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Rediscovering State Constitutions

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I commend the *North Carolina Law Review* for devoting this issue to state constitutional law and for persuading one most responsible for its renaissance, retired United States Supreme Court Associate Justice William J. Brennan, Jr., to contribute to this body of work. In addition to Justice Brennan's Essay, this issue includes professional Articles discussing the history and content of the North Carolina Constitution. Of particular importance to North Carolina lawyers are the issue's student notes and comments reviewing recent decisions construing our state constitution. These pieces demonstrate that state constitutional law is not merely of intellectual interest; it is also of important practical application.

State constitutions are a fundamental source of American law. The earliest were ratified by citizens of the original colonies immediately after the signing of the Declaration of Independence, years before a Federal Constitution was drafted. Compared with the Federal Constitution, state constitutions contain more detailed protections for the individual and, in some cases, protections which have no parallel in the federal document. For example, some state constitutions expressly provide for a right of privacy,[1] a right of access to the courts,[2] or a right to public education.[3]

Although the Federal Constitution is popularly regarded as the ultimate protector of individual rights, state constitutions often expressly offer the individual even greater protection. As the United States Supreme Court takes an increasingly minimalist view of the protections of individual rights provided by the federal document, close scrutiny of state constitutions becomes increasingly important in this area.

Notwithstanding that law schools had given scant attention to state constitutional law until the last decade, state constitutions have contributed to American jurisprudence for more than two centuries. The framers of the federal document drew heavily on the experience of delegates

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* Chief Justice, Supreme Court of North Carolina. The author gratefully acknowledges the assistance of Lucy N. Inman, his law clerk, in the preparation of this Essay.

1. *E.g.*, ALASKA CONST. art. I, § 22, *construed in* Ravin v. State, 537 P.2d 494, 498-504 (Alaska 1975).

2. *E.g.*, FLA. CONST. art. I, § 21, *construed in* Kluger v. White, 281 So. 2d 1, 3-5 (Fla. 1973); N.C. CONST. of 1868, art. I, § 35, *quoted in* Pentuff v. Park, 194 N.C. 146, 157, 138 S.E. 616, 621 (1927).

3. *E.g.*, N.C. CONST. art. I, § 15.

to state constitutional conventions.[4] The Bill of Rights, not originally included in the Federal Constitution, was added at the demand of delegates to ratification conventions in states whose constitutions guaranteed similar rights.[5]

State constitutions provided the first opportunity for American courts to declare constitutions supreme over other laws. State judges, quickly cognizant of the importance of this principle, were not hesitant to invoke it. Law students usually are taught that the doctrine of judicial review was first established by the United States Supreme Court's decision in *Marbury v. Madison*.[6] This was true only for the federal judiciary, for *Marbury* was not the first American decision to assert the judicial branch's authority to invalidate acts of the other branches of government on the ground that they violate supreme law—a constitution. Fifteen years before *Marbury*, the North Carolina Court of Conference,[7] in *Bayard v. Singleton*,[8] invalidated a state statute because it violated the North Carolina Constitution.

Bayard was an action in ejectment brought for the recovery of a house and lot to which plaintiff claimed ownership. Defendant moved to dismiss, contending that he held title from a superintendent commissioner of confiscated estates.[9] A statute provided that where one could "make affidavit" that he held such title, suits against him to recover the land (presumably brought by those from whom the land had been confiscated or their successors) should be dismissed.[10] Defendant produced

4. *See* Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 404 (1988); *see also* James G. Exum, Jr. & Gary R. Govert, *North Carolina and the Federal Constitution: A Commitment to Liberty* 15-16 (Sept. 1987) (unpublished manuscript, on file with the North Carolina Supreme Court Library) (discussing North Carolina delegates' contribution to the Federal Constitution).

5. *See* Williams, *supra* note 4, at 422-23. North Carolina (and Rhode Island) refused to ratify the Federal Constitution until the Bill of Rights was added. For accounts of North Carolina's ratification process, see Exum & Govert, *supra* note 4, at 15-16; *see generally* Walter F. Pratt, Jr., *Law and the Experience of Politics in Late Eighteenth-Century North Carolina: North Carolina Considers the Constitution*, 22 WAKE FOREST L. REV. 577 (1987) (discussing the Hillsborough Convention, at which North Carolina failed to ratify the Federal Constitution).

6. 5 U.S. (1 Cranch) 137 (1803).

