1988

Justice Kelleher and the Constitutions

Robert B. Kent
Cornell Law School, rbk5@cornell.edu

JUSTICE KELLEHER AND THE CONSTITUTIONS

Robert B. Kent*

Monday, January 10, 1966 was the effective date of the Rhode Island Rules of Civil Procedure. Having played a part in the preparation and adoption of those rules, I traveled to Providence, Rhode Island to attend a brief ceremony at the Superior Court to mark the occasion. On the previous Friday the Grand Committee of the Rhode Island General Assembly had elected Thomas F. Kelleher an Associate Justice of the Supreme Court. My first meeting with the new justice had involved another happy coincidence twenty years earlier when, on opening day, the entering class of Boston University School of Law was assigned its seats in alphabetical order. It was inevitable that Kelleher and Kent would be in propinquity. Now Kelleher, qua Justice, has attained the age of majority, (as it was reckoned then), and I am privileged to take part in this celebration.

There is yet another coincidence, one of much more importance. At just about the time Justice Kelleher ascended the bench, the United States Supreme Court was rapidly making provisions of the Bill of Rights applicable to the states. By its terms, the original Bill of Rights applied only to the national government.[1] Although the Court narrowly rejected the argument that the privileges and immunities clause or the due process clause of the fourteenth amendment made the full panoply of rights secured in the Bill of Rights applicable to the states,[2] by 1966 the process of selective incorporation was under way. The familiar standard, articulated by Justice Cardozo in *Palko v. Connecticut*,[3] was that the fourteenth amendment embodies fundamental principles of jurisprudence rooted in the tradition and concepts of the American people, and values implied in a system of ordered liberty basic to our system of justice. *Palko* rejected the notion that the mere enumeration of a right in the first eight amendments made it one of those "principles" protected by the fourteenth amendment. Yet by 1940, the Court found that rights protected against state abridgement included freedom of speech,[4] press,[5] assembly,[6] petition,[7] and the free exercise[8] and nonestablishment of

---

* A.B., Harvard; LL.B., Boston University. Professor of Law, Cornell Law School.

1. *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 250 (1833) (first ten amendments restrain action of federal government).
2. Adamson v. California, 332 U.S. 46, 53 (1947).
3. 302 U.S. 319, 325 (1937).
4. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
5. Near v. Minnesota, 283 U.S. 697, 707 (1931).
6. De Jonge v. Oregon, 299 U.S. at 360.
7. Hague v. CIO, 307 U.S. 496, 513 (1939).

religion.[9]

The impact of selective incorporation on the administration of state criminal justice did not reach major proportions until the mid-1960's. While the right to a public trial gained recognition in 1948,[10] and the freedom from unreasonable searches and seizures the next year,[11] not until 1961 did the Supreme Court apply the so-called exclusionary rule to the states.[12] The remainder of the decade witnessed a series of decisions which brought the remainder of the criminal procedural safeguards contained in the Bill of Rights under the umbrella of the fourteenth amendment. The fifth amendment rights to be free from compulsory self incrimination[13] and double jeopardy,[14] the sixth amendment rights to a speedy trial,[15] to trial by jury,[16] to confront adverse witnesses,[17] to compulsory process for obtaining witnesses,[18] and the eighth amendment freedom from cruel and unusual punishment[19] were held applicable to the states. At the end of Justice Kelleher's third year on the bench these federal constitutional requirements were virtually all in place, giving rise to an enlarged judicial responsibility to apply federal law of constitutional dimensions to state criminal cases. Of course, the fourteenth amendment's commands to the states included more than the incorporated Bill of Rights. The equal protection clause has a content of its own, and both procedurally and substantively the states are subject to the requirements of due process.

Most of these constitutional principles were hardly strangers to the laws of the several states, including Rhode Island. Most of the provisions of the Bill of Rights have counterparts in the Rhode Island Constitution, some in nearly identical terms. These provisions have existed since the adoption of the Rhode Island Constitution in 1842.[20] State

---

8. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
9. Everson v. Board of Education, 330 U.S. 1, 15 (1947).
10. *In re* Oliver, 333 U.S. 257, 271-73 (1948).
11. Wolf v. Colorado, 338 U.S. 25, 33 (1949).
12. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
13. Malloy v. Hogan, 378 U.S. 1, 8 (1964).
14. Benton v. Maryland, 395 U.S. 784, 794 (1969).
15. Klopfer v. North Carolina, 386 U.S. 213, 222-26 (1967).
16. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
17. Pointer v. Texas, 380 U.S. 400, 403 (1965).
18. Washington v. Texas, 388 U.S. 14, 19 (1967).
19. Robinson v. California, 370 U.S. 660, 667 (1962).
20. Indeed, the Charter of Rhode Island and Providence Plantations of 1663 guarantees "that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye hav and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; . . . ." SOURCES OF OUR LIBERTIES at 170 (R. Perry ed. 1959).

Of course, the 1842 adoption of the Rhode Island Constitution came many years before the ratification of the federal constitution's fourteenth amendment, to say nothing of the expanded

judges faced with the duty of applying principles of constitutional law drawn from two governmental sources, often find these principles appearing together when parties challenge governmental action on both federal and state constitutional grounds.[21] In a sense the state supreme court justice wears two robes. One is that of an intermediate appellate court judge, attempting to apply the "supreme law of the land" as elaborated in the opinions of the Supreme Court of the United States. The other is that of a judge of a court of last resort, authoritatively interpreting and applying the constitution of the state.

Some of the most challenging and fascinating problems arise when questions of federal and state constitutional law appear together in a single case, each potentially determinative of the outcome. It is this class of cases which I take this occasion to address in some detail, but first it seems appropriate to comment upon the approach and the philosophy of Justice Kelleher in performing this dual function of a state appellate judge in constitutional cases. I do not know the total number of opinions Justice Kelleher has written, but I do know that in the area of constitutional law, both state and federal, his output exceeds 165 opinions, inclusive of concurrences, dissents, and advisory opinions.

I. JUSTICE KELLEHER AND THE RHODE ISLAND CONSTITUTION

Justice Kelleher approaches the Rhode Island Constitution as an interpretivist. In *Bailey v. Baronian*,[22] for example, the court construed amendment XXXVIII, adopted in 1973, which disenfranchised persons "convict[ed] of a felony." The problem was whether this applied to one convicted of a felony under the law of another state. The court held that it did. Justice Kelleher, writing for a unanimous court, began the discussion:

> In construing constitutions, our chief purpose is to give effect to the intent of the makers. . . . Ordinary words are to be given their usually accepted meaning, and we must presume the language was carefully weighed and that its terms imply a definite meaning. . . . We must look to the history of the time and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy.[23]

The word "felony" simply could not furnish the answer to the question

---

Supreme Court interpretations of the 1960's. Specific references to due process, equal protection, and freedom of speech were added to the Rhode Island Constitution by the 1986 amendment. *See* R.I. CONST. art. I, §§ 2 & 21.

21. *See infra* notes 94-97 (discussing adequate and independent state grounds of state court decision generally precluding Supreme Court review).

22. 120 R.I. 389, 394 A.2d 1338 (1978).

23. *Id.* at 391-92, 394 A.2d at 1339.

before the court. Justice Kelleher's opinion is a painstaking treatment of the history of this type of provision and the circumstances leading to the adoption of the amendment. While not averse to occasional use of the works of Noah Webster when others argue for an interpretation which he believes the language will not bear, Justice Kelleher is an admirer of the "sagacious comments made by Judge Learned Hand when he observed that the courts should be wary of 'mak[ing] a fortress out of the dictionary' ".[24]

The more general the constitutional provision, the more sweeping its reach, the less answers can be derived simply from the language itself. Accordingly, article III of the Rhode Island Constitution, entitled "Of the Distribution of Powers", reads, "The powers of the government shall be distributed into three departments: the legislature, executive and judicial." The words are few and simple, but the concepts behind them are not. *Weeks v. Personnel Board*[25] represents a careful application based on history, practice in Rhode Island and elsewhere, and sensitivity to the perceived needs of the governmental system. Recognizing its independence of federal notions as to the distribution of powers, the court through Justice Kelleher held that judicial review of adjudicatory rulings in the administrative sector is not violative of article III.

Justice Kelleher has added much to the contributions of the Rhode Island court to a reasoned and soundly-functioning law with respect to delegation of legislative powers,[26] standing to challenge administrative action,[27] the political question doctrine,[28] and the unique status of the structure of government of New Shoreham.[29] His clearly stated and workable standard for determining standing to challenge the validity of administrative action is particularly admirable. The court settled upon

---

24. Hansen v. Stocking, 120 R.I. 455, 458, 388 A.2d 19, 21 (1978) (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)). In order to emphasize that a literal interpretation of language is a misapplication of reason, Justice Kelleher in *Hanson* quoted Judge Hand:

> There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document, as a whole, is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose, because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.

Central Hanover Bank & Trust Co. v. Commissioner, 159 F.2d 167, 169 (2d Cir. 1947).

25. 118 R.I. 243, 373 A.2d 176 (1977).

26. J.M. Mills, Inc. v. Murphy, 116 R.I. 54, 76, 352 A.2d 661, 672 (1976).

27. R.I. Ophthalmological Soc. v. Cannon, 113 R.I. 16, 26, 317 A.2d 124, 129 (1974); Rosen v. Restrepo, 119 R.I. 398, 399-400, 380 A.2d 960, 961 (1977).

28. Lee v. Nielson, 120 R.I. 579, 582-83, 388 A.2d 1176, 1178-79 (1978).

29. Whitman v. Mott, 114 R.I. 530, 336 A.2d 836 (1975).

the principle of "injury in fact" as the sole guidepost, thus avoiding the confusion and cloudiness which surrounds the doctrine at the federal level. Perhaps the court can afford to be more hospitable to the entertainment of constitutional claims given its tradition of an interpretivist approach to its role. And the warning is given that not just anything will qualify as an injury in fact.[30]

The Supreme Court of Rhode Island is not reticent in defining the scope of judicial power and the constitutional limits on the power of the legislature to control it. In *Simmons v. Coventry Town Council*,[31] Justice Kelleher reminds that in an earlier case "[w]e acknowledged the Legislature's right to limit the right of appeal but pointed out that this right is subject to the provisions of article XII of the amendments to the state constitution which specifically reserves to this court the power to exercise 'final revisory and appellate jurisdiction upon all questions of law and equity.' This revisory and appellate jurisdiction over inferior tribunals is exercised by our power to issue prerogative writs."[32]

In 1971, the Rhode Island General Assembly enacted a statute relieving members of the legislature, be they litigants, counsel, or witnesses, of the responsibility of attending trials in the courts of Rhode Island during legislative sessions and rendering void any process served to compel attendance in court during such times. While disclaiming holding legislators subject to arrest during a session, Justice Kelleher's opinion termed the statute "blatantly unconstitutional."[33] He forcefully asserted that "[o]ne part of judicial power is the inherent right of the judicial system to control the order of its business."[34] Rejecting the mandate of the statute, Justice Kelleher softened the blow: "All the judiciary requires is that the legislator, who wishes to be excused, explain to the justice who has charge of the particular litigation the reason which makes it impossible for the legislator to be present. The trial justices, we are sure, will make every effort to accommodate the needs of their colleagues in state government."[35]

Likewise, Justice Kelleher leaves no doubt as to the status of the

---

30. R.I. Ophthalmological Soc. v. Cannon, 113 R.I. 16, 317 A.2d 124 (1974). Justice Kelleher wrote:

> Despite our broadening of the concept of standing, we will not render advisory opinions or function in the abstract. Litigation will be confined to those appropriate situations where the litigant's concern with the subject matter evidences a real adverseness, *i.e.* his own injury in fact. However, the pleadings must be something more than an ingenious exercise in the conceivable. . . . The allegations must be capable of proof at trial.

Id. at 28, 317 A.2d at 130-31.

31. 112 R.I. 522, 312 A.2d 725 (1973).

32. *Id.* at 524-25, 312 A.2d at 726-27.

