require is not limited to construing safeguards already spelled out in the state constitutions.

D. Trial by Jury

One of the recurrent complaints of the American colonists against British acts in the 1760's and 1770's was the denial of trial by jury. In their petition to the King, the Stamp Act Congress implored protection for the right of "Trial by our Peers," a right the petitioners traced to Magna Carta. Similarly, following the "Coercive" or "Intolerable" Acts, the Continental Congress in 1774 demanded recognition of "the great and inestimable privilege of being tried by their peers of the vicinage." George Mason set the example for constitutional draftsmen in other states when, in his draft for the Virginia Declaration of Rights in 1776, he included an accused's right to "a speedy Tryal by a Jury of his Vicinage," a right to which the Williamsburg convention readily agreed. Trial by jury being one of the ancient "rights of Englishmen," it became one of the staples of American state constitutions.

151 Id. at 338, 217 N.W.2d at 29.
152 See PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766 at 65 (E. Morgan ed. 1959).
153 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789 at 69 (W. Ford ed. 1904-06).
Thus, there is a great deal of history, as well as explicit constitutional text, for state courts to consider in deciding whether trial by jury in a given state requires more than may be mandated by the Sixth and Fourteenth Amendments.

In 1968, in *Duncan v. Louisiana*, the Supreme Court held that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in a federal court, would come within the ambit of the Sixth Amendment. Notwithstanding this federalization of state jury trials, there remain significant opportunities for the states to have more exacting standards as to juries than would be required in a federal court. *Duncan* left open some important issues, among them whether a state must have juries of twelve and whether a jury's verdict must be unanimous. In *Williams v. Florida* and *Apodaca v. Oregon* the Court answered both questions in the negative.

State constitutions and state courts, however, may require higher standards. The Virginia Constitution today, as in 1776, requires that jury verdicts in criminal cases be unanimous, the rule followed, at least in serious cases, in the vast majority of states. Likewise, nearly all the states require juries of twelve in serious cases.

After the Supreme Court's decision in *Williams v. Florida*, the Supreme Court of Rhode Island was asked to render an advisory opinion to the state senate on the constitutionality of pending legislation proposing to reduce the number on petit juries from twelve to six, a bill obviously prompted by *Williams*. While the court saw no federal constitutional objection to the proposal, it concluded that the bill would conflict with the Rhode Island Constitution, a document "made by Rhode Islanders for a Rhode Island government." Whatever the Sixth Amendment might

---

mean, Rhode Island's provision was to be interpreted in the light of Rhode Island's history, which the court explored with care. While a jury of twelve might have struck the Williams Court as an "historical accident," the Rhode Island court concluded that when the draftsmen of the Rhode Island Constitution said that the right of trial by jury "shall remain inviolate," they meant twelve jurors.

Under the incorporation doctrine of Duncan v. Louisiana, the Fourteenth Amendment allows crimes punishable by imprisonment for periods of less than six months to be considered petty offenses in which a jury trial would not be required. Here again, states may adopt stricter standards. The Supreme Court of Maine, for example, has held that Maine's constitutional provisions giving criminal defendants a right to trial by jury in "all criminal prosecutions" extends to trials for even the most minor infractions. The court relied on the textual language of the provisions, on the fact that in colonial Massachusetts (part of which was to become Maine) jury trials were more broadly available for minor infractions than in England and in the colonies outside New England, on the debates in Maine's constitutional convention, and on the court's consistent construction of the constitutional provision since the first year of Maine's statehood. Similar decisions can be found in other states.

E. Other Areas

The illustrations explored above—admissibility of a defendant's statements, search and seizure, right to counsel, and trial by jury—could be multiplied by looking at other areas of criminal law and procedure. The Supreme Court of Alaska has held that the due process clause of the Alaska Constitution requires procedural safeguards in prison disciplinary proceedings beyond those required by the United States Supreme Court in Wolff v. McDonnell. Thus, an Alaska prisoner has the right to confront and
cross-examine accusers (unless compelling reasons dictate otherwise), the right (with some exceptions) to call witnesses and present documentary evidence, the right to assistance of counsel where the infraction amounts to a felony, and the right to have the entire proceeding tape recorded.\textsuperscript{160} Similarly, the Supreme Court of New Jersey raised sua sponte the question whether that state's double jeopardy provision ought to be read more restrictively than the Fifth Amendment.\textsuperscript{170}

F. Summary

The tide of criminal procedure decisions, which ran so strongly in the direction of the rights of the accused during the Warren years, has ebbed in the Burger Court. Many state courts have shown an inertial tendency simply to follow the new federal decisions. The state decisions accepting \textit{Harris v. New York} are a good illustration.\textsuperscript{171} Perhaps the fact that we have become so used to Supreme Court leadership in criminal procedure partially explains this judicial behavior. It is likely that the inclination to follow the federal lead is especially strong when the direction of Supreme Court decisions is conservative, that being the inherent temper of so many state courts.

State courts that go along with the United States Supreme Court sometimes speak either of the deference owed that Court's pronouncements or of their highly persuasive character. Uniformity of state and federal law is often proclaimed as a worthy goal, as indicated, for example, by the Supreme Court of Oregon's decision to follow \textit{United States v. Robinson}.\textsuperscript{172} Occasionally state courts do not even trouble to inquire whether there might be reasons for an

\textsuperscript{160} McGinnis v. Stevens, 543 P.2d 1221 (Alas. 1975).


\textsuperscript{171} See note 111 \textit{supra} and accompanying text.

\textsuperscript{172} State v. Florance, 270 Ore. 169, 184, 527 P.2d 1202, 1209 (1974). See notes 125-126 \textit{supra} and accompanying text.
independent state rule. The conforming decision in those instances has an almost automatic quality, as when the Court of Criminal Appeals of Oklahoma, noting the identical language of state and federal search and seizure provisions, thought it "elementary" that the court must turn to United States Supreme Court decisions to determine the legality of a search and seizure, regardless of "any prior decision" of the Oklahoma court.\textsuperscript{173}

Notwithstanding the forces operating for uniformity, some state courts have developed a tradition of using the state constitution as the basis for construing the breadth of individual rights independent of federal law. California has been active in this regard, and Justice Mosk's opinion in \textit{People v. Brisendine} \textsuperscript{174} is a thoughtful exposition of the independent role of a state bill of rights. Also of special interest are Alaska opinions, the characteristic tenor of which is the statement that the Alaska Constitution should be construed in light of its "intention and spirit" and with the object of developing "the kind of civilized life and ordered liberty" that is at the core of Alaska's heritage.\textsuperscript{175}

Where state courts decide to rest criminal procedural rights on the state constitution, various factors may be identified as playing a part. One is policy. Frequently a state court will extend a procedural right with no more explanation than that the "better view" on the issue is to extend the right. Where the state court's choice is between the majority and dissenting positions in a United States Supreme Court decision, the state court, if it decides against the prevailing federal view, may say simply that it is more impressed with the logic of the Supreme Court dissenter.\textsuperscript{176} But if a state court is obliged to choose between competing values—for example, the needs of law enforcement versus the right of the defendant—the area for judgment is broad. Other factors having particular influence in state criminal justice decisions are the language of the state constitution (frequently more explicit than that of the Federal Constitution), the state's history, and the history of the particular state constitutional provision.\textsuperscript{177}

\begin{footnotes}
\footnotetext{\textsuperscript{174} 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).}
\footnotetext{\textsuperscript{175} Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alas. 1970).}
\footnotetext{\textsuperscript{176} See, e.g., State v. Santiago, 55 Hawaii 254, 270-71, 492 P.2d 657, 667 (1971).}
\footnotetext{\textsuperscript{177} See notes 330-336 infra and accompanying text.}
\end{footnotes}
Criminal procedure may be a more inviting area to some state courts for independent action because of the traditional concern of courts for questions of procedure. A court is likely to view itself as inherently more competent to decide what is essential to a fair trial, regardless of what the Federal Constitution might require, than to make independent judgments about substantive questions not having a peculiar effect on the courts. Additionally, it is easier for a state court to develop independent doctrine because the state court has supervisory power over state criminal proceedings. With that power, a state court can lay down procedural requirements, whether or not required by the state constitution, just as the United States Supreme Court can use its supervisory powers to impose requirements not grounded in the Federal Constitution. The Supreme Court of Pennsylvania has made active use of its supervisory powers in prohibiting multiple prosecutions arising from the same criminal episode and excluding evidence obtained during an unnecessary delay between arrest and arraignment. Pennsylvania's assertion of its supervisory powers has operated as an adequate and independent state ground blocking United States Supreme Court review.