7. The North Carolina Supreme Court was not established until 1818, and did not hear cases until 1819. Until then appeals were heard by the circuit-riding Judges of the Superior Court, sitting as the Court of Conference. *See* Kemp P. Battle, *An Address on the History of the Supreme Court*, 103 N.C. 339, 352-61 (1889); Walter Clark, *History of the Supreme Court of North Carolina*, 177 N.C. 617, 619-20 (1919).

8. 1 N.C. (Mart.) 5 (1787).

9. *Id.* at 5.

10. *Id.*

such an affidavit and claimed the statute entitled him to a dismissal. Holding that plaintiffs had a constitutional right to a determination of their property rights by jury trial "unrepealable by any act of the General Assembly,"[11] the court denied defendant's motion to dismiss. The case proceeded to trial, which defendant won.

In support of its decision to deny the motion to dismiss, the Court of Conference noted that if the constitution[12] was altered or repealed by statute, lawmakers "would at the same instant of time destroy their own existence as a Legislature, and dissolve the government thereby established."[13] With "great reluctance . . . against involving themselves in a dispute with the Legislature of the State," the court felt "bound to declare," among other things that

> by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury [and] . . . might with equal authority . . . render themselves the Legislators of the State for life, without any further election of the people . . . .[14]

The court thus explained that a constitution is supreme law, and that it is the responsibility of the judiciary to enforce its provisions, even against other branches of government. Without such a check on executive and legislative power, the court reasoned, our government could be reduced to tyranny or dissolved into anarchy. *Bayard* has been characterized "as the strongest precedent for judicial review prior to the Philadelphia Convention."[15]

Marbury was a mandamus case. William Marbury and other plaintiffs brought an original action in the Supreme Court asking the Court to issue a writ of mandamus to Secretary of State James Madison, compelling Madison to issue commissions certifying their appointments by for-

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11. *Id.* at 7.

12. The court referred throughout its opinion to the "constitution." *See, e.g., id.* at 5 ("constitutional points"); *id.* at 7 ("That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury"). This reference was to the North Carolina Constitution of 1776, inasmuch as it was the only constitution available in North Carolina in 1787, the Federal Constitution not yet having been ratified. *See* John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287, 291 (1991).

13. *Bayard*, 1 N.C. (Mart.) at 7.

14. *Id.*

15. FRANK P. STRONG, AMERICAN CONSTITUTIONAL LAW 62 (1950). *Cf.* I LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 63 (1932) (describing *Bayard* as "heralded far and wide as one of the cases in which the judiciary stood up for the protection of constitutional rights, protecting the minority against the tyranny of the majority").

mer President John Adams as Justices of the Peace in the District of Columbia. The act of Congress that established the federal judiciary—the Judiciary Act of 1789—authorized the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to . . . persons holding office under the authority of the United States."[16] The first issue addressed in *Marbury* was whether the mandamus provision of the Judiciary Act violated Article III of the United States Constitution, which declares that "the Supreme Court shall have *original* jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases the Supreme Court shall have *appellate* jurisdiction."[17] If the Act's mandamus provision did violate Article III, the second issue was whether the Court had the power to say so; in other words, whether the Act, as expressing the will of Congress, was valid and binding on the Supreme Court. The Court concluded that the Act, insofar as it authorized the Court to issue writs of mandamus in the exercise of its original jurisdiction, was contrary to Article III, and the Court had the power to declare the Act void.[18]

Bayard and *Marbury* dealt with different sides of the same constitutional question. *Bayard* discussed whether the legislature could deprive the courts of their power to determine cases by jury trial even though the state constitution guaranteed this method of resolution; *Marbury* analyzed whether Congress could confer on the Supreme Court the power of mandamus even though the constitutional grant of jurisdiction did not include this power. Because both cases examined powers of the very courts that decided them, it was easier and more natural for the tribunals to decide that they, and not the legislature, should be the final arbiters of such questions. Each court could probably have reached the same result by simply invoking the separation of powers doctrine. Yet both the North Carolina Court of Conference and the United States Supreme Court reasoned on broader grounds and thus laid the foundation for the judiciary's claim to judicial review of all acts of the other branches of government.

Chief Justice Marshall did not cite or otherwise refer to *Bayard* in *Marbury*, but he likely knew of and probably had read it before composing his landmark opinion. The North Carolina lawyer who unsuccessfully argued defendant's cause on the motion to dismiss was none other than Alfred Moore, who was serving as associate justice of the United

16. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 148 (1803).

17. U.S. CONST. art. III, § 2, cl. 2 (emphasis added); *see Marbury*, 5 U.S. (1 Cranch) at 173-74.

18. *See Marbury*, 5 U.S. (1 Cranch) at 177.