33. Lemoine v. Martineou, 115 R.I. 233, 238, 342 A.2d 616, 620 (1975).

34. *Id.* at 239, 342 A.2d at 620.

35. *Id.* at 242, 342 A.2d at 622.

supreme court's opinions in the judicial scheme within the state. In rendering a decision a trial judge had stated that he was not going to follow certain supreme court precedents with which he disagreed, "unless some day the Supreme Court might undertake to either agree with me or overrule me." The court overruled him.[36]

A prominent feature of Justice Kelleher's career has been his steadfastness regarding the right to trial by jury as secured by article I, sections 10 and 15 of the Rhode Island Constitution. In 1971, he and three other justices, with Chief Justice Roberts dissenting, responded to a question from the Senate as to the constitutionality of a pending bill, reducing the number of petit jurors from twelve to six. Justice Kelleher and his colleagues replied that the reduction was consistent with the United States Constitution but not with that of Rhode Island.[37] A thorough historical analysis led to the conclusion that "in and about 1842 [the date of promulgation of the constitution] a trial by jury was synonymous with a trial by a jury of twelve."[38] The majority rejected the United States Supreme Court's characterization of twelve as an "historical accident."[39] Change in Rhode Island subsequently came through the adoption of amendment XLIII in 1976: "In *civil cases* the General Assembly may fix the size of the petit jury at less than twelve but not less than six."[40]

In *State v. Vinagro*,[41] Justice Kelleher wrote for the court concerning the validity of legislation reclassifying as "violations" statutory offenses punishable only by a fine of not more than $500. The court held unconstitutional the withdrawal of trial by jury as to "violations" notwithstanding a statutory provision that "conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a

---

36. D'Arezzo v. D'Arezzo, 107 R.I. 422, 426-27, 267 A.2d 683, 685 (1970). Justice Kelleher noted that:

> [u]nder our constitution it is the prerogative of this court to determine the law. The late Mr. Justice Jackson of the United States Supreme Court in an oft-quoted statement said that courts of last resort are not final because they are infallible, but rather they are infallible only because they are final. A trial judge's critical view of a reviewing court's holding is understandable. The law is a profession in which every case represents a difference of opinion among men, and the tribunal which must ultimately resolve these differences is certain to please some and displease others. . . . However, an opinion declares the law and the law thus announced becomes a precedent which must be followed by any inferior court. . . . This is so even though a trial judge may personally disagree with the wisdom or soundness of the established rule to be applied—otherwise there can be no stability in the law.

Id.

37. Advisory Opinion to the Senate, 108 R.I. 628, 640-41, 278 A.2d 852, 858-59 (1971).

38. *Id.* at 637, 278 A.2d at 857.

39. *Id.* at 640, 278 A.2d at 858.

40. *Id.* (emphasis added). *See* R.I. CONST. art. I, § 15 (amend. 1986). The General Assembly has fixed the number at six. R.I. GEN. LAWS. § 9-10-11.1.

41. 433 A.2d 945 (R.I. 1981).

criminal offense." Justice Kelleher's historical analysis led the court to the conclusion that the offense charged (keeping a pit bulldog for purposes of fighting) was of a type triable to a jury in 1842. Indeed, many offenses punishable by a fine of $50 or even less were so triable. Reclassifying the offense as a "violation", even with the removal of criminal taint, could not alter the constitutional right. To the argument that jury trials of such minor offenses impose a disproportionate cost upon the administration of justice, Justice Kelleher characteristically responded that if so, "the proper solution is to amend the constitution."[42]

Two years later Justice Kelleher lost his majority in *Appt v. City of Warwick Building Department*.[43] A divided court, speaking through Justice Murray, denied the constitutional right to trial by jury to one charged with violating a zoning ordinance, an offense authorizing a fine of up to $100 for each violation, with each day of a continuing violation constituting a separate offense. Justice Murray treated the issue as whether the offense is "criminal in nature." Concluding that a zoning violation is not the type of offense which was triable to a jury at the time of the adoption of the Rhode Island Constitution, the court held the defendant not so entitled. Justice Kelleher was not convinced. Joined by Chief Justice Bevilacqua, he insisted that the offense was analogous to those tried to juries in 1842, pointing specifically to a case involving the unlicensed sale of liquor, calling for a fine of not more than $50.[44] In a somewhat surprising dictum-in-dissent, Justice Kelleher pointed to an acceptable "technique" for alleviating the jury trial docket of the superior court. The suggested approach was that employed by the legislature in 1976,[45] when it created an Administrative Adjudication Division within the Department of Transportation for disposition of a host of traffic offenses through the imposition of money penalties. Various statutory minor offenses related to motor vehicles were transferred to the jurisdiction of the agency, with the proceedings termed "civil" in nature. Justice Kelleher's dissenting opinion argued that such infractions are non-criminal in nature and thus beyond the reach of the jury trial provisions of the state constitution.

The implications are troublesome. In both *Vinagro* and *Appt*, initial adjudication was in a district court. What the legislature had eliminated was a trial de novo with a jury on appeal to the superior court. This was

42. *Id.* at 949. Justice Kelleher rejected the applicablity of *State v. Holliday*, 109 R.I. 93, 280 A.2d 333 (1971) because its holding, that petty offenses need not be tried to a jury, was based on the requirements of the sixth amendment to the United States Constitution and not on "the thrust of the state's constitutional guarantee." *Id.* at 949 n.6.

43. 463 A.2d 1377 (R.I. 1983).

44. *Id.* at 1380 (citing State v. Peckham, 3 R.I. 289, 291 (1838)) (Kelleher, J., dissenting).

45. R.I. GEN. LAWS § 31-43-1.

unacceptable to Justice Kelleher, even though the legislature had placed the non-criminal tag on the offenses in question in *Appt*. The extent to which the General Assembly can immunize offenses from the jury trial requirement by transferring their initial adjudication outside the judicial system raises additional constitutional issues as to limits on the power of the legislature to assign judicial or quasi-judicial functions to administrative agencies.

II. JUSTICE KELLEHER AND THE CONSTITUTION OF THE UNITED STATES

Before reaching the principal theme of this article (the role of the state court when both state and federal constitutional claims are raised with respect to the same governmental action) a few words seem in order about Justice Kelleher's general treatment of federal constitutional issues. No court could behave more professionally in relation to the duty of state courts to apply federal law than does the Supreme Court of Rhode Island. It is clear that the Constitution and the laws of the United States are the supreme law of the land and that they as state judges are "bound thereby anything in the constitution or laws of [the] state to the contrary notwithstanding."[46] Nor does there appear any doubt in the minds of Justice Kelleher and his colleagues that this duty includes unwavering attempts to follow the precedents established by the opinions of the United States Supreme Court in interpreting the Federal Constitution and laws.[47]

In many ways, Justice Kelleher's dissent in *State v. Innis*[48] is one of the high points of his career. Arrested on suspicion of murder and advised of his constitutional rights pursuant to *Miranda v. Arizona*,[49] Innis said that he wanted to see a lawyer. Three police officers, instructed not to question him, began the trip to the police station with him in custody. One officer expressed concern to another for the safety of children at a

46. U.S. CONST. art. VI, § 2.

47. In the course of preparing this article, I have read virtually all of Justice Kelleher's constitutional opinions and many of those of his colleagues. I can recall not a single sentence of grudging acquiescence in Supreme Court holdings with which the author disagrees, no figurative gnashing of teeth attendant upon performing an unpleasant duty. It is refreshing. Of course the process is not always easy, and conscientious judges do not always agree. But what Justice Kelleher preached in *D'Arezzo* about the duties of a trial judge to follow the precedents of the state supreme court, he and his colleagues practice in respect to the opinions of the Supreme Court of the United States. For an excellent example, see Justice Kelleher's opinion in *Constitutional Right to Life Committee v. Cannon*, 117 R.I. 52, 363 A.2d 215 (1976), considering the validity of state abortion regulation in the light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

48. 120 R.I. 641, 391 A.2d 1158 (1978), *vac. sub nom.* Rhode Island v. Innis, 446 U.S. 291 (1980), *on remand*, State v. Innis, 433 A.2d 646 (R.I. 1981).

49. 384 U.S. 436 (1966).

nearby school for the handicapped in the event they should come upon the murder weapon. Apparently upon hearing the remark, Innis asked that he be returned to the place of arrest so that he might show the officers the location of the shotgun used in the murder. Again advised of his rights, Innis said he wanted to show the police where the weapon was hidden. He did so. His subsequent motion to suppress the shotgun as evidence was denied. It was admitted at the trial and Innis was convicted.

The Supreme Court of Rhode Island reversed Innis' conviction in a majority opinion written by Justice Doris. The court held that the defendant was "interrogated" within the meaning of *Miranda* after he had stated that he wanted an attorney, and that under the circumstances his subsequent conduct could not be considered a waiver amounting to an intentional relinquishment of a known right under the fifth amendment to the United States Constitution. Justice Kelleher's dissenting opinion, joined by Justice Joslin, is a model of meticulous statement of the facts, thorough research into the precedents of the United States Supreme Court, and a well-reasoned application of the principles discerned. The key seems to have been his persuasion that the record showed no intent on the part of the officers to trick or otherwise induce Innis to talk. Satisfied as to that, Justice Kelleher distinguished with great care precedent seeming to support the defendant's position. The fact that subsequent United States Supreme Court review proved him "right" is not the point.[50] His work stands on its own as a model of judicial craftsmanship.

In such a setting Justice Kelleher's opinions are not always vindicated in the sense of controlling the outcome. In *State v. Burbine*,[51] he again was in dissent. Justice Kelleher urged reversal of a conviction, following an unsuccessful motion to suppress evidence of the defendant's confessions. The trial judge found the confessions voluntary, likewise written waivers of the defendant's right to remain silent and his right to counsel at the interrogation. The problem was a telephone call made to the police station by a lawyer from the Public Defender's office, which was representing Burbine in an unrelated criminal matter. The call was stimulated by a request for help made by Burbine's sister without his knowledge. The lawyer who called the police station told an unidentified "detective" that she would act as Burbine's counsel in the event that the police intended to place him in a line-up or question him that evening. She was told that the police would not be questioning Burbine that evening nor placing him in a line-up, and that they were through with him for the night. The answerer did not inform the lawyer that Burbine was

50. Rhode Island v. Innis, 446 U.S. 291 (1980).
51. 451 A.2d 22 (R.I. 1982).

a suspect in a murder case, nor that Providence police officers were in the Cranston station to question him. The defendant was not told of the call. After signing waivers he confessed to the murder.

The trial judge in *Burbine* found that the lawyer made the call but that there was no evidence of collusion or conspiracy to secrete Burbine from his attorney. Speaking through Justice Weisberger, the Supreme Court of Rhode Island affirmed the conviction, finding the confession voluntary and the waiver knowing. The court accepted the trial judge's findings regarding the making of the lawyer's call and, at least as to the interrogating officers from Providence, the absence of collusion or conspiracy. Justice Weisberger's opinion represents an exemplary application of a complex set of Supreme Court opinions to a novel set of facts.

Justice Kelleher's disagreement turns on perceptions of fact and inferences to be drawn. He regards as clearly wrong the conclusory findings of the trial judge as to the absence of collusion and conspiracy, given that judge's finding that the lawyer made the call to the Cranston police station. All the justices rejected a New York approach under its own constitution to the effect that no waiver of the privilege against self-incrimination by a person in custody can be recognized as voluntary in the absence of counsel. Justice Kelleher, however, found this police conduct violative of constitutional norms. Recognizing the possibility that the United States Supreme Court might agree with the majority on the federal constitutional question, Justice Kelleher invoked the Rhode Island Constitution, asserting that the state document accords more rights to Burbine than its federal counterpart.[52]

Although the defendant did not seek direct review in the United States Supreme Court, the case did not end at that point. The United States District Court for the District of Rhode Island denied a petition for the writ of habeas corpus, holding the admission of the confession not violative of the defendant's fifth amendment rights.[53] The United States Court of Appeals for the First Circuit reversed. Judge Coffin's opinion closely paralleled those of the Rhode Island Supreme Court dissenters.[54] But the last word came from the United States Supreme Court, which reversed the court of appeals, in effect affirming the judgment of the Rhode Island court.[55]

Lest this essay descend from admiration to sycophancy, I turn to one area of federal constitutional law in which I find Justice Kelleher's opin-

52. *Id.* at 39. Chief Justice Bevilacqua dissented, joined by Justice Kelleher, who also dissented separately. *Id.*

53. Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 475 U.S. 412 (1986).