III. Religion

The Burger Court has been notably active in sketching the contours of relations between church and state. Much of what the establishment clause of the First Amendment means turns on decisions of the 1970's. The rising plight of private education—both parochial schools and private colleges and universities—has produced major decisions on the limits that the First Amendment imposes on state and federal power to channel money to private church-related education. The Burger Court has shown a marked willingness to draw rather strict lines. Indeed, some of the decisions of the 1970's have pushed First Amendment doctrine beyond

what might have seemed the natural implications of leading Warren Court decisions.

The most striking example arises in cases where challenges have been made to state aid to parochial schools. During the Warren Court era even so stern a constitutional absolutist as Justice Black was able to write *Everson v. Board of Education*, 8 **2** upholding a state statute authorizing local school districts to reimburse parents for bus transportation to private schools, including Catholic schools. Similarly, in 1968, in *Board of Education v. Allen*, 1968 **3** the Court upheld New York's law requiring the loan of textbooks to students in private schools, most of which were parochial. The Burger Court, however, has moved in a series of cases to invalidate virtually every kind of state aid, other than bus transportation and the loan of textbooks, that imaginative lobbyists and legislators have been able to devise. Between 1971 and 1975, the Court struck down state salary supplements for teachers in private schools, maintenance and repair grants, tax deductions for parents, tuition grants to parents, payments to private schools for testing, loans of instructional materials and equipment, and the use of public school employees to provide auxiliary services such as counseling, psychological testing, and speech and hearing therapy.

With so many religion decisions being handed down by the Supreme Court, one might suppose there was little left for state courts and state constitutions to do. Such a view could not be more mistaken. The Burger Court has not overruled *Everson* or *Allen*, and state courts may construe their state constitutions to prevent the kinds of aid upheld in those cases. Further, the Court has been far more generous with governmental programs aiding private higher education than it has where aid goes to private elementary and secondary schools. *Tilton v. Richardson* 189 upheld federal construction grants to four church-related colleges in Connecticut, and

---

189 403 U.S. 672 (1971).
Hunt v. McNair permitted South Carolina to create a state authority to assist a Baptist-related college in borrowing money for construction purposes. State courts, of course, must decide whether they want to agree with the Supreme Court that aid programs at the level of higher education pose fewer dangers for church and state relations than do programs involving elementary and secondary schools.

The states' historical activity in the area of religion accounts in part for the existence of an independent body of state constitutional doctrine in religion cases. From the beginning state constitutional draftsmen have had a marked interest in ensuring both free exercise of religion and separation of church and state. The strictness with which a state's constitution separates church and state often reflects that state's history. The Utah Constitution emphasizes separation because as a territory Utah had to convince Congress that they had effectively separated the Mormon church from the civil government in order to secure admission as a state. Similarly, when New Mexico was admitted to the Union, parochial schools, mostly Catholic, had a near monopoly on education, and Congress conditioned admission on approval by the territory's people of strong constitutional provisions requiring the establishment of a public school system and barring aid to private schools. On the other hand, some states have a strong religious orientation. Tennessee has long maintained a fundamentalist religious atmosphere; its constitution lacks a prohibition on sectarian aid, and its establishment clause has been interpreted as forbidding only the supremacy of one religion over another.

---

190 413 U.S. 734 (1973).
192 For example, see the discussion of the evolution of the provisions of the Virginia Constitution (including the role played by Mason and Madison) in 1 A. Howard, Commentaries on the Constitution of Virginia 290-92 (1974).
194 R. Larson, New Mexico’s Quest for Statehood 1846-1912 at 102, 159, 168 (1968); T. Wiley, Public School Education in New Mexico 23, 28-31 (1965).
Religion clauses in state constitutions take many forms. Some parallel the First Amendment. More commonly, they are both longer and more detailed than the First Amendment. Additionally, there are provisions not expressly dealing with religion that may operate as a bar to state aid to religion; these include, for example, provisions against the diversion to nonpublic schools of funds meant for public schools and provisions that limit how a state may contract debt, lend credit, or tax and spend. In recent years, with the rise in interest in aiding private education, a number of states have amended their constitutions to make more explicit what each state may do in this area, especially in creating aid programs for private colleges or their students.

There is a vast body of state case law interpreting religion provisions of state constitutions Some state courts say explicitly that a program that will pass muster under the First Amendment will stand under the state constitution. The Supreme Court of Vermont, for example, has called the First Amendment "more demanding" than the Vermont Constitution's religion clauses, and the Supreme Judicial Court of Maine has characterized the Maine Constitution as being "no more stringent" than the First Amendment. In states where the state courts adhere to First Amendment standards, it is often unnecessary for the courts even to discuss the state constitution.

State courts can, of course, find the language of their constitutions to be more demanding than the federal constitutional pro-

---

196 E.g., ALA. CONST. art. I, § 4.
197 E.g., VA. CONST. art. I, § 16; WYO. CONST. art. I, § 18.
198 E.g., ALA. CONST. art. IV, § 99 (prohibiting the lending of credit); DEL. CONST. art. X, § 4 (public school funds to be used only for support of public schools); MINN. CONST. art. XII, § 1 (taxes may be levied and public funds spent only for a public purpose).
199 For example, a number of states have amended their constitutions to permit programs of grants or loans to students. See, e.g., COLO. CONST. art. XI, § 2a; ME. CONST. art. VIII, § 2; VA. CONST. art. VIII, § 11.
200 For a discussion of, inter alia, state court "church and state" decisions involving state aid to private education, see A. HOWARD, STATE AID TO PRIVATE HIGHER EDUCATION (scheduled for publication in late 1976).
The Supreme Court of Delaware, in a 1966 opinion, held that the Delaware Constitution would not permit a program of school bus transportation for pupils attending private elementary and secondary schools. The court distinguished *Everson* on the ground that the relevant Delaware provision (Article X, Section 3) was more explicit than the First Amendment. Similarly, courts in other states, such as Idaho, Nebraska, and Oregon, have invoked state constitutional provisions to strike down programs that the courts recognized would be valid under the First Amendment.

The "child benefit" theory is one example of the opportunities that state courts have to decide whether to apply standards stricter than those of the First Amendment. In *Everson* Justice Black concluded that New Jersey's program of reimbursing parents for transporting their children to school by bus did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." The program could therefore be compared to other "general government services" such as police and fire protection. This emphasis on how the child rather than the school benefits has been called the "child benefit" theory, and where a court is willing to apply the theory an aid program is more likely to be upheld. A number of state courts, in California, Connecticut, Kentucky, Ohio, Pennsylvania, and West Virginia, among others, have applied the theory in upholding programs of bus transportation. But courts in other states, including Delaware, Idaho, Ne-

---

208 Id. at 17. See also Board of Educ. v. Allen, 392 U.S. 236 (1968).
braska, Oklahoma, Oregon, and Wisconsin, have rejected the theory.\(^\text{210}\)

State constitutions and state courts thus remain battlegrounds for questions of church and state. A draftsman who has drawn a program he is sure will satisfy the First Amendment would be foolish to assume, without more, that he has necessarily avoided problems under his state constitution. Passions over religion can still run high, as the drafters of a proposed new constitution for New York learned in 1967 when they proposed repealing that state's "Blaine Amendment" prohibiting state aid to parochial schools.\(^\text{211}\) Virginians learned how tricky this area can be when they had to amend their state constitution twice, in 1971 and then again in 1974, to overcome constitutional obstacles to state aid programs for students in private church-related colleges.\(^\text{212}\) There is no reason to suppose that, whatever the further course of United States Supreme Court religion decisions, state constitutional law in this arena will be any less active.