States Supreme Court when *Marbury* was decided.[19] Moreover, Marshall had argued cases in the United States Supreme Court during the tenure of Justice James Iredell, another North Carolinian who, like Marshall, was a staunch Federalist.[20] Additionally, Marshall served as Circuit Justice for the North Carolina District from 1801 until his death in 1835—a duty that demanded familiarity with North Carolina law.[21]

The similar reasoning employed in the two cases further indicates that Marshall read and relied on *Bayard*. Both opinions referred to the proposition that the constitutions before them were established by the people themselves. Both commented on the organization of government into three separate branches. And in both cases the judges referred to their obligation—voiced in their judicial oaths of office—to uphold and enforce a constitution. Finally, both opinions emphasized that a contrary holding would bestow unlimited power on the legislative branch—power that could be exercised contrary to the will of the people, clearly and unambiguously expressed in a constitution.[22]

Several state courts have relied on their state constitutions to provide more protection of individual rights, than is provided by the Federal Constitution. For example, nearly fifteen years ago the United States Supreme Court sustained provisions of the Uniform Commercial Code in a private commercial transaction against a federal due process challenge

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19. Moore was appointed to the Supreme Court in 1799 by President John Adams to replace Justice James Iredell, who incidentally had been the winning lawyer on the motion to dismiss in *Bayard*. Moore, a strong Federalist, had previously served as North Carolina Attorney General from 1782 to 1791. He resigned that position when it was replaced with that of Solicitor General, which he considered to be unconstitutional. Moore resigned in 1804 due to poor health. He died in 1810. CONGRESSIONAL QUARTERLY, CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 803 (Elder Witt ed., 1979).

20. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 210-20 (1796) (summarizing Marshall's argument on behalf of the defendant); Exum & Govert, *supra* note 4, at 2, 17-18.

21. *See* VI THE PAPERS OF JOHN MARSHALL 399-402 (Charles F. Hobson ed., 1990) (collecting opinions of the U.S. Circuit Court, North Carolina, June 1805); Martin H. Brinkley, *"Where Justice Must be Equally Administered": Constitutional Decisionmaking in the United States Circuit Court for the District of North Carolina, 1790-1805*, at 70-149 (1992) (unpublished manuscript, on file with the *North Carolina Law Review*).

22. *See* Bayard v. Singleton, 1 N.C. (Mart.) 5, 7 (1787), quoted in part in text. In *Marbury* the Court explained that to hold otherwise would mean that the Congress could impose duties on exports from various states, provide for the conviction of treason on the testimony of only one person, or pass ex post facto laws—all clearly contrary to express constitutional prohibitions. It is particularly noteworthy that Chief Justice Marshall wrote, "If, however, such a bill [of attainder or ex post facto law] should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?" *Marbury*, 5 U.S. (1 Cranch) at 179. Compare this allusion with *Bayard*'s concern for condemning persons to death without the benefit of jury trial. *Bayard*, 1 N.C. (Mart.) at 7. Of course, the Federal Constitution's jury trial guarantee was not added until 1791, four years after *Marbury* was decided. *See* U.S. CONST. amend. VI.

because no state action was involved.[23] Less than a year later the New York Court of Appeals, considering similar provisions of New York's lien laws, concluded that no state action was required under its state constitution's guarantee of due process. The New York court held the lien laws, which violated debtors' state due process rights, could not be invoked by individual creditors.[24] More recently, in *United States v. Leon*,[25] the United States Supreme Court engrafted on the rule excluding evidence obtained in violation of the Fourth Amendment a "good-faith" exception.[26] When, however, a North Carolina defendant invoked the state's constitution the North Carolina Supreme Court interpreted the prohibition against unreasonable searches and seizures in Article I, Section 20 as not allowing a "good-faith" exception.[27]

The narrower scope of protections in the United States Constitution may be attributed to the political realities that brought about its existence. The sparse language of the Bill of Rights suggests that federal delegates, representing a diverse and widely dispersed population and wielding the power to dispute every word in the document, found it difficult to agree on details or a greater number of specified rights. By contrast, delegates to individual state constitutional conventions, who represented more homogenous local populations, may have found the going somewhat easier.