54. 753 F.2d 178 (1985), *rev'd*, 106 S. Ct. 1135 (1986).

55. Moran v. Burbine, 475 U.S. 412 (1986).

ions curiously troubling. In *Berger v. State Board of Hairdressing*,[56] the Rhode Island court considered the validity of a statute which barred schools teaching hairdressing from charging any fee for supplies used on any person acting as a subject for student training. Because there was then no due process clause in the Rhode Island Constitution, save for that operative in criminal cases, Justice Kelleher treated the challenge as based solely on the due process clause of the fourteenth amendment to the United States Constitution. He found the statute unconstitutional, while conceding the validity of a ban on the charging of fees for hairdressing services performed by students. The conclusion is clear: "[W]e fail to find any relationship between the prohibition of material charges and the safe-guarding of public health, safety, and general welfare. Accordingly, we find that portion of [the statute] unconstitutional since it violates the due process clause of the fourteenth amendment to the United States Constitution."[57] In reaching this conclusion, based squarely on a federal constitutional ground, Justice Kelleher does not cite a single federal court decision, let alone one from the United States Supreme Court. That Court has not invalidated an economic regulation on substantive due process grounds since 1937. The absence of any reference to United States Supreme Court cases such as *United States v. Carolene Product Co.*,[58] *Williamson v. Lee Optical*,[59] and *Ferguson v. Skrupa*,[60] all upholding statutes of very dubious reasonableness, seems out of character, given the Justice's dedication to respect for Supreme Court opinions in the adjudication of federal questions. The *Berger* court seems to have done that which Justice Murray, in a later case, declined. She wrote, "I refuse to awaken long rejected notions of substantive due process and adhere to the *Williamson* rule in cases of nonfundamental rights. Economic legislation is clearly the province of the Legislature."[61] Whatever may be the reach of substantive due process under state court interpretations of their own constitutions, Justice Murray's dictum appears accurate as to the state of federal constitutional law. Reliance on the fourteenth amendment for the result reached in *Berger* is highly questionable.

The other troublesome opinion by Judge Kelleher is *Boucher v. Sayeed*,[62] decided in 1983. At stake was the validity of a revised version

56. 118 R.I. 55, 371 A.2d 1053 (1977).

57. *Id.* at 62, 371 A.2d at 1057. Article I, section 2 of the 1986 revision of the Constitution of Rhode Island adds a due process and an equal protection clause.

58. 304 U.S. 144 (1938).

59. 348 U.S. 483 (1955).

60. 372 U.S. 726 (1963).

61. Kennedy v. Cumberland Engineering Co., 471 A.2d 195, 205 (R.I. 1984) (Murray, J., dissenting).

62. 459 A.2d 87 (R.I. 1983).

of the Rhode Island Medical Malpractice Act.[63] The act required a preliminary hearing before a judge of the superior court to determine whether the evidence sufficed to raise a "legitimate question of liability appropriate for judicial inquiry, or whether the plaintiff's case is merely an unfortunate medical result." In the latter event the action "shall be dismissed with prejudice." The act would seem vulnerable to the challenge that it abridged the right to trial by jury in violation of the Rhode Island Constitution.[64] That issue was raised, but the court did not decide it, finding it unnecessary to do so in light of its holding that the act violated the Federal Constitution's equal protection clause.

Justice Kelleher's statement of the applicable equal protection analysis seems unexceptionable. With ample references to United States Supreme Court precedents, he concluded that the interests at stake were non-fundamental, and that the classifications were not of a suspect variety. Finding no basis for any form of heightened scrutiny, he applied a rational basis standard, thus inquiring whether the classifications furthered a rational state objective. Accepting the trial judge's premise that the purpose of the statute was to alleviate a "medical malpractice crisis," the court further agreed with the determination below that facts of which courts take judicial notice demonstrate that the "crisis" of 1975-76 (when the initial medical malpractice legislation was enacted) had disappeared by 1981 when the statute at issue was passed, thus eliminating any rational basis for the special treatment that the statute accorded medical malpractice cases.

The result in *Boucher* may well flow from the premise that it is crisis and only crisis which justified the legislation in the first place. The court does not, and analytically could not, conclude that the legislature in 1981 could not rationally find a problem in the area. Given a problem, not necessarily a crisis, the legislative classifications appeared related to it. At least there appears a rational basis for thinking so. If that is the case, the equal protection challenge based on the fourteenth amendment must fail.[65] Support for this position appears in *Williamson v. Lee Optical*[66] and in *Minnesota v. Clover Leaf Creamery Co.*[67] These two cases are recognizably absent from the discussion in *Boucher*. The result appears in the end to represent substitution of judicial judgment for that of the legislature in an area in which the Supreme Court has been most deferen-

63. R.I. GEN. LAWS § 10-19-4. Following the decision in *Boucher v. Sayeed*, the statute was repealed. 1985 R.I. Pub. Laws 150.

64. 459 A.2d at 91 n.13. Justice Kelleher indicated as much.

65. The reasoning of *Boucher* was expressly rejected in *Houk v. Furman*. 613 F. Supp. 1022, 1031 (D. Me. 1985).

66. 348 U.S. 483 (1955). *See id.* at 491 (expressly rejecting heightened scrutiny when economic objective supports reasonable state regulation).

67. 449 U.S. 456 (1981).

tial, equal protection review of economic regulatory statutes. The court in *Boucher* could have reached the same result through the equal protection clause of the Rhode Island Constitution,[68] particularly if the court were willing to embrace a somewhat heightened standard of scrutiny, an approach which Justice Kelleher declined and which was unnecessary in light of his conclusion that the statute did not survive the lower tier test.[69]

III. Two Robes or One?—The Relation Between State and Federal Constitutional Law

A. The Incorporation Phenomenon

The creation or recognition of additional constitutional rights means more occasions for the exercise of judicial power and therefore more work for courts. When the United States Supreme Court, through a gradual process, held various provisions of the Bill of Rights applicable to the states through the fourteenth amendment, state courts became obligated to apply an increasingly large body of federal constitutional law. The principle of such obligation was not new, but the occasions for its exercise multiplied as the law of criminal procedure became more and more a subset of federal constitutional law. The binding precedents come from the United States Supreme Court. Subject to these precedents, the decisions of state courts applying the provisions of the fourth, fifth, sixth, and eighth amendments to the United States Constitution themselves become part of the law binding the lower court judges in the particular states. Additionally, they become sources of persuasion and influence for other state courts and indeed for the United States Supreme

68. The term "equal protection of the laws" did not then appear in the Rhode Island Constitution. A functional equivalent was found in article I, section 2. Thus, "[a]ll free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens." *Id.* In *City of Warwick v. Almac's, Inc.*, 442 A.2d 1265 (R.I. 1982), challengers to the validity of Sunday closing laws relied upon this section in attacking statutory exemptions as unconstitutional classifications. The court ultimately rejected the challenge but did entertain it, describing the section as "essentially a guarantee of equal protection of the laws." *Id.* at 1270. Article I, section 2 of the 1986 revision does contain an equal protection clause.

69. Most medical malpractice legislation in this country has withstood constitutional challenge. Those courts which have held such measures invalid have generally relied upon the guarantees of trial by jury or state equal protection provisions as the constitutional barriers. The troublesome aspect of *Boucher* is not so much its result, as it is having that result squarely based on the fourteenth amendment and thus laid at the door of the United States Supreme Court. *See generally* Lacy v. Green, 428 A.2d 1171, 1175 (Del. Super. Ct. 1981) (surveying cases and concluding medical malpractice legislation generally has withstood constitutional challenges); *see also* Henderson, *Agreements Changing the Forum for Resolving Malpractice Claims*, 49 Law & Contemp. Probs. (2) 243, 249-50 (1986) (discussing appropriate constitutional analysis used to challenge medical malpractice legislation).

Court itself.[70] The law acquires a unitary look about it as state courts apply the constitutional norms derived from the specifics of the federal Bill of Rights and the United States Supreme Court continues to examine and re-examine, to define and redefine the reach of the federal mandates. In a sense the courts of the nation and of the states are involved in a partnership, or a joint venture, under the leadership of the United States Supreme Court, of securing to the people of the United States the rights embedded in the Constitution whose 200th birthday we celebrate this year. The venture includes accommodating those rights to others with which they come into tension, the rights of the people to the maintenance of public order and protection of individuals from the depredations of wrongdoers. One may regard the process of constitutional adjudication as interpretive, but the language alone hardly furnishes ready markers to questions as to the precise boundaries of a defendant's right "to be confronted with the witnesses against him" or his right not "to be compelled in any criminal case to be a witness against himself," any more than it defines for us the "freedom of speech" secured against governmental abridgement, or even what it means to "abridge." Judicial creation there is, and the debate continues as to how much is legitimate and in what form. In this realm of federal constitutional law the state supreme court does take on the look of an intermediate appellate court. But of course in the federal system there is more.

B. The Mixture of State and Federal Questions

The states have written constitutions of their own. They have in common an adherence to the separation of powers, to a model similar to the federal, one including a judicial structure headed by a court of last resort with the power and duty to apply and interpret the state constitution. As to state law the state supreme court is supreme. And state constitutions have bills or declarations of rights, containing provisions of great similarity to those contained in the federal Bill of Rights. Some of these are older than their federal counterparts, some younger. Some have a long history of judicial application; some have gone virtually unnoticed. When state and federal safeguards speak to the same issues, parties frequently raise them both. Passing for the moment the question as to which the state court will address first, and assuming that it must address both to dispose of the case before it, the role of the state court becomes dual. As to the federal issue, the duty is to apply the precedents of the United States Supreme Court.[71] How should this obligation inform the state court's approach to the interpretation of the identical, nearly identi-

70. *See infra* note 77 and accompanying text.
71. *See* Oregon v. Hass, 420 U.S. 714, (1975).

cal, or at least similar provisions of the state constitution? The federal standard is one below which the state court cannot go in deciding a case in which the federal issue is raised. Should the state court in the interest of uniformity, clarity, and ease of administration emulate the Supreme Court when it decides the state constitutional questions? If it does so in a given instance, and the Supreme Court subsequently modifies its rule, should the state court, in accordance with a self-imposed duty, correspondingly modify its own? Or does the state court view itself as bound to render its own judgment as to the scope, the reach, and the content of the provisions of its own constitution creating what may well be termed fundamental rights? Under this approach the decisions of the Supreme Court are, like the decisions of other state courts, simply materials for examination, perhaps highly persuasive, perhaps not. In the end responsibility for judgment remains with the state supreme court.

Responses to these questions vary not only from state to state but from safeguard to safeguard, and from time to time, within a given state. Scholars urge upon state courts one approach or another.[72] As the era of expansion of federal constitutional guarantees associated with the Warren Court came to a close, and we entered into a period of greater emphasis by the United States Supreme Court upon other societal interests competing with those embodied in the Bill of Rights, some state courts became more assertive in the enforcement of constitutional norms recognized by state constitutions and perceived as under enforced by the United States Supreme Court in its elaboration of federal constitutional law. Some commentators have hailed this as "the renaissance of active and independent state judicial implementation of state constitutional law."[73] Others have urged caution, pointing to the "dark side of state court activism."[74] A state court's rejection of blind adherence to Supreme Court precedents in interpreting its own constitution, of course, does not necessarily herald a burst of judicial activism in the expansion of individual rights. Choices of constitutional approach and philosophy remain. Recognition of the responsibility for fashioning a living body of state constitutional law does not determine the perspective from which that responsibility is exercised.