**IV. Environment**

Environmentalists have not found the Burger Court an especially congenial forum. Twice in two years the Court has rebuffed an environmentalist drive to force railroads to haul scrap and other recyclable materials at reduced rates.\(^\text{213}\) Environmentalist class action suits were made substantially more difficult to bring with

---


\(^{211}\) See McKay, Constitutional Revision in New York State: Disaster in 1967, 19 Syracuse L. Rev. 207, 223 (1968).


the Court's ruling that each plaintiff must meet the statutory $10,000 jurisdictional amount requirement or be dismissed from the class.\textsuperscript{214} The Court's opinion refusing to allow the Sierra Club standing to challenge a recreational development in the Mineral King Valley expressed concern about "organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process."\textsuperscript{215} A hard blow was dealt to those who go to court as "private attorneys general" to vindicate environmental values when the Court overturned a federal court of appeals' award of attorneys' fees to groups that had sued to prevent issuance of government permits for the building of the trans-Alaska pipeline.\textsuperscript{216}

Occasionally the environmentalists do win cases. A unanimous Court has ruled that the Federal Water Quality Improvement Act does not preempt a Florida oil spill law imposing strict liability for such spills,\textsuperscript{217} and that, notwithstanding extensive congressional environmental legislation, there is federal common law on environmental pollution that federal district courts can use in fashioning appropriate remedies.\textsuperscript{218} But for the most part, an environmentalist is not likely to find the Burger Court's record encouraging. Nor is the departure of the Court's most eloquent and devoted friend of the environment, Justice Douglas, apt to make environmentalists more comfortable.\textsuperscript{219}

From time to time people have urged that a federal constitutional right to a decent environment be recognized either through judicial action developing such a right from the existing Federal Constitution,\textsuperscript{220} or, more directly, from an amendment to the

\textsuperscript{216} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).
\textsuperscript{218} Illinois v. City of Milwaukee, 406 U.S. 91 (1972).
\textsuperscript{219} Justice Blackmun may take over some of Douglas' role here. Blackmun dissented in Sierra Club, saying:

The case poses — if only we choose to acknowledge and reach them — significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

\textsuperscript{220} Roberts, The Right to a Decent Environment: Progress Along a Constitutional
Federal Constitution. But no amendment has been adopted, and the federal courts have been unresponsive. A federal district court in Ohio rejected the argument that the right to a healthful environment is a "fundamental" right under the United States Constitution; similarly, the Court of Appeals for the Fourth Circuit "decline[d] the invitation to elevate to a constitutional level" environmental concerns.

It is not likely that the Supreme Court will be any more willing than lower federal courts to declare a constitutional right to a decent environment. The reasoning that led a majority of the justices in San Antonio Independent School District v. Rodriguez to refuse to view education as a fundamental right under the Fourteenth Amendment would surely prevail were the Court to be asked to give special constitutional status to environmental claims. The Supreme Court likely would be as quick to point to the lack of textual support in the Federal Constitution for an environmental right and the difficulties courts would have in making allocation of resources decisions in environmental litigation as the justices were in outlining analogous considerations in Rodriguez.

Environmentalists disappointed at the failure of the federal courts to hand down more supportive opinions should turn to the state constitutions. Those documents historically have been concerned with giving special protection to conservation and the environment. Some of the constitutional provisions are of ancient origin, such as the people's rights of fishery or of free access to the shore—rights having their ancestry in Magna Carta. Other provisions came about because of the conservation movement in the


221 Senator Gaylord Nelson proposed the following amendment: "Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right." S.J. Res. 169, 91st Cong., 2d Sess (1970). For a longer and more detailed proposal by Representative Richard L. Ottinger of New York, see H.R.J. RES. 1321, 90th Cong., 2d Sess. (1968).


earlier part of this century. But the most important state constitutional provisions, certainly those that are broadest in their scope, have come into being with the popular concern over environmental quality that peaked in the late 1960's and early 1970's.

Many kinds of environmental provisions can be found in state constitutions. Some declare public policy. Others direct the state legislature to enact environmental legislation or to acquire natural resources, or authorize legislative action. A state constitution may also impose restraints on disposition of the public trust, declare environmental rights in individuals or in the people, or authorize citizens' suits to protect the environment. Other provisions authorize tax advantages to encourage conservation.

Although state courts have a variety of doctrinal weapons that can be used in protecting the environment, one of the most useful is the doctrine of public trust, a body of law having ancient roots in England and America and holding that there are some kinds of property, such as navigable waters and tidelands, that the state holds in trust for the people generally. A court may devise a presumption that a state does not ordinarily intend to divest normal public uses of public trust property. It may also put the burden

---

226 E.g., the “forever wild” clause of the New York Constitution, N.Y. Const. art. XIV, § 1.

227 E.g., Fla. Const. art. II, § 7 (effective Nov. 5, 1968); Ill. Const. art. XI, §§ 1, 2 (effective July 1, 1971); Mich. Const. art. IV, § 52 (effective Jan. 1, 1964); Va. Const. art. XI, § 1 (effective July 1, 1971).

228 E.g., N.Y. Const. art. XIV, § 4.


230 E.g., N.Y. Const. art. XIV, § 4.


232 E.g., N.Y. Const. art. XIV, § 4; Pa. Const. art. I, § 27.


234 E.g., Ill. Const. art. XI, § 2; N.Y. Const. art. XIV, § 5.


on a state agency to show specific, knowing legislative approval for any invasion of the public trust,\textsuperscript{238} or require that enabling legislation specify the particular public trust land and show an awareness of the public use.\textsuperscript{239} Although state courts have shown a reluctance to limit a legislature's ultimate power to act in derogation of the public trust, the cases reveal a variety of devices that courts can use to protect the public trust. Additionally, the public trust doctrine has shown a capacity for growth. As the Supreme Court of New Jersey said, the doctrine "should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."\textsuperscript{240}

By no means are all state courts vigorous in defense of environmental values, even where there is ample historical and constitutional warrant for their doing so. Courts are especially reluctant to substitute their own judgment for legislative decisions as to how the balance should be struck between environmental interests, such as the public trust, and other objects of public policy, such as jobs and development. But the fact remains that the existence of specific environmental provisions in state constitutions offers opportunities for argument that environmental lawyers should not pass up.\textsuperscript{241}

V. **Education**

Education was not a subject of the first state constitutions. For most people of that time, education was a sometime thing, left to private initiative. Only in the nineteenth century did states, especially northern states, begin creating superintendents of public instruction and state boards of education. By the middle of the nineteenth century it was more common for state constitutions to deal with education. In Virginia public education before the Civil War had depended almost entirely on legislation; neither the state constitution of 1776 nor that of 1830 mentioned the subject. Virginia's

1870 constitution, in contrast, dealt with it in great detail, giving public education in the Commonwealth its first genuine constitutional underpinning.\^242 Today forty-two state constitutions direct the legislature to establish a system of schools.\^243

Jefferson saw the intrinsic link between an educated citizenry and self-government. In describing a bill on education, he said education renders "the people the safe, as they are the ultimate, guardians of their own liberty."\^244 Such a philosophy would argue for education being viewed as one of the constitutional "fundamentals" under either the Federal Constitution or a state constitution.

Many observers, watching the Warren Court create the "new" equal protection that required strict scrutiny of statutes found to impinge upon "fundamental" rights or to rest on "suspect" classifications, anticipated that the Court might proclaim education to be one of those fundamental rights. Reformers hoped that such a ruling would result in courts acting to invalidate the system, widespread among the states, of depending on local property taxes to produce much of public school revenues, a system that caused wide variations between the amount of money spent on students in rich and poor school districts.\^245 These hopes were quickened in 1971 when the Supreme Court of California decided Serrano v. Priest.\^246 There a Chicano citizen complained that his children's schools were badly financed compared to those of schools in neighboring Beverly Hills. The California court held that, if true, the facts alleged by Serrano constitute a denial of equal protection under the Fourteenth Amendment of the United States Constitution.\^247

\^242 See 2 A. Howard, supra note 192, at 880-82.
\^244 Notes on the State of Virginia 148 (W. Peden ed. 1955).
\^246 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
\^247 Id. The court therefore overruled a lower court decision to sustain defendant's demurrer. Kenneth Karst has taken the occasion of the Serrano decision to give thoughtful consideration to a state court's role in fashioning federal constitutional law. See Karst, Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law, 60 Calif. L. Rev. 720 (1972).
**Serrano**, however, did not presage what the United States Supreme Court would do. In 1973 the Court decided *San Antonio Independent School District v. Rodriguez*,\(^{248}\) reviewing a challenge to a Texas school financing system relying heavily on local property taxes. Justice Powell, speaking for the Court, found neither a suspect classification nor a fundamental right; hence, a rational basis was sufficient to sustain the statute. The decision was close, with four of the five Warren Court holdovers dissenting. Only Justice Stewart joined the four Nixon appointees to form the majority.

*Rodriguez* leaves the status of the *Serrano* decision unclear. The reasoning in *Serrano* was based essentially on the Federal Constitution, with no independent consideration of state constitutional provisions, and the Supreme Court of California has ordered a rehearing of the case.\(^ {249}\) As *Rodriguez* eliminated the Fourteenth Amendment basis for the original California holding, the state court on rehearing is faced with choosing between its longstanding belief that the state and federal equal protection clauses are to be similarly construed and the Burger Court's rejection of California's reading of the equal protection clause as applied to education.