As a result, state constitutions generally contain a longer list of individual rights than the Federal Constitution, and their language is generally richer, more detailed, and more specific than that of the federal document. Article I of the North Carolina Constitution, for example, contains the Declaration of Rights, of which the Bill of Rights is the federal counterpart. The Declaration of Rights contains thirty-six discrete provisions, ranging from language lifted directly from the Declaration of Independence in Section 1[28] to a reminder that "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people" in Section 36.[29]

While the Bill of Rights speaks in terms of prohibitions against gov-

23. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 153, 156-63 (1978).

24. *See* Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 157-67, 379 N.E.2d 1169, 1172-78, 408 N.Y.S.2d 39, 42-48 (1978) (construing N.Y. CONST. art. I, § 6).

25. 468 U.S. 897 (1984).

26. *Id.* at 917-26.

27. State v. Carter, 322 N.C. 709, 710, 712-24, 370 S.E.2d 553, 554, 555-62 (1988). Other state courts have reached the same result under their state constitutions. *See, e.g.*, State v. Novembrino, 105 N.J. 95, 144-59, 519 A.2d 820, 849-57 (1987) (construing N.J. CONST. art. I, § 7).

28. N.C. CONST. art. I, § 1.

29. *Id.* § 36.

ernment action, the North Carolina "Declaration of Rights," like similar articles in other state constitutions, speaks positively and contains broad grants of power to the people. For example, Article I, sections 12 and 13 of the North Carolina Constitution provide, respectively:

> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.[30]
>
> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.[31]

How much richer are these detailed grants of individual liberties than the mere prohibitions against abridgment of them found in the federal Bill of Rights!

State constitutions also contain provisions for which there are no federal counterparts. For example, Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[32] This provision has led the North Carolina Supreme Court to invalidate a school-fee waiver policy designed to alleviate the fee requirement for economically disadvantaged students because the school board failed to provide adequate notice of the policy or the procedure for using it.[33] Other state courts have construed their state constitutional educational guarantees to require equal opportunity for all students regardless of financial circumstances. In *Edgewood Independent School District v. Kirby*[34] the Texas Supreme Court held that financial inequalities among state school districts violated the Texas Constitution and required the state legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools."[35] In *Rose v. Council for Better Education*[36] the Kentucky Supreme Court held that Kentucky's public school system violated Section 183 of the state constitution, which required the state to "provide an

30. *Id.* § 12.

31. *Id.* § 13.

32. *Id.* § 15.

33. Sneed v. Board of Educ., 299 N.C. 609, 610-20, 264 S.E.2d 106, 108-14 (1980).

34. 777 S.W.2d 391 (Tex. 1989).

35. *Id.* at 394.

36. 790 S.W.2d 186 (Ky. 1989).

efficient system of common schools throughout the state."[37] After deciding in 1989 that the entire statutory scheme for the public school system was unconstitutional, the Kentucky Supreme Court announced that it would withhold final judgment while the legislature scrambled to redesign the school system during its next regular session.[38]

So long as a state court interpreting its state constitution does not give individual rights less protection than the Federal Constitution requires, the state court can employ a unique method of constitutional analysis.[39] To protect the integrity of its decision from federal review, the state court must make clear that its decision is based on adequate and independent state grounds.[40] Moreover, using state constitutional law permits state courts to be more innovative, and helps keep state law constant in the face of changing winds that sometimes blow out of Washington.

Differences between state constitutions and the United States Constitution must always be resolved at the state level in favor of the individual right at issue. This does not always mean that the right prevails over the other interests asserted; it means, rather, that if either constitution favors the right, the right must prevail. Thus a state court interpreting its state constitution may give greater, but never less, protection to individual liberties than is mandated by the United States Constitution.[41] Under this principle of dual sovereignty, federal and state constitutional rights "stand side by side . . ., a double-edge sword in the service of freedom."[42]

One of the tasks of an advocate is to make decisionmakers conscious of points that tilt in the advocate's favor. In the law, this often becomes a matter of raising the court's awareness of and educating the court about principles that might persuade the court to decide in favor of the lawyer's client. I hope this issue of the *North Carolina Law Review* will make all who read it aware of the fertility of the field of state constitutional law. It is, indeed, time to dust off these hallowed documents and use them in the service of freedom and justice for all.

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37. *See* KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

38. *Rose*, 790 S.W.2d at 216.

39. For a discussion of cases in which the Supreme Court of North Carolina has employed a constitutional analysis unique to the North Carolina Constitution, see Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1751-57 (1992).

40. Michigan v. Long, 463 U.S. 1032, 1037-45 (1983).

41. Oregon v. Hass, 420 U.S. 714, 723-24 (1985).

42. Exum & Govert, *supra* note 4, at 21.