C. Supreme Court Review

1. The Occasion for its Exercise

The increase in decisions of questions of federal law by state courts

72. *See infra* notes 73, 74 & 102-04.

73. Sager, *Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985).

74. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

expands the occasion for United States Supreme Court review. Such review is largely discretionary. Common are petitions for certiorari on behalf of defendants claiming denial of federal constitutional rights. The Court grants review in a small fraction of such cases, those presenting important public questions, such as a novel application, or an unclear state of the law produced by conflicting decisions of various state and lower federal courts. Frequently, the complaint to the Supreme Court comes not from the defendant, but from a state's prosecuting officer. Thus, when the state supreme court sets aside the defendant's conviction on federal constitutional grounds, the state may say that its court is wrong in its application of Supreme Court precedents and ask the country's highest Court to set the matter right. The granting of review in such cases is more likely when the Court is of a collective mind to curb the expansion of the federal constitutional rights of criminal defendants and to treat more narrowly than some state courts do Supreme Court precedents drawn from an earlier period characterized by more hospitable reception to claims of federal constitutional rights. Recently the frequent granting of petitions filed by prosecuting authorities often has been accompanied by summary reversal. There is not unanimity as to the appropriateness of this practice.[75]

That the current United States Supreme Court emphasizes the need for uniformity becomes clear when one focuses upon its articulated standard for deciding cases involving the Bill of Rights in criminal cases. "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[76] Given this standard, the weighing of competing interests in any given context represents a judgment in the name of the Constitution. Overweighing of either interest against the other by a state court constitutes an erroneous application of the Constitution.

---

75. As Justice O'Connor explains it:

> [B]asic facts about our judicial federalism indicate the need for some means to assure a consistent and uniform body of federal law among the state and federal courts. The goal of national uniformity rests on a fundamental principle: that a single sovereign's laws should be applied equally to all—a principle expressed by the phrase, 'Equal Justice Under Law,' inscribed over the great doors to the United States Supreme Court. . . . In our dual system of courts, review of state court decisions on federal law . . . is the principal means we have of encouraging the needed uniformity. The Supreme Court recognized this as early as 1816, when it stated, in *Martin v. Hunter's Lessee*, that its review of state court decisions is demanded by the 'necessity of *uniformity* of decisions throughout the whole United States upon all subjects within the purview of the constitution.'

O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. 1, 4 (1984) (emphasis in original) (footnotes omitted).

76. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

Justice Stevens disagrees with this emphasis upon uniformity. On several occasions he has questioned the use of the Court's discretionary power to review state court decisions that are, in the Court's view, overly protective of criminal defendants in the name of federal constitutional law. Conceding the existence of Supreme Court jurisdiction for such review, he sharply questions the Court's use of its discretionary power.[77]

It is clear, nevertheless, that in 1914 the Court acquired jurisdiction to review cases in which a state court has overapplied a federal constitutional provision,[78] and that "a State [court] may not impose such greater restrictions as a matter of *federal Constitutional law* when this court specifically refrains from imposing them."[79] The message is clear. If the state court wishes to extend to its citizens more rights than those established by the Federal Constitution, it must do so pursuant to its own constitution.[80]

2. *The Doctrine of Adequate and Independent State Grounds*

"[A] State [Court] is free *as a matter of its own law* to impose greater restrictions on police activity than those this [Supreme] Court holds to be necessary upon federal constitutional standards."[81] As Justice O'Connor has put it: "When a state court has decided a case on both federal and

---

77. In articulating this view, Justice Stevens argues that:

> cases like [this] pose disturbing questions concerning the Court's concept of its role. Each such case, considered individually, may be regarded as a welcome step forward in the never ending war against crime. Such decisions are certain to receive widespread approbation, particularly by members of society who have been victimized by lawless conduct. But we must not forget that it is a central purpose of our written Constitution, and more specifically of its unique creation of a life-tenured federal judiciary, to ensure that certain rights are firmly secured *against* possible oppression by the Federal or State Governments. As I wrote last Term; 'I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.' *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (emphasis in original). Yet the Court's recent history indicates that, at least with respect to its summary dispositions, it has been more concerned with vindicating the will of the majority and less interested in its role as protector of the individual's constitutional rights. . . . [T]he Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor. The Framers surely feared the latter more than the former."

Florida v. Meyers, 466 U.S. 380, 385-87 (1984) (Stevens, J., dissenting) (emphasis in original) (footnotes omitted).

78. Act of December 23, 1914, Pub. L. No. 224, ch. 2, 38 Stat. 790. *See* 28 U.S.C. § 1257(3) (1982).

79. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original).

80. *See id.* at 719-20 (state court under State constitution may give more protections but not less than Federal Constitution provides).

81. *Id.* at 719 (emphasis in original). And as Justices Marshall and Brennan stated in dissent: "It is peculiarly within the competence of the highest court of a state to determine that in its jurisdiction the police should be subject to more stringent rules than are required as a federal constitutional minimum." *Id.* at 728 (Marshall, J., dissenting).

state grounds, the Supreme Court's jurisdiction is limited to reviewing only the federal law grounds. A state court's view on issues of state law is, of course, binding on the federal courts."[82] Furthermore, if a state court judgment rests on both state and federal grounds, and if the state ground is independent of the federal and thus adequate to support the result, the Supreme Court will not review the decision. Thus, if reversal of the state court on the federal question would still leave the *judgment* undisturbed, the Supreme Court will not undertake the journey. It will not review *at all* a state court judgment resting on an adequate and independent state ground.

This statement of the doctrine is relatively easy; its application is not. If a state court rejects a defendant's state and federal constitutional claims and thus affirms his conviction, the decision of the federal question is essential to the result reached, and the Supreme Court's jurisdiction to review is clear. Conversely, if the defendant's constitutional claims are sustained under both state and federal grounds, the Supreme Court will not review, provided the decision of the state question is independent of the decision of the federal question.[83]

Currently, the doctrine is under some attack. There are proposals for its confinement:[84] even its demise,[85] but at this writing it is alive and well.[86]

> The principle that we will not review judgments of state courts that rest on adequate and independent grounds is based, in part, on 'the limitation of our own jurisdiction.' The jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.'[87]

The Court makes it clear, however, that it must determine as a matter of federal law whether the alternative state ground is indeed "independent"

---

82. O'Connor, *supra* note 75, at 5 (footnotes omitted).

83. I do not treat here the situation in which a state court declines to hear an appellant's federal claim because of a state procedural default. *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965); *see also* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

84. *See* Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study In Interactive Federalism*, 19 GA. L. REV. 861 (1985).

85. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291 (1986).

86. For an excellent and balanced discussion, *see* Baker, *The Ambiguous Independent and Adequate State Ground In Criminal Cases: Federalism Along A Mobius Strip*, 19 GA. L. REV. 799 (1985).

87. Michigan v. Long, 463 U.S. 1032, 1041-42 (1983) (quoting Herb v. Pitcairn, 324 U.S. 117, 125 (1945)) (footnote omitted).

and "adequate" to support the judgment.[88] But, sometimes this is not easy.

3. The Problem of Clarity and Its Implications

a. The Earlier Approaches

A convicted defendant in a state criminal proceeding appeals to the state supreme court, complaining that the conviction stemmed from admission of evidence obtained in violation of the privilege against self-incrimination. As in the court below, the defendant relies on the fifth and fourteenth amendments and an identically worded provision in the state constitution. The state supreme court begins its opinion by stating that the fifth amendment and the state constitution impose identical restraints upon the prosecution. The court then recites the circumstances of the case, following with a canvas of the precedents to determine the proper standard and its application to the particular facts. A cursory reference to one of its own cases and one from a sister state is followed by a detailed analysis of several decisions of the United States Supreme Court applying the fifth amendment. A typical state court concludes:

> We hold that the admission of this evidence violated the fifth amendment to the Constitution of the United States, made applicable to the states through the fourteenth amendment. We further hold admission of the evidence violative of the privilege against self-incrimination as secured by our own constitution. The judgment of conviction is reversed.

The state petitions the United States Supreme Court for a writ of certiorari, asserting that the state court based its judgment on an erroneous interpretation and application of the United States Constitution. The state defendant opposes Supreme Court review, arguing that the judgment is based on an adequate and independent state ground. The state constitutional ground is certainly "adequate" to support the state court judgment. But is it "independent" of the federal question? The answer is not clear. What is "independent"? Did the state court decide the question under an apprehension that the United States Constitution required the result?

At one time the court would have vacated the state court judgment in such a case and have remanded the case for clarification, "for the elimination of the obscurities and ambiguities".[89] This approach to the problem has not been the only one taken. The Supreme Court has sometimes asked the state court to eliminate the ambiguity by furnishing a certificate clarifying its grounds of decision. On occasion, the Court simply

88. *Id.* at 1083.

89. Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

has gone ahead and resolved the doubts on the basis of the material before it. Moreover, the Court sometimes has denied review without resolving the ambiguity by assuming that the state ground was independent unless the party seeking review could persuade otherwise.[90]

b. Overenforcement of the Bill of Rights

Until the 1970's, questions involving the adequate and independent state ground arose relatively infrequently. But, with the incorporation of the Bill of Rights into the fourteenth amendment and the Supreme Court's subsequent dampening of the extension of its safeguards, the scene changed. Some state courts retained the momentum of the Warren years and expansively interpreted and applied the provisions of the Bill of Rights, to the distress of state prosecutors and ultimately of the Justices of the Supreme Court. Even though many of the cases also involved state court reliance on its own constitution, state prosecutors increasingly sought Supreme Court review and obtained it.[91]

The adequate and independent state ground doctrine represents a barrier to Supreme Court review of what state courts *say* in the name of the Consitution of the United States. Well rooted in our system of federalism, it immunizes from Supreme Court review state court rulings on questions of federal law, so long as they are accompanied by independent state grounds adequate to support the judgment. The result is a body of state court opinions more expansive in their interpretation of federal constitutional rights than the Supreme Court would approve. A fresh look at the adequate and independent state ground doctrine was inevitable.

c. The Supreme Court's Response — Michigan v. Long

In *Michigan v. Long*,[92] police officers stopped to investigate when an erratically driven car went into a ditch. An officer, concerned about

---

90. H. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 534-57 (P. Bator, P. Mishkin, D. Meltzer & D. Shapiro ed. 1988 3d ed.).

91. In 1983, Justice Stevens described the phenomenon:

> These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and 'over-protected' the citizen. . . . Sometime during the past decade . . . our priorities shifted. The result is a docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens.

Michigan v. Long, 463 U.S. 1032, 1067-70 (1983) (Stevens, J., dissenting). In a footnote Justice Stevens added: "[A] cursory survey of the United States Law Week index reveals that so far this Term at least eighty petitions for certiorari to state courts were filed by the States themselves." *Id.* at 1070 n.3 (Stevens, J., dissenting).

92. 463 U.S. 1032 (1983).

weapons, looked into the car and saw that something was protruding from under an armrest. Lifting the armrest the officer saw a pouch containing what appeared to be marihuana. The driver, Long, was arrested for possession. An officer then searched the unlocked trunk of the car and discovered seventy-five pounds of marihuana. A motion to suppress the marihuana in state court was denied, and Long was convicted. He appealed unsuccessfully to the Michigan Court of Appeals, but the Supreme Court of Michigan reversed his conviction. The court held that all the marihuana was the fruit of an unconstitutional search.

The Michigan court opinions in *Long* focused entirely upon whether the search was unlawful under *Terry v. Ohio*[93] and its progeny. The majority read those precedents as rendering the searches unlawful. It concluded "that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution."[94]

The Supreme Court granted certiorari and faced at the outset the question of the "independence" of the state ground. Writing for the Court in *Long*, Justice O'Connor noted that "[t]he court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law."[95] Long argued that Michigan courts have provided greater protection from searches and seizures under the state constitution than that accorded under the fourteenth amendment. The Supreme Court declined to vacate the state court judgment and remand for clarification or to seek it by certificate. It declined to search state materials to ascertain what the state court meant. It firmly rejected a presumption of independence. Pointing out the inconsistencies in its previous ways, the Court determined that "[t]his ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[96] The Court concluded that, in order to preclude review, the state court "need only make clear by a plain statement" that its decision "is alternatively based on bona fide separate, adequate, and independent [state] grounds."[97]

---

93. 392 U.S. 1 (1968).