After *Rodriguez* the only hope of finding constitutional underpinnings for requiring a fundamental reordering of public school financing lies in state constitutions. The Supreme Court of Michigan, in a pre-*Rodriguez* decision, used "new" equal protection analysis to conclude that the state's school financing system denied equal protection of the laws guaranteed by the Michigan Constitution.\(^ {250}\) Anticipating the "fundamental right" question subsequently explored by Justice Powell in *Rodriguez*, the Michigan court found that the state constitution's mandate for the establishment and support of "a system of free public elementary and secondary schools" and Michigan's historic concern for education, dating back to the Northwest Ordinance of 1787, compelled the court "to recognize education as a fundamental interest under the Michigan Constitution," thus requiring strict scrutiny of legislative classifica-

\(^ {248}\) 411 U.S. 1 (1973).


tions touching distribution of educational resources. The continued vitality of the decision is an open question, however, because subsequent to Rodriguez the Michigan court vacated its order on the ground that the request by the governor of Michigan for certification of the question was improvidently granted.

Shortly after Rodriguez, the Supreme Court of New Jersey struck down a public school financing system relying heavily on local taxation as violative of the state constitution's mandate for equal educational opportunity. The court in Robinson v. Cahill expressly avoided relying on the equal protection clause of either the New Jersey or the Federal Constitution. It looked instead to the education provisions of the New Jersey Constitution, reviewed the history of education in New Jersey, and concluded that the mandate of "a thorough and efficient system of public schooling" meant that there must be an equal educational opportunity for the state's children, equipping a child "for his role as a citizen and as a competitor in the labor market." The state had neither articulated the content of the constitutionally mandated educational opportunity nor had it required local school districts to raise the money needed to meet that unstated standard. The school system, the court concluded, was a "patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate."

Some state courts have refused to find education to be "fundamental" under their state constitutions. The Supreme Court of Idaho has viewed strict scrutiny of that state's system of financing public education as inappropriate, preferring instead to defer to the traditional role of the state legislature and local governments in operating public schools. Hence, the supreme court has held that Idaho's system violates neither the state's equal protection

251 Id. at 25-28, 203 N.W.2d at 468-69.
254 62 N.J. at 515, 303 A.2d at 295.
255 Id. at 520, 303 A.2d at 297.
clause nor the constitutional mandate of "a general, uniform, and thorough system of public, free common schools."\(^{257}\)

Even where state courts are willing to hold education to be a fundamental right, they will not necessarily require a reordering of school financing. The Supreme Court of Arizona has held that the Arizona Constitution "does establish education as a fundamental right . . . ." But, distinguishing the California, Michigan, and New Jersey decisions, the Arizona court upheld Arizona's system of financing. So long as the system met the constitutional mandates that it be uniform, free, available to all persons aged six to twenty-one, and open at least six months per year, it otherwise need only be "rational, reasonable, and neither discriminatory nor capricious."\(^{258}\)

In addition to the textual and conceptual problems that school financing cases raise, state courts also must be concerned with how they would go about enforcing upon a state legislature a decision requiring equalization of spending. This may, in part, account for the mixed results in state decisions. The several opinions written by the justices of a sharply divided Supreme Court of Washington in *Northshore School District v. Kinnear*\(^{259}\) illustrate all of these problems. Article IX of the Washington Constitution declares it to be "the paramount duty of the state to make ample provision for the education of all children." When the Washington court had to consider a challenge to the state's system for funding public schools, three of the justices read that provision as placing the duty to decide what is "ample" upon the legislature and the Washington Superintendent of Public Instruction, rather than upon the courts. Education, while important, was not "the be-all and end-all, the alpha and omega of state government." These three justices resisted taking on a role that might obligate them to decide what taxes must be imposed and what public funds must be spent on schools.\(^{260}\)

Three other justices concurred in the *Kinnear* result. Two of them could not join in any suggestion that the state was in fact providing "ample" education for all students, for to them the

\(^{257}\) IDAHO CONST. art. 9, § 1.


\(^{259}\) 84 Wash. 2d 685, 530 P.2d 178 (1974).

\(^{260}\) Id. at 715-16, 530 P.2d at 195.
state's contribution appeared to be "inadequate." But since the record before the court did not clearly document this inadequacy, the two justices felt unable to convert "personal opinion to a constitutional mandate." The third concurring justice agreed that the petitioners simply had not made out their case.

The three dissenters were appalled by this decision giving the legislature and the Superintendent of Public Instruction carte blanche in deciding what was needed to satisfy Article IX's mandate. Finding Rodriguez, on which the prevailing opinion had relied, not dispositive, the dissenters insisted that the issue in this case was "whether the Washington statutes violate Washington's own more restrictive State constitution." While conceding that there might be no "exact standard" for measuring the quality of education received by children in a given school district, they argued that this did not put the state's duty to make "ample" provision for education beyond judicial scrutiny. Since in this case it was "crystal clear" that there were "vast discrepancies" in expenditures per student, a constitutional violation was clear.

The difficulties that the Washington judges had with the Kinnear case are understandable. School financing presents especially complex questions. It is not easy to work out the relationship between expenditures and quality education, and judges are no more comfortable with the task than legislators. Moreover, given the wide range of important ends for which public funds are spent, choices involving resource allocation are difficult, a consideration that heavily influenced the plurality justices in Kinnear. Judges feel much more comfortable when presented with the assertion of "negative" constitutional claims such as the rights of criminal defendants—traditional areas of constitutional adjudication where

261 Id. at 730-31, 530 P.2d at 203 (Rosellini and Wright, JJ., concurring).
262 Id. at 731, 530 P.2d at 204 (Weaver, J., concurring).
263 Id. at 739, 530 P.2d at 208 (Stafford, Utter, and Finley, JJ., dissenting) (emphasis in original).
264 Id. at 761-64, 530 P.2d at 219-21 (Stafford, Utter and Finley, JJ., dissenting). For discussions of the major financing cases see Andersen, Northshore School Dist. v. Kinnear: The "General and Uniform" and "Ample Provision" Clauses, 38 LAW & CONTEMPP. PROB. 366 (1973); Andersen, School Finance in Washington — The Northshore Litigation and Beyond, 50 WASH. L. REV. 853 (1975); Hain, Milliken v. Green: Breaking the Legislative Deadlock, 38 LAW & CONTEMPP. PROB. 350 (1973); Kast, Serrano v. Priest's Inputs and Outputs, 38 LAW & CONTEMPP. PROB. 333 (1973); Tractenberg, Robinson v. Cahill: The "Thorough and Efficient" Clause, 38 LAW & CONTEMPP. PROB. 312 (1973).
limitations on government action are at issue—than when presented
with claims of "positive" rights, entitlements asserted against
government. The "right" to an education is one of those newer,
less traditional claims. Additionally, the unwillingness of the
United States Supreme Court to enter the field of school financing
in Rodriguez can hardly make state judges bolder. Nor are state
judges likely to take heart from the situation in New Jersey, where
the state supreme court's attempts to spur legislative action largely
have proved futile. After postponing action several times out of
deferece to the legislature, the New Jersey court has finally taken
over the administration of state-appropriated school aid funds.265

Notwithstanding the problems, the fact of litigation has proved
an impetus for reform. In the wake of Serrano it was reported that
during the 1972-73 legislative year eleven states substantially re-
formed their programs of public school aid. In at least some of
these states it is evident that concern about the constitution-
ality of the existing system of financing was a key factor in
change.266

Not all of the reform has been limited to legislation. State con-
stitutional revision has also occurred. An example is Virginia's
1971 Constitution, for which the revisors drew upon Jefferson's
Notes on the State of Virginia to add the following commitment to
education:

That free government rests, as does all progress, upon the broadest
possible diffusion of knowledge, and that the Commonwealth should
avail itself of those talents which nature has sown so liberally among
its people by assuring the opportunity for their fullest development
by an effective system of education throughout the Commonwealth.267

This language in the Virginia Constitution's Bill of Rights is
implemented by the more specific provisions of the Constitution's
education article mandating a system of free public elementary
and secondary schools, prescribing how standards of quality shall

266 See Grubb, The First Round of Legislative Reform in the Post-Serrano World, 38
LAW & CONTEMP. PROB. 459-60 (1974). The Supreme Court of Wyoming has also attempted
to prod the legislature into school financing reform through favorable cites to Serrano
267 VA. CONSt. art. I, § 15.
be formulated and allocation of costs between state and localities
determined, and requiring that localities provide their share under
such apportionment.\textsuperscript{268}

In some states resistance to constitutional change has proved
formidable. In the elections of November 1972, voters in Cali-
ifornia, Colorado, Michigan, and Oregon defeated amendments to
their state constitutions that would have eliminated or sharply
limited property tax as a source of funds for public education.\textsuperscript{269}
But so long as the Burger Court continues to stay its hand, as it
did in \textit{Rodriguez}, problems of education financing remain one of
the challenges for state constitutional revisors and state courts.\textsuperscript{270}

\section*{VI. AUTONOMY AND LIFESTYLES}

One of the great questions confronting the law is what sphere
of individual autonomy the law should respect. John Stuart Mill,
in his classic essay \textit{On Liberty}, framed the question this way:

What, then, is the rightful limit to the sovereignty of the individual
over himself? Where does the authority of society begin? How much
of human life should be assigned to individuality, and how much to
society? \textsuperscript{271}

Mill asserted the principle that the “only purpose for which power
can be rightfully exercised over any member of a civilized com-
munity, against his will, is to prevent harm to others.” \textsuperscript{272} In our
own century the debate has often taken the form of asking whether
and to what extent the law is justified in enforcing morality. De-
fending society’s right to use the law to preserve morality, Lord
Devlin has argued that “without shared ideas on politics, morals,
and ethics no society can exist.” \textsuperscript{273}

\begin{footnotes}
\item[268] VA. CONST. art. VIII, §§ 1, 2. For a full discussion see I. A. HOWARD, \textit{supra} note 192, at 285-87; 2 id. at 883-907.
\item[269] N.Y. Times, Nov. 9, 1972, at 36, col. 4.
\item[270] As of January 1976 school financing cases were pending in Alaska, Connecticut, Florida, Georgia, Kansas, Maine, Missouri, New Jersey, Ohio, Oregon, and West Virginia. LAWYER’S COMM. FOR CIVIL RIGHTS UNDER LAW, SCHOOL FINANCE PROJECT, UPDATE ON STATEWIDE SCHOOL FINANCE CASES (1976).
\item[272] Id. at 15.
\end{footnotes}
In the United States arguments over the autonomy of the individual, over law and morality, over the right to one's own "lifestyle" often have taken constitutional form. Those who want to do what others might think deviant or aberrational have tried to invoke a constitutional right to privacy, the unstated rights of the Ninth Amendment, or notions of "liberty" protected by due process of law.

The Warren Court accepted at least some of these arguments. Of seminal importance is *Griswold v. Connecticut*,\(^\text{274}\) in which the prevailing justices, though by varying reasoning, agreed that there is a right of marital privacy, which required the Court to strike down Connecticut's birth control law. The Court's 1969 decision in *Stanley v. Georgia*,\(^\text{275}\) reversing a conviction for knowing possession of obscene matter, further enhanced constitutional protection of individual autonomy. The obscene material had been found in Stanley's home and Justice Marshall, writing for the Court, said:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.\(^\text{276}\)

To the surprise of many, Burger Court opinions have extended some autonomy rights. The most striking decision, of course, is *Roe v. Wade*,\(^\text{277}\) a remarkably activist opinion that read the right of privacy, grounded in the Fourteenth Amendment's due process clause, broadly enough to encompass a woman's decision of whether or not to terminate a pregnancy. Her right to control her own body is, under that decision, virtually unqualified up to the point of viability of the fetus.

Individual lifestyles also have been acknowledged in other Court opinions. *Wisconsin v. Yoder*\(^\text{278}\) held that Wisconsin's compulsory school attendance laws could not be applied to that state's Amish people. And in another decision the Court, with only two justices dissenting, invalidated Congress' exclusion of households

\(^{274}\) 381 U.S. 479 (1965).
\(^{276}\) Id. at 565.
\(^{277}\) 410 U.S. 113 (1973).
\(^{278}\) 406 U.S. 205 (1972).
containing unrelated persons from the food stamp program, an exclusion that the majority found to have been aimed at preventing “so-called 'hippies' and 'hippie communes' from participating in the food stamp program.” A “bare congressional desire to harm a politically unpopular group” could not, the Court ruled, constitute a legitimate governmental interest.279 In yet another decision, the Court reversed the conviction of a young man who had worn a small American flag sewn to the seat of his trousers and had been convicted under a Massachusetts statute punishing anyone who publicly “treats contumeliously” the flag. Justice Powell, who wrote for the majority, noted that wearing a flag “in a day of relaxed clothing styles may be simply for adornment or a ploy to attract attention.” 280

Additionally, the Court has used the vagueness doctrine to strike down a “suspicious person ordinance” designed to punish a person who “wanders about the streets” or who is found abroad at “late or unusual hours” and cannot give “satisfactory account of himself,” 281 as well as a vagrancy ordinance under which, as Justice Douglas viewed it, “poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts.” 282

Reading such opinions, one might suppose that the philosophy of John Stuart Mill has won over the Supreme Court. The Court has not gone so far. In fact, there is rising evidence of the Court’s willingness to limit protection of individual autonomy. In Ham v. South Carolina,283 the Court ruled that the Fourteenth Amendment had been violated by the trial court’s refusal to permit voir dire on the jurors’ racial bias, but it saw no constitutional defect in the judge’s having refused to permit questioning about the jurors’ bias against bearded people. The majority was unmoved by Justice Douglas’ plea that hair growth “is symbolic to many of rebellion against traditional society” and suggests “an undesirable

279 United States Dep’t of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).
lifestyle characterized by unreliability, dishonesty, lack of moral values, communal ('communist') tendencies, and the assumption of drug use."  

The Burger Court's obscenity decisions make clear the justices' willingness to permit government to enforce moral standards. In holding that states have a legitimate interest in regulating the exhibition of obscene materials in "adult" theatres, Chief Justice Burger emphatically rejected the "consenting adults" argument that pornography acquires constitutional immunity when exhibited only to consenting adults. More broadly, Chief Justice Burger emphasized the public's interests in the "quality of life" and the maintenance of "a decent society." To enforce those interests the Court has also adjusted the guidelines for defining obscenity, thereby making prosecutions easier. Additionally, Stanley v. Georgia has been narrowly confined to private possession of obscene material in one's home. The Court has refused to give protection to individual possession outside the home.

The early months of 1976 have brought cogent evidence that no general theory of personal autonomy or personhood has emerged in the Supreme Court. Justice Rehnquist, writing for a six-man majority, upheld a county regulation limiting the length of county policemen's hair. Even assuming that the Fourteenth Amendment protects one's "choice of personal appearance," a question the Court did not decide, the Court found a rational basis for the county's regulation. And in another recent case the Court failed even to write an opinion in affirming the decision of a three-judge district court upholding Virginia's sodomy statute both on its face and as applied to private, consensual acts of homosexuals. Finally, in a related area of autonomy, the Court recent-

284 Id. at 530 (Douglas, J., dissenting).
286 Id. at 57-60.
ly held that liberty or property interests are not infringed when one is labelled an "active shoplifter" in a police flyer. 291

Lifestyle and autonomy cases reaching the Supreme Court are the barest tip of an iceberg that has brought large numbers of cases to lower courts, both state and federal. In 1972, dissenting from the Supreme Court's refusal to review a case involving the length of a student's hair, Justice Douglas said that at that time there had already been over fifty reported cases raising that issue. 292 This is but one example of the ample opportunities state courts have had to develop a body of doctrine regarding the autonomy of the individual and the interplay between law and morality. This article selects four areas—hair length, motorcycle helmet laws, sexual acts between consenting adults, and marijuana—through which to explore state courts' responses to regulation of lifestyles and autonomy.

A. Hair Length

Although it decided the case involving the length of a policeman's hair, the Supreme Court has refused to hear cases raising challenges to school regulations decreeing the length of a student's hair, even though there has been a readily arguable conflict among the circuits on the question. 293 The Court appears to share the view of Justice Black, who, in denying a motion to suspend school hair length regulations pending appeal, said: "Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys." 294

293 Four circuits have upheld the right of students to wear their hair as they choose: Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969). Another, in Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973) (police grooming), has recognized the right by implication. Four circuits have upheld school grooming codes: Zeller v. Donegal SchoolDist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975); Karr v. Schmidt, 460 F.2d 609 (5th Cir.); cert. denied, 409 U.S. 889 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.); cert. denied, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.); cert. denied, 400 U.S. 850 (1970). One circuit, in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1092 (1972), refused to intervene, calling it a state matter.
State courts that have upheld school appearance regulations seem to have used either of two rationales—that there is no substantial constitutional interest in a student's appearance,\textsuperscript{296} or a recognition of such an interest but a holding that it must give way where there is a governmental interest in promoting good order and discipline in the schools.\textsuperscript{296} In contrast, courts striking down school hair length regulations have done so on varying grounds. The Supreme Court of Idaho, using the Ninth Amendment to the Federal Constitution and the "inalienable rights" and "reserved rights" provisions of the Idaho Constitution, held that "the right to wear one's hair in a manner of his choice" is a "protected right of personal taste," not to be interfered with by the state unless it met a "substantial burden" test.\textsuperscript{297} A Florida court, looking to the due process clauses of the Federal and the Florida Constitutions, characterized hair length as being a question of "fashion, not morality" and held that "presumptively the regulation of individual style and taste is a matter for the individual," which the school can regulate only if it is or threatens to become disruptive.\textsuperscript{298}

Only one state court hair length case has relied solely upon state constitutional analysis to strike down school regulations. In Breese v. Smith,\textsuperscript{299} the Supreme Court of Alaska abstained from deciding the federal constitutional question because of the unsettled state of federal law. Instead the court relied on the Alaska Constitution's guarantee of a natural right to "liberty" to hold that students in Alaska schools have "a constitutional right to wear their hair in accordance with their personal tastes."\textsuperscript{300} The traditions of a pluralistic society, especially strong in Alaska, imply such basic values as "the preservation of maximum individual

\textsuperscript{295} See, e.g., Dunkerson v. Russell, 502 S.W.2d 64 (Ky. App. 1973); Kraus v. Board of Educ., 492 S.W.2d 783 (Mo. 1973).