94. People v. Long, 413 Mich. 461, 472-73, 320 N.W.2d 866, 870 (1982), *rev'd*, Michigan v. Long, 463 U.S. 1032 (1983).

95. Michigan v. Long, 463 U.S. 1032, 1037 (1983).

96. *Id.* at 1039.

97. The Court announced a new approach.

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses

Michigan v. Long has engendered criticism,[98] much of it based on the perception that beneath its structural content the opinion evidences an exaggerated Supreme Court concern with overexuberant state court enforcement of the Bill of Rights, and an intention to step up correction of such errors in the interest of a uniform body of federal constitutional law harmonious in content with the views of its present Justices.[99] Experience has borne that out.

Critics, including Justice Stevens, have argued that the Court has more important uses to which it can put its resources than in reviewing state court decisions overprotective of the very interests the Bill of Rights was designed to protect.[100] To those who deeply cherish the Bill of Rights and the values it represents, that is an appealing view. But in the end it rests on disagreement with the present Court over the proper reach of the constitutional safeguards themselves. The disagreement is really more over substance than it is over process.

Clearly, *Michigan v. Long* constitutes no threat to the independence of the state judiciaries. A state court remains free to elaborate a body of constitutional law more protective of individual rights than that of federal law, provided that the state court clearly grounds its decisions in its own constitution. It is only when the state court relies directly on the federal constitution or blurs the line between such reliance and its pronouncements on state law that the Supreme Court may step in and correct erroneous interpretations of federal law. Such does not seem unreasonable. It leaves the state court in charge of its own agenda and in a position of great importance in determining the agenda of the Supreme Court.

---

merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41. Reading the Michigan opinion, the Court concluded that it rested primarily on federal law. The Court undertook review and reversed. *Id.* at 1043-53.

98. *See* Note, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 227 (1983); Note, *State Law and the Adequate and Independent State Grounds Doctrine After Michigan v. Long*, 62 WASH. U.L.Q. 547 (1984).

99. *See supra* note 98.

100. Michigan v. Long, 463 U.S. 1032, 1067-72 (1983) (Stevens, J., dissenting); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 689-707 (1986) (Stevens, J., dissenting); Florida v. Meyers, 466 U.S. 380, 385-87 (1984) (Stevens, J., dissenting); Colorado v. Connelly, 474 U.S. 1050 (1986) (Brennan, and Stevens, J.J., dissenting).

IV. THE ROLE OF THE STATE COURT IN CONTROLLING THE AGENDA

When litigants present to a state court both federal and state claims as to the validity of a governmental action, the state court has great flexibility in ordering its treatment of the issues, and its choices may have a decisive effect on whether the Supreme Court may ultimately review its judgment. There is one sequence, however, in which the state supreme court can have no such effect. If the state court rejects both the federal and state challenges, the United States Supreme Court may review its denial of the federal claim. But if the state court is disposed to sustain the claim on either state or federal grounds or both, its options are several.

Suppose the state court hears an appeal by a convicted defendant contending that he or she was deprived of his or her right to confront witnesses in violation of both the federal and state constitutions. The court may take up the federal question first, sustain the appeal, and vacate the conviction, announcing that it is unnecessary to consider the state constitutional issue. If this occurs, the Supreme Court has jurisdiction to review. Conversely, the state court may entertain the state constitutional issue first and sustain the appeal, making it clear that there is no need to consider the federal question. In this situation the Supreme Court has no basis for review, even if the state court has used federal materials in deciding the state issue. Given *Long*, prudence would dictate that the court make clear that its use of federal precedents was for persuasive purposes only. A third alternative is for the court to take up both the federal and state questions and to decide both favorably to the appellant. Now the availability of Supreme Court review depends upon whether the state court furnishes a "plain statement" that its state lawground is independent of the demands of federal law. Notwithstanding such boiler plate language, there remains a very real possibility of Supreme Court review if the state court's use of federal precedents in deciding the state question has been cast in "we-are-compelled-to" terms. This would create an inconsistency with the "plain statement" of reliance on independent state grounds. Yet the state court may still have a second bite at the apple. To be sure, the Supreme Court may review the judgment and reverse it for error of federal law, but on remand the state court may determine that the state ground was independent of federal considerations and reinstate its prior judgment.[101]

101. *See e.g.*, Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985).

V. BEHIND THE CHOICES — THE STATE COURT'S PERCEPTION OF ITS ROLE

The foregoing outlines various choices open to a state court when considering federal and state questions in tandem. It also points to the consequences attendant upon the selection of state or federal law in terms of Supreme Court review. What *should* a state court do? In which order should it take up the state and federal issues? Should it take up and decide them both? The answers depend in part upon the emphasis the state court wishes to place on the state law in issue and in part upon the extent to which it wishes to place distance between its state law holding and the way it anticipates the Supreme Court would resolve the federal question. The answers also depend on the state court's perception of its role, not only as the highest judicial tribunal in a sovereign state, but as a partner in the larger judicial system, in our federalist venture called the United States of America.

This burgeoning of judicial business involving federal and state questions coming together in the administration of criminal justice has led to a remarkable resurgence of interest in state constitutional law and in the proper role of the state court in the federal system. The literature is now voluminous, and some of its most thoughtful contributors have been state court judges.[102] The various approaches lend themselves to classification.[103] Although the labels vary somewhat, most analysts divide state constitutional theories into three categories: primacy, supplemental (or interstitial), and dual sovereignty (or co-equality).

The primary approach calls for recognition of the state constitution as the primary source of individual rights; the court must address the state

---

102. *See* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Douglas, *State Judicial Activism — The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123 (1978); Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) [hereinafter *E. Pluribus*]; Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

A full exposition of the theories of state constitutional law is well beyond the scope of this article.

103. Three excellent collections of articles on state constitutional law appeared in 1985. *See* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW: THE WILLIAMSBURG CONFERENCE (B. McGraw ed. 1985); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1318 (1985); *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 789-1133 (1985); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

claim first.[104] Only if it is rejected is there occasion for determination of the federal question. This is the route followed in the New Hampshire case of *State v. Ball*.[105] A defendant sought reversal of his conviction, arguing that the warrantless seizure of his property and its subsequent use against him violated both the fourth amendment to the United States Constitution and part one, article 19, of the New Hampshire Constitution. The issue was probable cause. Justice Charles Douglas, writing for the court, made clear its determination to decide the state question first and only if necessary the federal question.[106]

The New Hampshire court examined many precedents, some state, some federal. It concluded that the search was unreasonable. "Because the seizure was illegal under the New Hampshire Constitution, the court need not reach the federal issue."[107] The court thus made it plain that the state question was the only one decided. Had the court rejected the state claim it would have then proceeded to decide the legality of the seizure as matter of federal constitutional law.[108]

Some courts employ the "supplemental" or "interstitial" model whereby the state court first determines whether the challenged practices failed to accord the accused the minimum protections of the Federal Constitution. Only if the state court holds the state action consistent with federal law will the court proceed to determine whether state law provides greater protection, and if so whether it was accorded the de-

---

104. Justice Hans Linde, of the Supreme Court of Oregon, has extensively articulated this theory. *See E. Pluribus, supra* note 102.

105. 124 N.H. 226, 471 A.2d 347 (1983).

106. Justice Douglas wrote:

> Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that we consider State constitutional guarantees. This is because any decision we reach based upon *federal* law is subject to review by the United States Supreme Court, whereas we have unreviewable authority to reach a decision based on articulated adequate and independent *State* grounds. *Michigan v. Long*. . . . Since this court is the final authority on New Hampshire law, initial resolution of State constitutional claims insures that the party invoking the protections of the New Hampshire Constitution will receive an expeditious and final resolution of those claims. Therefore, we will first examine the New Hampshire Constitution and only then, if we find no protected rights thereunder, will we examine the Federal Constitution to determine whether it provides greater protection. . . . Although in interpreting the New Hampshire Constitution we often followed and agreed with the federal treatment of parallel provisions of the federal document, we never have considered ourselves bound to adopt the federal interpretations.

Id. at 232, 233, 471 A.2d at 351 (emphasis in original).

107. *Id.* at 237, 471 A.2d at 354.

108. Justice Douglas authored one of the early pieces calling for a renewed and vigorous attention to state constitutions. *See* Douglas, *supra* note 102, at 1127 (discussing role of state courts to accord rights to citizens under state constitution); *see also supra* notes 102-104 and accompanying text (discussing recent developments in renewed importance of state constitutional law).

fendant in the case at bar. The Massachusetts case of *Commonwealth v. Upton*[109] is a vivid illustration of this approach and its consequences. Again, the issue was probable cause, this time for the issuance of a search warrant. Federal and state grounds were raised. The supreme judicial court took up the federal issue first. The court said that it did not have to consider provisions of the Massachusetts Declaration of Rights since federal law, in its view, required suppression of the evidence.[110] The court did concede, however, that if it were wrong about the federal law, "this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art. 14 and the consequences of the violation of those protections."[111] In this respect only, the court was prophetic. The United States Supreme Court summarily reversed the judgment, holding the warrant supported by sufficient probable cause as required by the fourth amendment.[112] Justice Stevens concurred in *Upton* and complained about the state court's approach. He argued that:

> [the] judgment of the Supreme Judicial Court of Massachusetts reflects an error of a more fundamental character than the one this Court corrects today. It rested its decision on the Fourth Amendment without telling us whether the warrant was valid as a matter of Massachusetts law. It has thereby increased its own burdens as well as ours.[113]

Justice Stevens aligns himself clearly with those who believe a state court should decide state questions first. He concluded that:

> [t]he Bill of Rights is now largely applicable to state authorities and is the ultimate guardian of individual rights. The States in our federal system, however, remain the primary guardian of the liberty of the people. The Massachusetts court, I believe, ignored this fundamental premise of our constitutional system of government. In doing so, it made an ill-advised entry into the federal domain.[114]

On remand the supreme judicial court again took up the burden and again found no probable cause, this time in reliance on the Massachusetts

---

109. 390 Mass. 562, 458 N.E.2d 717 (1983), *rev'd*, 466 U.S. 727 (1984), *on remand*, 394 Mass. 363, 476 N.E.2d 548 (1985).

110. *Id.* at 573, 458 N.E.2d at 723-24. The majority stated:

> Because we conclude that the evidence seized pursuant to the search warrant should have been suppressed by application of Fourth Amendment principles expressed by the Supreme Court of the United States, particularly and most recently in *Illinois v. Gates*, [462 U.S. 213 (1983)] we need not consider whether the search violated the cognate provision of art. 14 of the Massachusetts Declaration of Rights or, if it did, in what circumstances, if any, we would conclude that that evidence must be excluded as a matter of state law.

Id.

111. *Id.* at 574, 458 N.E.2d at 724.

112. Massachusetts v. Upton, 466 U.S. 727 (1984).

113. *Id.* at 735 (Stevens, J., concurring) (footnote omitted).

114. *Id.* at 739.

Constitution.[115] The end result bore out Justice Stevens' observation that such an outcome would render for naught much of the state court's first opinion and all of that of the United States Supreme Court.

The third theory of state constitutional law is termed "dual sovereignty" or "co-equal theory." Claims under both constitutions should be decided by the state court because both constitutions independently protect rights. If the state court reverses a conviction on both state and federal grounds, the risk of ambiguity is at its highest. *Michigan v. Long* thus comes into play. The judgment is subject to Supreme Court review unless the state court furnishes a plain statement of its independent reliance on state law. If it furnishes the statement the decision of the federal question appears gratuitous. If it does not make its independence clear, it may incur reversal on the federal ground and face the necessity of deciding on remand whether the state ground was indeed independent.