\textsuperscript{299} 501 P.2d 159 (Alas. 1972).

\textsuperscript{300} Id. at 168.
choice, protection of minority sentiments, and appreciation for divergent lifestyles." The right of "liberty" being fundamental, it could be overborne, held the court, only by a showing of a compelling state interest, and this the state had failed to make.

B. Motorcycle Helmet Laws

Most states require the operators of motorcycles to wear helmets and face shields. The constitutionality of these statutes under the Federal Constitution is not in doubt. In 1972 the Supreme Court affirmed the holding of a three-judge district court that Massachusetts' helmet law promotes the state's legitimate interest in minimizing social resources committed to motorcycle injuries.

The vast majority of state courts similarly have rejected state and federal constitutional challenges to helmet laws. The opinions offer a fascinating exercise in an attempt to decide whether the state has any business protecting the individual from himself. For example, a Michigan court rejected the state's argument that it had an interest in the "viability" of its citizens that would permit motorcycle helmet legislation to keep them "healthy and self-supporting." "This logic," objected the court, "could lead to unlimited paternalism." Since the statute had no relationship to the public health, safety, and welfare, it was invalid. The Supreme Court of Illinois used like reasoning in concluding that the "laudable" legislative purpose in safeguarding the wearer of the headgear from head injuries "cannot justify the regulation of what is essentially a matter of personal safety."

The most thorough airing of the question in the state opinions occurred in a 1973 Hawaii decision, State v. Cotton. There the majority, interpreting the Hawaii Constitution, accepted the tenet

---

301 Id. at 169.
302 Id. at 172-74.
305 Id. at 358, 158 N.W.2d at 76.
that the state could not enact regulations having as their purpose and effect "solely the protection of the individual from his own folly." But the law could be upheld if there were secondary harms to society as a whole that the statute sought to remedy. The court considered four arguable justifications—the "flying missile" theory (that unshielded cyclists might lose control and cause accidents), the "public ward" theory (the hospital and welfare costs borne by society), the "modelling" theory (that others might imitate the helmetless cyclist's behavior), and the "broad social impact" theory (the threat to society from the number and extent of accidents). The court accepted the second and fourth of these theories and upheld the statute. Two dissenting justices argued that the Hawaii Constitution guarantees the "right to be left alone" and the right to determine for oneself what is in one's best interest. To accept the state's argument, they said, would open the door to "unlimited paternalism."

C. Sexual Conduct Between Consenting Adults

The three-judge district court whose judgment upholding Virginia's sodomy statute was affirmed by the United States Supreme Court distinguished privacy decisions such as *Griswold* as condemning only state legislation "that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life." Since homosexuality was "obviously no portion of marriage, home, or family life," Virginia was free to apply its criminal sodomy statutes to private homosexual relations between consenting adults.

While this decision is generally representative of the results reached by state courts, some states have limited the application of their sodomy statutes. To avoid the implications of the right to marital privacy recognized in *Griswold*, several courts have construed their statutes not to apply to consenting acts in private by a

---

308 Id. at 139, 516 P.2d at 710 (emphasis in original).
309 Id. at 140, 516 P.2d at 710-11.
310 Id. at 146, 516 P.2d at 714 (dissenting opinion).
married couple.\footnote{313} The Supreme Judicial Court of Massachusetts thought the constitutionality of that state's sodomy statute questionable after \textit{Griswold} and \textit{Eisenstadt} and ruled that the "unnatural and lascivious" acts prohibited by the statute are limited to "sexual conduct which virtually all members of the community have regarded as offensive." Noting that community values on sexual conduct "no longer are . . . monolithic," the court held that the statute does not apply to "private, consenting conduct of adults."\footnote{314}

Appellate courts in two states have declined the opportunity to construe their sodomy statutes to avoid the constitutional issues, instead holding the statutes to be fatally overbroad. A New Mexico court, discussing only federal grounds, held that the state's sodomy statute invaded the rights of marital privacy, freedom from governmental interference with sexual conduct of unmarried consenting adults, and privacy of the home, and, in addition, was beyond the police power of the state.\footnote{315} Appellate courts in Arizona, also using federal constitutional reasoning, have held that the right of sexual privacy between consenting adults, whether married or not, is fundamental.\footnote{316}

\textbf{D. Marijuana}

Much evidence has been gathered and much debate engendered about the actual effects of marijuana. Some propose that it be decriminalized; others disagree.\footnote{317} While the legislative debate continues, courts have been asked to find constitutional protection for the use of the drug. For the most part they have refused.\footnote{318}

\footnotesize
\begin{itemize}
\item \textit{E.g.}, State v. Lair, 62 N.J. 388, 301 A.2d 748 (1973).
\item State v. Elliot, 88 N.M. 187, 539 P.2d 207 (N.M. App. 1975); (N.M. Sup. Ct. cert. granted).
\item See \textit{NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE} (1973); \textit{NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING} (1972); C. Whitebread & R. Bonnie, \textit{The Marihuana Conviction} (1974).
\end{itemize}
Supreme Court of Hawaii, finding the evidence on the drug's effect inconclusive, refused to second-guess the legislative decision to classify it as a harmful substance and prohibit its distribution. And to make that prohibition effective, the state also had the power to prohibit personal possession.\(^{319}\) The Supreme Court of Georgia stated that it would hold that the state had exceeded its police power in prohibiting marijuana only if the defendant could demonstrate that it was a "perfectly harmless substance"; the record, however, would not support such a finding.\(^{320}\)

An Alaska opinion is the most interesting of the state court marijuana decisions, because of both the protection it gives marijuana possession and the use it makes of the Alaska Constitution. In *Ravin v. State*,\(^{321}\) decided in 1975, the Supreme Court of Alaska held that possession of marijuana by an adult in the privacy of his home is protected by Alaska's explicit constitutional guarantee of the right of privacy.\(^{322}\) The court was unwilling to read Alaska's privacy amendment, added to their constitution in 1972, as making the possession or ingestion of marijuana itself a fundamental right, but the court decided that Alaskans have a basic right to privacy in their homes, which includes the right to possess and ingest marijuana unless the state can meet its "substantial burden" of showing that a prohibition is supported by a legitimate state interest.\(^{323}\)

Underpinning the Alaska opinion is the court's practice—so evident in other Alaska cases—of reading the state's constitution in light of the "character of life in Alaska":

> Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.\(^{324}\)


\(^{321}\) 537 P.2d 494 (Alas. 1975).

\(^{322}\) ALAS. CONST. art. I, § 22.

\(^{323}\) 537 P.2d at 502-04.

\(^{324}\) Id. at 504.
Ravin v. State is a leading example of the use a state court can make of its own constitution.

E. Summary

The autonomy and lifestyle cases seem to present a largely neglected opportunity for state courts to weigh values under their state constitutions. With rare exceptions, the most conspicuous being Alaska, the state courts seem generally to follow the United States Supreme Court. It is decisions of that Court, above all Griswold, around which most state court analysis turns. Paradoxically, as the recent decisions of the Burger Court make it evident that there are decided limits to how far that tribunal will carry autonomy, the habit of state courts to look to federal constitutional doctrine in this area makes it more likely that they will not go further either.

There are other reasons why autonomy and lifestyle claims do not prosper in state courts. It is hard to imagine that state judges feel much affinity for the parties who often raise autonomy claims—long-haired high school kids, sodomists, motorcycle buffs, or users of marijuana. Moreover, while the evidence may often be mixed, there are important state interests at least arguably at stake in many of these cases, such as discipline in schools and highway safety. Additionally, the lack of obvious textual support in the state constitution for the claimed autonomy rights make the judges even more timid about innovating.

Where the issue may be seen as one of using law to enforce morality, most state judges would doubtless agree with Chief Justice Burger that the state has a legitimate interest in acting in support of moral standards and a decent society. Other eminent jurists have taken that stand, including Lord Devlin in England and Chief Justice Warren and Justice Harlan in the United States. Only where enforcement measures impinge on home and family—as where a sodomy statute appears to apply to married couples—are state courts, either through statutory construction or constitutional decision, reader to deny the state’s power to legislate.

Where the issue can be framed as whether the state may legislate to protect one from injuring himself, some state courts are more readily persuaded to find a violation of the police power. Many courts, however, are willing to save even these laws by finding some additional social purpose; motorcycle helmet statutes are an example. But a state's effort to protect an individual from his own folly or carelessness awakens in the bosom of some justices a Peckhamesque concern about paternalism. Just as substantive due process lives in many states to limit what the police power can do to regulate economic affairs, so the same notion may operate to allow one to do his own thing—even if he gets killed in the process.

In general, constitutional recognition of individual autonomy is a sometime thing in the state courts. The doctrinal basis exists, especially in notions of privacy recognized in *Griwold*, *Roe*, and other cases, but its use in the 1970's beyond the areas of marriage and home is checkered. Alaska is different, but, then, that's how they justify their decisions.

**CONCLUSION**

Finding instances of state courts' use of state constitutions independently of the Federal Constitution is easier than articulating a principled theory of when courts should in fact use the power they have to chart their own course. What factors should a state judge take into account in deciding whether to strike out on his own? What are the implications of doing so?

Some commentators have voiced concern about state courts' breaking loose from Supreme Court interpretations. Professor Bice, for example, has said that a "difficult question of propriety is posed when a state court attempts to preclude Supreme Court review because it fears that the Supreme Court will give the federal constitutional provision a narrower, more restricted interpretation." 326 There is surely, however, no impropriety in state courts building a body of state constitutional law so long as they write decisions that will stand the test of detached criticism. 327 Too often, however, a state court makes no more than a pro forma

---


effort to justify its making independent use of a state constitutional provision.328

Both constitutional history and theory support the case for an independent body of state constitutional law, though they do not help very much in giving direction for specific decisions.329 History is supportive in that there were state constitutions and state bills of rights long before there was a Federal Constitution. Theory is supportive in that there are inherent differences between state constitutions and the federal document. One important difference is that the Federal Constitution is a grant of power, whereas state charters are a limit on power. State legislatures in nearly every state are held to be able to do whatever is not forbidden them by the state constitution or the Federal Constitution. Consequently, state constitutions are longer and more detailed than their federal counterpart, thus giving more opportunities for the development of an independent body of law.

When specific cases arise, a state judge may wish to consider some of the following factors:

(1) The textual language of the state constitution may give cogent ground for a decision different from that which would be arrived at under the Federal Constitution. Frequently a state provision will be more explicit, as with a requirement that mandates a jury of twelve or a religion clause that is detailed on what aid may not flow to church-related schools. Often there will be state provisions that have no explicit federal counterpart at all. Thus, every state constitution dwells at length on education, and most have something to say about conservation and the environment; the Federal Constitution mentions neither. Rights that must, if recognized at all in federal constitutional law, be implied in judicial decisions may be made explicit in a state constitution; such is the case with privacy in Alaska.

A state constitution may openly invite its courts to develop an independent body of law through a provision, such as that added to the California Constitution in 1974, that “Rights guaranteed

---


329 See generally Linde, Book Review, 52 ORE. L. REV. 325 (1973); Linde, supra note 328. In both Linde argues that there is a “hierarchy” of constitutional premises and that claims raised under the state constitution should always be dealt with before reaching a Fourteenth Amendment claim under the Federal Constitution.
by this Constitution are not dependent on those guaranteed by the United States Constitution." Where the rights are procedural in nature, the state's courts may use their rulemaking or supervisory powers to announce rights that the United States Supreme Court does not require.

(2) Whether or not the textual language is different from the Federal Constitution, legislative history may reveal an intention that will support reading a state provision independently of federal law. General revisions of a state constitution are accomplished by either a constitutional convention or legislative action, ratified at referendum. In either case there are usually study commission reports and certainly floor debates, which may, in addition to their relevance in interpreting specific provisions, yield statements of philosophy. An example is that set out in the 1969 report of Virginia's Commission on Constitutional Revision:

That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is, in the judgment of the Commission, no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.

(3) A state's history and traditions should be considered. Early events often throw considerable light on constitutional interpretation in states tending to strict separation of church and state. In criminal cases, courts in Rhode Island and Maine have dipped

---


332 Even identical language does not necessarily imply identical meaning. As Justice Holmes stated: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought . . . ." Towne v. Eisner, 245 U.S. 418, 425 (1918).


334 See, e.g., the interesting discussion of Wisconsin's pluralistic origins in State ex rel. Weiss v. District Bd., 76 Wis. 177, 195-99, 44 N.W. 967, 974-75 (1890).
thoughtfully into the region's history to decide that a jury must have twelve members and that a jury trial is a right even in trials for minor infractions. A sense of local uniqueness is especially evident in Alaska opinions, several of which have invoked the pioneer philosophy that brought people to Alaska originally.

(4) State courts should consider the nature of the subject matter in litigation and the interests affected by the local political process. In *Cooley v. Board of Port Wardens*, the United States Supreme Court did this in concluding that pilotage was not of such a nature as to require a single uniform rule throughout the country. While that approach to commerce cases has been superseded by other analyses, *Cooley* suggests a useful question for state constitutional interpretation: is the subject matter local in character, or does there appear to be a need for national uniformity? State courts too rarely debate this question. Occasionally state judges will join issue on the policy of uniformity versus diversity, as demonstrated by the Supreme Court of Oregon's decision to follow *United States v. Robinson*. Even when the question is raised, however, the debate tends to be perfunctory and conclusory on both sides. One wishes that state courts, aided by Brandeis briefs from counsel, would consider just what interests will be affected by hewing to the federal rule or departing from it.

For example, it has been argued that in the regulation of economic affairs state courts may be in a better position than the Supreme Court to make judgments about local economic conditions. At least one state supreme court has relied explicitly on that advice in shaping its approach to substantive due process.

If there is a case to be made for judicial concern about the power of special interest groups to use the legislative process for their own ends, to the detriment of the public interest—a case that, because of its implications for democratic theory, is by no means self-evident—state courts may be better placed to play that role. There is no doubt that some state courts do play it, as the Supreme Court of Nebraska has done in striking down statutes deemed to

---

335 *See* notes 161-164 and 166 *supra* and accompanying text.
336 *See* notes 299-302 and 321-324 *supra* and accompanying text.
338 *See* notes 125-126 *supra* and accompanying text.
340 *See* notes 66-68 *supra* and accompanying text.
have been passed for the mere advantage of private groups.\footnote{See notes 57-60, 79, and 81-82 supra and accompanying text.} State constitutions have long been a repository for concern about abuse of the legislative process by narrow interest groups, beginning with reformers trying to do something about the inordinate power that railroads and other interests wielded over legislatures in the nineteenth century.\footnote{See generally Strickland & Thomas, Most Sensibly Conservative and Safely Radical: Oklahoma's Constitutional Regulation of Economic Power, Land Ownership, and Corporate Monopoly, 9 TULSA L.J. 167 (1973).} Today a majority of state constitutions include prohibitions against the enactment of special, local, or private laws.\footnote{For lists of such prohibitions and the state constitutions in which they appear, see CITIZENS' CONF. ON STATE LEGISLATURES, STATE CONSTITUTIONAL PROVISIONS AFFECTING LEGISLATURES 37-41 (1967).}

(5) A state court may be influenced by the extent to which the United States Supreme Court has shown a "hands-off" attitude toward a particular class of problems. The Supreme Court's virtually total abandonment of the use of substantive due process in economic cases invites a closer look by state courts, since if they do not intervene—and they certainly may be persuaded that they should not—there is no federal forum to which to turn. Where state courts are the only effective forum for a particular kind of grievance, they should look more closely before deciding that they, like the Supreme Court, have no role to play.

Conversely, it can be argued that to the extent a subject has been "federalized"—as happened with much of criminal procedure in the 1960's—the state courts should play a deferential and retiring role. This argument should not be overstated, however, for as the trend of Burger Court decisions reminds us, the Federal Constitution places a floor under, rather than a ceiling over, the rights of an accused. The manifestly diverse and specific provisions of state constitutions should not be ignored in the name of uniformity.\footnote{For instances where courts have realized this see, e.g., People v. Brisendine, 13 Cal. 3d 528, 545-51, 531 P.2d 1099, 1110-13, 119 Cal. Rptr. 315, 326-29 (1975); Commonwealth v. O'Neal, — Mass. —, 339 N.E.2d 676, 690 (1975); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487, 490 (1971).} The values of uniformity should give a state court pause before departing from the federal standard, but they should not be taken to force automatic acquiescence.