The state court's ordering of its consideration of federal and state questions thus has substantial implications for the agenda of the United States Supreme Court as well as for its own. Subtle considerations may play a part. A court with a general disposition to decide state questions first may encounter circumstances when it finds itself unready or unwilling to decide whether the particular state protection does or does not go beyond the federal. In such a situation the court may well decide the federal question, deliberately leaving the state question for decision only if the prosecution is successful in obtaining Supreme Court review and a reversal.

Michigan v. Long does not deprive the state court of the last word on questions of state constitutional law. To whichever theory it subscribes in a given case, it may "plainly" rest its decision on a state constitutional safeguard, either when it first decides the case or upon remand from the Supreme Court of the United States. What the state court cannot do, without incurring the possibility of Supreme Court review, is to leave us in doubt whether it rests its decision independently on its determination of its own law.

How aggressive should a modern state court be in pushing out the frontiers of constitutional norms beyond the point determined by the United States Supreme Court? At least for some the answer may depend upon whether the state constitutional guarantee in question is specifically focused, or whether it represents a broad and general aspiration.

115. Commonwealth v. Upton, 394 Mass. 363, 476 N.E.2d 548 (1985).

VI. THE RHODE ISLAND EXPERIENCE — COEXTENSION OR A HIGHER STANDARD OF PROTECTION?

A. The Textual Framework

That the Constitution of Rhode Island should contain a Declaration of Rights was virtually inevitable, given the history of the state.[116] With its effective date of 1843, it is hardly surprising that the Declaration bears a striking resemblance to the Bill of Rights of the Constitution of the United States. Indeed if one examines those articles of the Bill of Rights dealing with the administration of criminal justice, the fourth, fifth, sixth and eighth amendments, one finds all their safeguards in article 1, sections 6, 7, 8, 10, and 13 of the Rhode Island Declaration of Rights. One might say that making most of the Bill of Rights applicable to the state through the fourteenth amendment is like carrying coals to Newcastle as far as Rhode Island is concerned. Long before the United States Supreme Court began the process of selective incorporation the safeguards were already there. But the applicability to the states of the specific federal provisions brought with it a new interpretive authority, a Court articulating the supreme law of the land, establishing minimum national standards which the state courts are obliged to apply. I have already discussed Justice Kelleher's approach to the interpretation and application of the respective constitutions. Now I focus upon his approach, and that of the Rhode Island Supreme Court, in those situations in which state and federal questions appear together in such form as potentially implicating the adequate and independent state ground doctrine. I have not discovered the adoption by the Rhode Island Supreme Court of any general theory in such constitutional cases. One finds illustrations of all three theories in the pages of the Rhode Island Reports.

B. Tate and the Coextensive Constitutions

Justice Kelleher's approach to the right of the criminal defendant to a speedy trial has evolved substantially, the end may not yet be here. The starting point must be his opinion for the court in *Tate v. Howard*,[117] decided in 1972, a case in which the court attempted to "put at rest the longtime belief held by many that the Attorney General has absolute control of the criminal calendars of the state's trial courts."[118] *Tate* invoked the constitutional right to a speedy trial protected by both the

116. *See* P. CONLEY, DEMOCRACY IN DECLINE: RHODE ISLAND'S CONSTITUTIONAL DEVELOPMENT 1776-1842 at 71, 236-68 (R.I. Historical Society 1977) (discussing circumstances leading to adoption of state constitution in 1843); *see also* Gorham v. Robinson, 57 R.I. 1, 14-20, 186 A. 832, 839-45 (1936) (discussing Supreme Court of Rhode Island's view on adoption of 1843 constitution).

117. 110 R.I. 641, 296 A.2d 19 (1972).

118. *Id.* at 651, 296 A.2d at 25.

sixth amendment to the Federal Constitution and article 1, section 10 of the Rhode Island Declaration of Rights. The Rhode Island court drew the rule of decision from the United States Supreme Court's opinion in *Barker v. Wingo*,[119] decided only a few months earlier. The United States Supreme Court identified four factors for consideration in administering the federal safeguard: length of delay, reason for delay, assertion of one's sixth amendment right, and prejudice to the accused. Justice Kelleher adopted *Barker* as "our guide", and after a painstaking review of the circumstances concluded that "Tate has been denied his constitutional right to a speedy trial!"[120] The court clearly relied on federal law and implicitly adopted the federal standard for the state, an approach subsequently reinforced in *State v. Newman*,[121] in which Justice Kelleher again applied the *Barker* criteria, noting that "this standard has been adopted and consistently followed by our court."[122]

The significance of the right to a speedy trial is underscored by Justice Kelleher in *State v. Bonsante*,[123] in which the court erects an estoppel against a second indictment for the same offense, once the initial indictment is dismissed for failure to accord the accused a speedy trial.[124] Whether that estoppel rests on state or federal law is not entirely clear. What is clear is that the Supreme Court of Rhode Island finds estoppel necessary in order to effectively implement the sixth amendment to the United States Constitution.

At no time has the Rhode Island court suggested that the state constitutional speedy trial provision is more protective than its federal counterpart. But added protections do emanate from the 1972 adoption of Rule 48(b) of the Rhode Island Rules of Criminal Procedure. Modeled upon the corresponding federal rule, it said, "If there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint." In a series of cases the Supreme Court of Rhode Island held that this provision was broader than the sixth amendment guarantee, requiring neither a showing of prejudice nor an assertion of the right to a speedy trial.[125] The superior court justices found the rule difficult to administer, and in 1984 they repealed it, subject to the approval of the supreme court.[126] That approval evoked a dissent, rare in such matters, from Justice Kelleher.

---

119. 407 U.S. 514 (1972).
120. Tate v. Howard, 110 R.I. 641, 656, 296 A.2d 19, 28 (1972).
121. 117 R.I. 354, 367 A.2d 200 (1976).
122. *Id.* at 359, 367 A.2d at 203.
123. 112 R.I. 547, 313 A.2d 134 (1973).
124. *Id.* at 549, 313 A.2d at 135.
125. State v. Brown, 486 A.2d 595 (R.I. 1985); State v. Dionne, 474 A.2d 445 (R.I. 1984); State v. Brady, 436 A.2d 717 (R.I. 1981).
126. R.I. GEN. LAWS § 8-6-2 (1985).

> I would agree with the rule's detractors that application of the rule has been far from trouble free. I would argue, however, that we should attempt to cure its defects, as have the vast majority of our sister states, instead of taking an approach that results in the baby being thrown out with the bath water. . . . By abandoning Rule 48(b) we have left Rhode Island among the small minority of states without the enhanced protection of a speedy-trial rule.[127]

The episode points out the variety of roles in which a judge may bring judgment to bear upon important issues of judicial administration. In theory at least, the judge might persuade his colleagues to protect the right of speedy trial by applying the state constitution more protectively than the United States Supreme Court has interpreted its federal model. Such a course is difficult to pursue after a period of unwavering application of the state constitution in terms which the United States Supreme Court has applied to the federal safeguard. The rulemaking or rule approving function may enable the judge to further constitutional values beyond the point where doing so decisionally seems feasible. The failed attempt does not detract from the appropriateness of the effort nor from the validity of the message which the dissent carried to judges and legislators in a position to deal with this important public problem by the enactment of a new rule or statute.

Justice Kelleher's constitutional writings in this area appear supplemental in their approach. He treats the federal standard as primary, and has not appeared to consider seriously an approach which would carry the Rhode Island Constitution beyond the ambit of established sixth amendment guidelines.

C. Maloof *and the Higher Standard of Protection*

While Justice Kelleher viewed the speedy trial provisions of the two constitutions as coextensive, he took another road when it came to unreasonable searches and seizures. In *State v. Maloof*,[128] the subject was wiretaps. The interplay was not only between the two constitutions, because a Rhode Island statute authorizing wiretaps was involved.[129] The trial judge suppressed evidence obtained through wiretaps against some ninety defendants charged with bookmaking and drug related offenses. The statute, patterned directly upon the Federal Omnibus Crime Control and Safe Streets Act,[130] authorized the Rhode Island Attorney General to apply to the Presiding Justice of the Superior Court for an order au-

127. *In re* Superior Court Rule of Criminal Procedure 48(b), 497 A.2d 24, 25-26 (R.I. 1985) (Kelleher, J., dissenting). Chief Justice Bevilacqua joined in this dissent. *Id.*

128. 114 R.I. 380, 333 A.2d 676 (1975).

129. R.I. GEN. LAWS § 12-5.1-1 et seq. (1969 Reenactment).

130. 18 U.S.C. §§ 2510-20 (1970).

thorizing wiretaps in conjunction with certain crimes and upon tightly drawn conditions. Among the conditions was a requirement that the order authorize the tap for no longer than necessary to achieve its stated objectives. The orders in *Maloof*, by contrast, expressly stated that the taps need not terminate upon achievement of their objectives. The other statutory conditions were met, and the state argued that there was substantial compliance with the statute. Through Justice Kelleher, the court rejected the state's argument:

> The root issue in this appeal is not a contract but a constitutional right which seeks to safeguard one's privacy from unwarranted and unauthorized intrusions. It is a right that protects conversations as well as property and it might be described as a double-barreled right in that it is set forth in the United States Constitution and the Rhode Island Constitution. As part of our Declaration of Rights, it enjoys a status which is separate and apart from the status it has been given by the Fourth amendment.[131]

He added that "in matters of individual liberty, including the area of search and seizure, the states are free to adopt a higher standard of protection than that compelled by the Federal Constitution."[132] The question is not whether the Federal Constitution requires strict compliance with the authorizing statute. The Rhode Island Constitution does. This is an illustration of primacy; the state issue is taken up first, and it disposes of the case. To generalize from this would be risky, for there was no Supreme Court precedent on the precise issue. Hence the court may have taken up the state issue first to avoid guessing what the United States Supreme Court would do.

D. From Maloof *to* Manocchio — *Selective Enlargement*

How general is the approach in Maloof, to consider and sometimes find a higher standard of protection in the state constitution than that which the federal constitution might or does provide? The pattern is one of selectivity. Where both claims are raised, and the court first considers and rejects the federal claim, it must then consider the defendant's request that the court accord a higher standard of protection than that afforded under federal law. Justice Murray has noted that "in most contexts the Fourth Amendment provides ample protection against unreasonable searches and seizures."[133] In *State v. Benoit*,[134] the court found the federal standard for permitting warrantless searches not protective enough for the Rhode Island court's view of article 1, section 6 of the

131. 114 R.I. at 388-89, 333 A.2d at 681.
132. *Id.* at 389, 333 A.2d at 681.
133. Duquette v. Godbout, 471 A.2d 1359, 1361 (R.I. 1984).
134. 417 A.2d 895 (R.I. 1980).

state's constitution. It is when the state court *sustains* the federal claim that life becomes more complex. We may learn much through three cases, *State v. Innis*,[135] *State v. von Bulow*,[136] and *State v. Manocchio*.[137] The variations are instructive.

We start with *Innis* in 1978, a case discussed above.[138] Innis was under arrest when one officer expressed to another, in the defendant's presence, a concern for handicapped children in the area were they to come upon a weapon. Though he had earlier invoked his fifth amendment right to be silent until he consulted a lawyer, Innis thereupon led the officers to a hidden shotgun. His successful appeal from a murder conviction rested upon his entitlement to suppression of the evidence. A sharply divided Rhode Island court considered the issue wholly in terms of federal law. Justice Doris wrote for the court: "On the facts before us, we believe that the defendant was interrogated within the meaning of *Miranda* in the absence of counsel after requesting to see an attorney."[139] Further, the state's claim that he had waived his rights was held not to meet the "strict standard" of voluntariness required by federal law. The court's judgment is unmistakably based upon federal law alone: "Having reached the conclusion that both the shotgun and defendant's statements were obtained in violation of defendant's *fifth amendment* rights, we must set aside the conviction and order a new trial unless we are convinced that the error was harmless beyond a reasonable doubt."[140] The court did cite *State v. Travis*,[141] where the Rhode Island court, after discussing federal precedents, said:

> The police conduct here nullified defendant's privilege against compelled self-incrimination *as guaranteed by the Constitution of Rhode Island*, art. 1, section 13, and the fifth amendment to the United States Constitution (made obligatory upon the States by the fourteenth amendment) as that privilege is defined by the dictates of *Miranda v. Arizona* and *State v. Lachapelle*.[142, 143]

Notwithstanding the citation to *Travis*, the *Innis* court made no reference to the state constitution, nor did Justice Kelleher, joined by Justice Joslin

---

135. 120 R.I. 641, 391 A.2d 1158 (1978), *vacated sub nom.* Rhode Island v. Innis, 446 U.S. 291 (1980), *on remand*, 433 A.2d 646 (R.I. 1981), *cert. denied*, 456 U.S. 930, 932 (1982).