(6) State constitutions are a peculiarly useful mirror of funda-
mental values. While the Federal Constitution is amended infrequently and only with great difficulty—witness the travails of the Equal Rights Amendment—state constitutions by contrast are periodically revised to reflect changing values. It is not uncommon for one of the older states, for example, to have had half a dozen constitutions since 1776. Moreover, constitutional revision comes in waves, the era of Jacksonian democracy, the post-Civil War era, and the 1960’s being periods of notable activity. Each period of reform and revision has brought with it a new generation’s insights, and new values have taken constitutional dimension. In Virginia, for example, revisors of the mid-nineteenth century were concerned with reforming legislative apportionment and democratizing the franchise, those of the Reconstruction convention with creating a statewide system of public education, revisors at the turn of the century with restraining corporate power, and the drafters of the 1971 constitution with financing government, quality education, and the environment. With state constitutions thus responding to the felt needs of each generation, there is greater reason for state judges to read those documents as benchmarks for decision.

General revisions aside, state constitutions are far easier to amend than the Federal Constitution. It is hard for the United States Supreme Court to outrage people so much that they amend the Federal Constitution. Critics have tried and failed, as opponents of the Court’s school desegregation, one-man one-vote, prayer, and abortion decisions will attest. Supreme Court justices therefore carry an unusually heavy burden when they break new ground. State judges, by contrast, though they should not innovate lightly, should recall that state constitutions are less immutable. At least one state judge has cited the ease of amending state constitutions as a justification for an activist position. Every state legislature can propose amendments to the state constitution, and in a majority of states there is provision for calling a constitutional convention. Additionally, about a quarter of the state constitutions may be amended through popular initiative. After the Supreme

348 Graves, State Constitutional Law: A Twenty-Five Year Summary, 8 Wm. & Mary L.
Court of California decided that capital punishment violated the California Constitution, the voters promptly amended that document to overturn the court’s decision.

(7) The tradition of the states as experimenters is an honored one. Justice Brandeis celebrated this tradition when he said that it is “one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Other great justices, among them Frankfurter and Harlan, have raised the same banner. On the Burger Court, Justice Powell, an articulate acolyte of the values of federalism, has argued that the Brandeis tradition in economic and social reform might bring “valuable innovation” in criminal procedure.

While these justices had in mind experimentation by state legislatures, the same reasoning supports innovation and diversity among state courts. Legislatures can profit from the experience of sister states, and so can state judges.

One reason we live so readily with the Brandeis notion of experimentation is that state legislatures affect, in the main, only the people of that state. Where legislation has extraterritorial effect, there is a federal remedy—the commerce clause, for example. But for the most part we are perfectly content to let each state’s legislators experiment as they will, compatibly with paramount federal law. Likewise, state court decisions also have limited territorial effect. The justices of the Supreme Court have the burden of knowing that their writ runs throughout the country, a concern that state judges do not share.

The case for an independent role for state courts should not be read as a case for unthinking activism. No judge, state or federal,
is a knight errant, whose only concern is to do good. Hence, the
state judge, when presented with the invitation to develop a body
of state constitutional law, should pause to consider some of the
dangers and hazards that may lie along the way.\textsuperscript{354}

To be sure, the constraints on state judges are not identical with
those upon the federal judiciary.\textsuperscript{355} Some considerations that do or
should act as a brake upon Supreme Court justices should not
really concern a state court judge. For example, however far we
may have come since 1789, ours is still a federal union, and the
Supreme Court properly takes into account what impact its de-
cisions will have on federalism. It would be false logic, however,
for a state court to stay its hand in a given area by pointing to a
Supreme Court decision that in fact rested on considerations of
federalism. It seems odd, for example, that at least one state court,
refusing to intervene in student hair length cases, cited Justice
Black's notion that this is a question best left to the states.\textsuperscript{356} There
may be good reasons for a state court not to decide hair length
cases, but a mechanical use of Justice Black's judgment, whose
basis was federalism, is surely not one of them.

There are some genuine concerns, however, that a state judge
should mull before mounting an activist horse. Judicial review,
even when exercised by elected judges, is never without an anti-
democratic flavor. When judges invalidate a legislative act, how-
ever correct that judgment, they are thwarting an expression of
popular will. What state courts do, then, has clear and significant
implications for the political process and for democratic theory.
This should weigh on their consciences just as it should upon their
distinguished brethren on the federal bench.

\textsuperscript{354} This caveat should not be overemphasized. There are, after all, powerful forces
operating in many states — a traditional conservatism on the bench and the mode of
decision's election, among others — that make state courts markedly cautious about getting
out in front of what is required by federal constitutional law. See Karst, Book Review,

\textsuperscript{355} One commentator has voiced concern that a state court may, in basing a decision
on both state and federal grounds, "insulate" its decision from both Supreme Court review
(because of the adequate state ground doctrine) and from the state's political process
(because amending the state constitution could not correct the interpretation of federal
law and therefore could not change the result of the state court's decision). Bice, supra
note 326, at 757.

\textsuperscript{356} Dunkerson v. Russell, 502 S.W. 64, 65 (Ky. App. 1973), citing Karr v. Schmidt, 401
Further, a state court should determine whether it is being asked in a case at bar to make an essentially legislative judgment. Fuzzy though the bounds between legislative and judicial acts may be, the spirit of our system (not to mention the text of our constitutions) tells us that the roles of judges and legislators are not the same. There are some questions that, because they require a legislative weighing of interests and facts, judges are not well equipped to answer.357

Even without attempting to define what is inherently “judicial” and what is inherently “legislative,” it is certainly important to ask what judges do well and what they do badly. Justice Powell obviously thinks that courts are not very good at running schools; this belief has much to do with his opinion in San Antonio Independent School District v. Rodriguez.358 Justice Rehnquist believes that deciding how to allocate resources—choosing what use to make of finite resources—is a “classic example” of a judgment about priorities that is best made by legislatures. Thus, he objected to the Court’s striking down an Arizona statute requiring a year’s residence in a county as a prerequisite to an indigent’s receiving nonemergency medical care at the county’s expense.359 Additionally, it is relevant to ask whether courts are so extending themselves that the judicial system will simply become overloaded. Justice Powell, concurring in the Supreme Court’s decision to extend the Sixth Amendment right to counsel to state “petty offense” prosecutions, preferred a case-by-case approach because, among other things, of the serious potential impact of the Court’s ruling “on our already overburdened local courts” and upon “the day to day functioning of the criminal justice system.” 360

Values like these—the expertise of judges, their capacity to make resource allocation decisions, and the workload of the courts—ought to concern state courts as well. In general, state judges should strongly consider the potential costs, social and otherwise, of “constitutionalizing” any area.361 They might want to ask the

357 At the federal level this is one of the assumptions underlying the “political question” doctrine.
question raised by a judge in Florida who, although holding that the way a student wears his hair is presumptively a matter of individual style and taste, was troubled that the courts were obliged to resolve disputes of this kind:

We doubt that any free society can ultimately endure either a general disposition to take every grievance to court or a disposition on the part of those in authority to require a court order as a condition precedent to the recognition of the individual's rights. ... We are not personally sympathetic with this sort of litigation because we know how tenuously the rights of the people depend on accessibility of the courts. The invocation of the judicial power in cases which could be resolved by a little reflection on the school board's part and a haircut on Conyers' seems unnecessarily to delay decision of more important matters.  

Where a case is properly presented, a court often must enter. But it is likely to act with more care if it weighs the tradeoffs and external costs.

Another danger, familiar to any student of United States Supreme Court decisions, is that invitations to a court to explore new terrain often entail the risk of going where there simply are no ascertainable standards to guide the judge. Natural law may be a great philosophical tradition, but it is a dubious guide for judges. When the Supreme Court embarked on its long and unhappy career as superlegislature in economic matters, it used what Justice Black often referred to as a "natural law due process" formula.  

Whatever the case for a state court to play a more active role in substantive due process than the federal courts, it is hard not to be restless on reading the North Carolina decision which, in the face of impressive legislative facts about the relation between an oversupply of hospital beds and the rising cost of medical services, puts free enterprise first.  

And it is difficult to see the legitimacy of courts making judgments about competition and socialism as a matter of constitutional law.

Having offered these cautionary notes, one returns to the original theme: that the coming of the Burger Court offers an appro-

---


priate time for state courts to reflect on their ancient heritage as interpreters of their state charters of liberty and on the ever growing opportunities to look to those documents to vindicate the rights of the people of the several states. George Mason and the framers of Virginia’s 1776 Declaration of Rights called for a “frequent recurrence to fundamental principles.”

It is in that spirit that successive generations of state judges breathe continued life into their states’ constitutions.

365 This language is still to be found in VA. Const. art. I, § 15.