136. 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

137. 496 A.2d 931 (R.I. 1985), *vacated sub nom.* Rhode Island v. Manocchio, 475 U.S. 1114 (1986), *on remand*, 523 A.2d 872 (R.I. 1987).

138. *See supra* notes 48-50 and accompanying text.

139. 120 R.I. at 649, 391 A.2d at 1162, *vacated sub nom.* Rhode Island v. Innis, 446 U.S. 291 (1980).

140. *Id.* at 652, 391 A.2d at 1164 (emphasis added).

141. 116 R.I. 678, 360 A.2d 548 (1976).

142. 112 R.I. 105, 308 A.2d 467 (1973).

143. 116 R.I. at 683, 360 A.2d at 551 (emphasis added).

in dissent. The disagreement within the court was thus entirely over the scope of the federal standard and its application to the facts of the case.

The state obtained review in the United States Supreme Court on a writ of certiorari. That Court's jurisdiction was clear. It might have been otherwise. Had the Rhode Island court stated that the police practice violated both the federal and state constitution, as it did in *Travis*, the picture would have been clouded. The state ground would have been adequate to support the result, but would it have been independent of the state court's belief that it was bound by *Miranda*? In such a situation the Supreme Court might well have remanded for clarification.[144] It is clear, however, that by relying solely on the federal ground, the Rhode Island court subjected its *Innis* judgment to Supreme Court review.

The Supreme Court reversed, basically agreeing with the Kelleher dissent on the fifth amendment issues. On remand Justice Kelleher wrote for the court.[145] In his own delightful style he began, "This is the latest chapter in the continuing saga of *State v. Innis*."[146] The federal issue was now easy. The Supreme Court had spoken, and Innis' fifth amendment rights had not been violated. But other contentions, which the court had in its earlier opinion found it unnecessary to reach, now came to the fore. Among them was this: "Innis also charges the trial justice erred by failing to allow the motion to suppress the shotgun and verbal admissions made to the police while he was in custody. . . . Innis asks that we do what we did in *Travis* and fault the police on the basis of our State Constitution."[147] With no discussion as to whether *Travis* imports a more protective Rhode Island standard than the federal one, Justice Kelleher concluded that "the record in this case bears little resemblance to *Travis*."[148] It is here that Chief Justice Bevilacqua disagreed. Noting the court's freedom to find more protection in the state constitution than in the federal, he found this an occasion to do so.[149] Chief Justice Bevilacqua's colleagues in the majority in the first *Innis* case, however, this time joined Justice Kelleher's opinion, confirming the impression that in writing *Travis*, Justice Paolino regarded the Rhode Island privilege against self-incrimination as coextensive with the fifth amendment.

Should the court in *Innis* have taken up and decided the state question

144. The case was decided well before the United States Supreme Court's decision in Michigan v. Long, 463 U.S. 1032 (1982).

145. 433 A.2d 646, 646 (R.I. 1981), *cert. denied*, 456 U.S. 942 (1981). For a painstaking criticism of the Rhode Island court's disposition of *Innis* on remand, *see* Krevat, *A Subjective Standard for Custodial Interrogation Under the Rhode Island Constitution*, 16 SUFFOLK U.L. REV. 455 (1982).

146. 433 A.2d at 647.

147. *Id.* at 651.

148. *Id.*

149. *Id.* at 655 (Bevilacqua, C.J., dissenting).

in the first place? Had it done so the narrow majority might have immunized its judgment from United States Supreme Court review, but only if it had set out the state ground as independent of the federal. In as close a case as this one there is virtue in deciding the federal question alone and subjecting the judgment to Supreme Court review if that court is so disposed. Potentially it does place an extra burden on both courts, for had the Rhode Island Court in the end reinstated its earlier judgment on a clearly articulated independent state ground, it could have saved much judicial labor. Since the court finally rejected any heightened state protection, the sequence followed turned out to be sensible. In any event, at the time of *Innis* less attention was paid to such matters. *Michigan v. Long* was still five years away.

State v. von Bulow[150] came before the court in 1984. At issue was the validity of toxicological testing by state officials of property taken without authority by private persons from the defendant's premises. Holding that taking possession of the items by the officials did not constitute an unreasonable *seizure*, the court held that subsequent warrantless toxicological testing of the items constituted an unconstitutional *search* prohibited by both the federal and state constitutions. By this time *Michigan v. Long* had been decided, and the Supreme Court of Rhode Island knew all about it.

Justice Murray wrote for a unanimous court. She first established the distinction between private and public searches, and the inapplicability of the fourth amendment to the former. But the state expansion of the private search was another matter. Had the state, by testing the pills which were taken from the defendant's possession and delivered to its officials by private persons, so expanded the search as to bring it into conflict with the constitutional prohibition? An examination of the precedents, drawn both from the United States and the Rhode Island reports, led to the conclusion that the warrantless toxicological testing constituted an unreasonable search in violation of the fourth amendment to the United States Constitution. The court at this point had several options. The one it embraced shielded the decision from United States Supreme Court review.[151] Justice Murray wrote as follows:

Even were we to hold that defendant's Fourth Amendment rights had

150. 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

151. *Id.* The Rhode Island court could have simply stopped here in the fashion of the initial *Innis* opinion, resting the result solely on federal grounds, thus rendering the decision clearly reviewable by the United States Supreme Court. Or it could have added a simple clause or sentence holding, without elaboration, that the testing also violated article 1 section 6 of the Rhode Island Constitution, thus creating the strong impression that the two guarantees are coextensive. But the court took neither of these roads. The consequences of the Supreme Court's decision are discussed below in the context of State v. Manocchio, 496 A.2d 931 (R.I. 1985), *vacated sub nom.* Rhode Island v. Manocchio, 475 U.S. 1114 (1986), *on remand*, 523

> not been violated by the State Police's chemical testing, our own constitutional prohibition against unreasonable searches and seizures mandates that the evidence obtained through the state's toxicological examination of the contents of the black bag be suppressed. Art. I, section 6, of the Rhode Island Constitution is an alternative, independent foundation upon which we rest our holding that the toxicological testing was an illegal search. That section constitutes 'bona fide separate, adequate, and independent grounds,' *Michigan v. Long* . . . ,upon which we base our decision to suppress the admission of evidence produced by the state's toxicological analysis.[152]

This is about as clear a compliance with the "plain statement" requirement of *Long* as one could envision. It represents an authoritative interpretation and application of the search and seizure provision of article 1, section 6, of the Rhode Island Constitution, an interpretation independent of the mandate of the fourth amendment. The Rhode Island court took full responsibility.

The United States Supreme Court denied certiorari.[153] Its refusal to review could reflect satisfaction with the Rhode Island court's application of the fourth amendment or simply the Supreme Court's judgment that the question was not of sufficient importance or timeliness to warrant review. Given the Supreme Court's recent performances in this area, however, such explanations are unlikely. Far stronger is the inference that the Court was applying the adequate and independent state ground doctrine and carrying out its obligations as set forth in *Long*.[154]

The last of our trilogy is *State v. Manocchio*,[155] decided in 1985. The picture differs from *Innis* and *von Bulow*. This time the issue was the sixth amendment right of confrontation. Manocchio was indicted for being an accessory before the fact and for conspiracy to commit murder.

A.2d 872 (1987). *See infra* notes 155-62 and accompanying text (discussing *Manocchio* opinions).

152. 475 A.2d 995, 1019 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1984).

153. 469 U.S. 875 (1984).

154. Critics of the doctrine would deplore this approach. A state court has enunciated an interpretation of the fourth amendment with which the Supreme Court may not be in agreement, and the Court should hold that it has jurisdiction to review, so the argument runs. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policies, And Independent State Grounds Doctrine,* 86 COLUM. L. REV. 1291. *Michigan v. Long*, however, reaffirms the position that the United States Supreme Court will not review state court pronouncements on federal law unless those pronouncements control the decision in the case at bar. The Court recognizes the freedom of the state courts to make choices as to the law on which they rely, provided only that their judgments do not ultimately rest on erroneous determinations of federal law. By resting its result in *von Bulow* on state as well as federal law, the Supreme Court of Rhode Island makes plain to the lawyers and the people of the state that the fundamental law of Rhode Island condemns the police practice in question.

155. 496 A.2d 931 (R.I. 1985), *vacated sub nom.* Rhode Island v. Manocchio, 106 S. Ct. 1627 (1986), *on remand*, 523 A.2d 872 (R.I. 1987).

His flight and subsequent voluntary surrender delayed arraignment and trial for ten years. The prop of the cause against him was a sixty-eight year old witness, Kelley, testifying as to events fifteen years old. He had evident trouble with his memory.[156] The trial judge restricted cross-examination to the point where the jury could not hear of the witness' treatment for Alzheimer's disease and "many other things" for which, at a suppression hearing, he admitted having been treated. The defense had little access to other sources of information, for this witness had been a participant in the federal government's witness protection program. It was cross-examination or nothing. The convicted defendant's appeal raised several issues, but the decisive one was his contention that the unwarranted restriction on cross-examination of Kelley as to his deficiencies of memory and mental disease constituted a denial of the defendant's right to be confronted with the witnesses against him under the sixth amendment to the Federal Constitution and article 1, section 10, of the Rhode Island Constitution. As to this contention, Justice Kelleher wrote for the court, "We agree." His discussion began with a statement of the sixth amendment's confrontation clause and references to two United States Supreme Court cases establishing cross-examination as a primary aspect of confrontation. The remainder of the opinion consists of a discussion of a series of Rhode Island decisions applying the cross-examination component of confrontation. The instant case was compared with its predecessors, and its circumstances were fully discussed. The court noted that the jury's determination of whether to convict rested entirely upon its assessment of Kelley's competency and veracity: "It is readily apparent to us that Kelley's credibility was the only real issue before the jury."[157] The court's conclusion was expressed in these words:

> [W]e find in line with our prior case law that the trial justice's limitation of cross-examination on the issue of Kelley's memory deficiencies and mental diseases was clear error, violating both Manocchio's Sixth Amendment right to confront the witnesses against him and art. 1, sec. 10, of the Rhode Island Constitution.[158]

The court vacated the conviction and ordered a new trial.

Did the judgment rest on an adequate and independent state ground?[159] The answer is not clear. The basic proposition, that confron-

---

156. *Id.* at 934. Kelley is a member of the Federal Witness Protection Program and had admitted at Manocchio's trial that his prior testimony against other defendants in this case had been tainted with perjury. *Id.* at 933, 935.

157. *Id.* at 934.

158. *Id.* at 935.

159. *Id.* The state constitution's confrontation clause was surely "adequate" to support the judgment. The court did hold that there had been a denial of right under article I, section 10, of the Rhode Island Constitution. Was that holding "independent" of the court's ruling that

tation includes cross-examination, is drawn from the sixth amendment. Arguably, on the other hand, the court did categorically state that there had been a violation of the Rhode Island Constitution. One thing is certain. There was no plain statement that the state ground was independent of the federal, as there had been in *von Bulow*. This left the judgment open to United States Supreme Court review on the federal confrontation clause issue.

The comparison with *von Bulow* is interesting. In each case the Rhode Island court reversed the conviction because of violations of both federal and state constitutional rights. In *von Bulow*, the court made clear that the state constitutional determination was independent of the federal, whereas in *Manocchio* it did not. The reason is not set forth, but one may suggest. While the search and seizure guarantee of the Rhode Island Constitution upon prior occasions has been found to contain a higher standard of protection than its federal counterpart, the same has not been true of the confrontation clause. The court here treated the safeguards as coextensive. Because the federal standard was not met, neither was the state requirement. One cannot say that the state ground was independent of the federal. The Rhode Island court could have stated that even if it were incorrect about the extent of Manocchio's federal right, it was declaring that independently his state confrontational right was violated. That it did not go that route perhaps simply reflects a view that the federal violation was clear, and because the state guarantee is at least as extensive as the federal, there was no occasion to consider its independence.

The state did seek review on certiorari in the United States Supreme Court. The Supreme Court summarily vacated the judgment and remanded in light of its decision in *Delaware v. Van Arsdall*.[160] In *Van Arsdall*, the Delaware court, relying on the sixth amendment, reversed a murder conviction for failure to accord the defense the constitutionally required scope of cross-examination. The Delaware court had declined to engage in a harmless error analysis before reversing the conviction. This, held the United States Supreme Court, was error. Agreeing with the Delaware court that the curtailment of cross-examination had violated the confrontation clause, the Court remanded for a Delaware court determination as to whether the error was harmless beyond a reasonable doubt.

That the United States Supreme Court did the same thing in *Manocchio* is surprising in that Justice Kelleher's opinion had made clear

---

Manocchio's sixth amendment rights had been violated? *See infra* notes 160-62 and accompanying text (discussing decision on remand from United States Supreme Court).

160. Rhode Island v. Manocchio, 475 U.S. 1114 (1986). *See* Delaware v. Van Arsdall, 475 U.S. 673 (1986) (requiring harmless error analysis in confrontation clause area).

that conviction without the witness Kelley would have been impossible. That he did not express that conclusion in terms of harmless error analysis is understandable, since the Rhode Island court's decision in *Manocchio* preceded the United States Supreme Court's *Van Arsdall* opinion. A harmless error analysis hardly seems necessary after the court has in effect already made it by declaring that the witness, clearly unlike the corresponding witness in *Van Arsdall*, was essential to the procurement of the conviction.

On remand the Rhode Island court met the Supreme Court's terms. Justice Weisberger made short work of the harmless error issue. "We are of the opinion that, in effect, a harmless-error analysis is satisfied by the observation that we made in our prior opinion."[161] Since the issue is federal, a return trip to the United States Supreme Court was theoretically possible, but it did seem nearly impossible for the state to establish that the error was harmless to Manocchio beyond a reasonable doubt. The judgment of conviction remained vacated.

It is worth noting the possible application to the first *Manocchio* decision of Justice Stevens' dissent in *Van Arsdall*, one he did not repeat in *Manocchio*. In *Van Arsdall* he again urged state courts to consider state questions first, and if they find governmental action violative of their own constitutions to say so clearly in conformity with *Michigan v. Long*, thus avoiding potentially meaningless Supreme Court review, the meaninglessness resulting from the state court holding, for the first time on remand, that the state ground was indeed independent of the federal. That the Rhode Island court followed Justice Stevens' prescription in *von Bulow* but not in *Manocchio* reflects, I believe, an unreadiness of the Rhode Island court to push the reach of the Rhode Island confrontation clause beyond the point established under federal constitutional doctrine. Even assuming this, however, the Rhode Island court could say in this setting that its view of the state's safeguard, while influenced by its reading of federal precedents, is nonetheless an independent judgment about the protection accorded by the Rhode Island Constitution.[162] Such an approach in *Manocchio* probably would have avoided the occasion for Supreme Court review, and the need for a subsequent reiteration by the Rhode Island court of essentially what it said before.

VII. THE ACCOUNTABILITY OF THE STATE COURT

The upsurge of interest in state constitutions as vehicles for enforce-

161. 523 A.2d 872, 874 (R.I. 1987).

162. Indeed, the 1986 revision of Rhode Island's Constitution specifies in article I, section 24: "The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States." *See*, Dibase, *Reviving Rhode Island Constitutional Rights: The Need for a New Approach to Constitutional Questions*, 35 R.I.B.J. No. 8, p. 5 at 8 (1987).

ment of individual rights brings with it closer examination of the proper role of the state court. Profound questions as to the theory of judicial review, hitherto largely focused upon the United States Supreme Court, now become directed to the work of state courts as well. As the adequate and independent state ground doctrine makes clear, state courts are free from federal restraints to elaborate state law, including state constitutional law, in a manner more protective of individual rights than is required by United States Supreme Court decisions interpreting the Bill of Rights. But state court judges are not free agents. They are not free to write whatever they may choose into the fundamental law of their states. They are bound by their oaths of office and the traditions of the courts on which they sit. And while they may have the last word with respect to disposition of the cases before them, they do not write all powerfully in terms of control over other agents of government. There are extra-judicial checks and balances. For one thing state constitutions are easier to amend than the Constitution of the United States. For another, state court judges, with a few exceptions, do not enjoy tenure during good behavior. They are subject to some political checks upon their entitlement to office. A recent experience in California is illustrative of both; witness a recent state constitutional amendment[163] in the area under discussion and voter removal of the chief justice and two associate justices of the Supreme Court of California.[164] The removals were not the product of perceived acts of personal misconduct. Rather, they stemmed from a popular dissatisfaction with the course of decisionmaking over a period of time, including the aggressive furthering of the values of the Bill of Rights through the Constitution of California. These judges have earned deep respect for their devotion to their duty as they saw it, and from many gratitude for what they have done for values more important than their own tenure. Their vindication, one may hope, will come in time. The cost, however, is heavy. Reaction can be excessive and downright destructive of important benchmarks of hard won progress, including the very independence of the judiciary.

Justice Brandeis' famous dictum regarding the state as laboratory is very much in fashion among those advocating aggressive interpretation of state constitutions. He wrote:

---

163. *See* CAL. CONST. art. I, § 28(d): "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . ." This provision is part of Section I of Initiative Constitutional Amendment of June 8, 1982, known as "The Victims Bill of Rights." For an excellent discussion of other recent state constitutional amendments curtailing criminal procedural rights, *see* Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984).

164. N.Y. Times, Nov. 6, 1986, at 30, col. 1.

> 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. . . . If we would guide by the light of reason, we must let our minds be bold.[165]

One finds little emphasis, however, currently placed upon one significant clause, "if its citizens choose." Certainly not a reference to public opinion polls, nor to the desirability of a weather vane approach to judicial review, it stands as a reminder of the source of all lawmaking, the consent of the governed.[166]

The recent episode in Rhode Island concerning the office of Chief Justice did not involve nor implicate the performance of the Supreme Court of Rhode Island, nor any of its judges, in the decision of cases and in the concomitant elaboration of the law of Rhode Island, including the law of its constitution. There has existed, and exists, a healthy respect for the independence of the judiciary. I only hope that the picture presented here is of a court careful and restrained in its interpretation of the state's constitution. It remains appropriate, however, to inquire concerning the status of supreme court justices, their tenure, and the mechanisms which exist for rendering them accountable. That their interpretations of the state constitution may be overruled by constitutional amendment is clear. That they are subject to impeachment is also clear. To the question whether they have tenure during good behavior, the surprising answer is that it is not clear at all. This important question was placed before the justices in *In re Advisory Opinion (Chief Justice)*.[167] Justice Kelleher's answer, different from that of his three responding colleagues, is a fitting note on which to end a tribute to a strong and able judge.

The text of the Rhode Island Constitution on this point then read:

> The judges of the supreme court shall be elected by the two houses in grand committee. Each judge shall hold his office until his place be declared vacant by a resolution of the general assembly to that effect; which resolution shall be voted for by a majority of all the members elected to the house in which it may originate, and be concurred in by a majority of all the members elected to the house in which it may originate, and be concurred in by the same majority of the other house. Such resolution shall not be entertained at any other than the annual session for the election of public officers; and in default of the passage thereof at said session, the judge shall hold his place as is herein provided. But a judge of any court shall be removed from office if, upon

165. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
166. *See* Mosk, *supra* note 102.
167. 507 A.2d 1316 (R.I. 1986).

impeachment, he shall be found guilty of any official misdemeanor.[168]

The original constitution, adopted in 1842, provided for two annual sessions of the General Assembly, one in May at Newport, "for the purposes of election and other business",[169] the other in October at various places with the business unspecified. In 1854, the article III amendments provided that, "there shall be one session of the General Assembly, holden annually."[170] The amendment made no reference to the election of officers. That legislative function lasted until 1893, when by article X of the amendments it was largely, if not entirely, eliminated.

When a joint resolution was introduced into the Senate on January 1, 1985, to declare vacant the office Chief Justice of the Supreme Court, the Senate referred it to a committee. Subsequently the Governor, the Speaker of the House of Representatives, and the Majority Leader of the Senate requested from the Justices of the Supreme Court an answer to the question whether the joint resolution might be acted upon in light of the provision in article X of the constitution, stating that "such Resolution [to declare vacant a seat on the Supreme Court] shall not be entertained at any other than the annual session for the election of public officers."

Justices Weisberger, Murray, and Shea responded in the negative, opining that the elimination of the annual session for the election of public officers eliminated the occasion for vacating the office of a justice, and that the power to do so, therefore, ceased to exist.

Justice Kelleher disagreed, refusing to find in the reduction of legislative sessions from two to one and in the elimination of reference to the election of officers an implied repeal of a provision which has been part of the constitution since its beginning.

I shall not attempt a detailed analysis of these opinions. They speak for themselves. As advisory opinions they do not constitute binding precedents.[171] Their influence depends on their powers of persuasion upon those who come afterwards. They are part of the constitutional history of Rhode Island, as are the events of 1935 when the General Assembly, for the only time to date, acted, or purported to act, pursuant to this power.[172] The law of any constitution is not found in judicial

168. R.I. CONST. art. X, § 4, printed with the General Laws of Rhode Island 1956 (1976 Reenactment).

169. R.I. CONST. of 1842, art. IV, § 3.

170. *See In re*, Advisory Opinion (Chief Justice, 507 A.2d 1316, 1322 (1986)).

171. Opinion to the Governor, 109 R.I. 289, 284 A.2d 295 (1971).

172. *See In re* Advisory Opinion (Chief Justice), 507 A.2d 1316, 1331-32 (opinion of Kelleher, J.) (discussing General Assembly's attempted use of removal power of supreme court justices in past).

decisions alone. It is found in governmental practice and experience and in public acceptance of what is done.

What is important about Justice Kelleher's opinion is the simple fact that he wrote it. There is much to be said on his side of the question, and given the non-binding character of the answers there is no particular virtue in unanimity, indeed much more in full and balanced exposition. As to whether, as an original question, this check upon the highest state court represents a vital cog in the balance wheel or whether its demise would strike a blow for much needed judicial independence, is another debate for another day. A revision of the Constitution of Rhode Island in 1986 surprisingly failed to resolve the issue. The power to declare a judge's place vacant remains in the text of Article X, Section 4, followed by the restriction that a resolution to that effect may only be entertained at the annual session for election of public officers.[173] Such annual session no longer exists. For the time being the answer remains clouded in ambiguity, perhaps not a bad state of affairs. One hopes that the occasion for exercise of such a legislative power will not come. Just the possibility that the power exists may help insure against its coming.

That an observer finds this one of Justice Kelleher's finest efforts and that he is persuaded by it can be of no great significance for anybody else. For me it is another happy coincidence. Whether or not the General Assembly has power to remove a justice, the day it elected Justice Kelleher was a great day for Rhode Island.

173. Article X, Section 4 of the Constitution of Rhode Island now reads: "The judges of the supreme court shall be elected by the two houses in grand committee. Each judge shall hold office until that judge's place be declared vacant by a resolution of the general assembly to that effect; which resolution shall be voted for by a majority of all the members elected to the house in which it may originate and be concurred in by the same majority of the other house. Such resolution shall not be entertained at any other than the annual session for the election of public officers; and in default of the passage thereof at said session, the judge shall hold that place as is herein provided."