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FIRST THINGS FIRST: REDISCOVERING THE STATES' BILLS OF RIGHTS

Justice Hans A. Linde†

*The first annual Judge Irving A. Levine Memorial program was held on May 16, 1979, in College Park, Maryland. The topic of the program was "States' Bills of Rights." Justice Linde's speech, set forth below, addressed the failure of state courts and lawyers to decide questions of constitutional rights under their own state constitutions when state law protects the interest at stake. Justice Linde suggests that a state court confronted with a constitutional question should always examine its state constitution before looking to the Federal Constitution.**

I. INTRODUCTION

Your invitation to join with you on this occasion in honor of Judge Levine gave me the opportunity to read a number of his opinions on problems which Maryland's courts face in common with Oregon's and those of other states, and particularly to reflect on the independent responsibility of state courts for the conditions of liberty in their respective states.

Much of the work of the state courts about which Judge Levine so obviously cared is concerned with the rights of individuals. Yet it is a curious fact that when we speak of individual rights, not only the newspaper reading public but no doubt most members of the legal profession take it for granted that we speak of federal law, pronounced by the federal courts. This is one phase of our shifting

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* The program was co-sponsored by the Irving A. Levine Memorial Committee and the Montgomery County-Prince George's County Continuing Legal Education Institute of which Judge Levine was a faculty member. Speaking with Justice Linde at the program were Judge Francis D. Murnaghan, Jr., now of the United States Court of Appeals for the Fourth Circuit, Judge Charles E. Moylan, Jr., Court of Special Appeals of Maryland, and Mr. James E. Clayton, Law Editor for the *Washington Post*.

The Irving A. Levine Memorial program has since become an annual event. The topic of the second annual program, held this spring, was the "Exclusionary Rule." Committee Chairman, Theodore Miller, Esq., has not yet solidified plans for the program next spring, but intends to continue the precedent of discussing topical, interesting, and controversial subjects.

and ambivalent views concerning the role of those courts. Today we have, on the one hand, proposals to slow or reverse the tide of cases flowing into the federal courts, and on the other hand a continued thrust of constitutional challenges against state and local authorities into the United States District Courts, even in the face of discouraging decisions under the Federal Constitution.

The state courts, however, take primary responsibility for most of the individual rights that concern most people most of the time — for their rights as buyers or sellers, as landlords or tenants, for their claims to alimony (or to “palimony”), and for their rights to damages if they are injured on the job or in a traffic accident. State law is neither immobilized by tradition nor unwilling to recognize social change in these areas, as developments in products liability and intrafamily relations show.¹ But while state courts routinely assume their charge to declare individual rights against other individuals or private entities, the curious fact is that they seldom and hesitantly assume the same responsibility for individual rights against public authority. The legal basis for such individual rights in the several states has always existed, and the courts’ responsibility is inescapable. Or it would be inescapable, were it not for the working habits of counsel and the way in which our law schools teach constitutional law.

This is our topic. We have entitled it: *First Things First: Rediscovering the States’ Bills of Rights*. I do not mean to deliver a lecture on all the individual rights that are found in the constitutions of the several states and what they mean. The emphasis is on the first part of the title — why the states’ bills of rights are first things that come first. I mean initially to review some general principles that will be familiar and that I hope are uncontroversial and later to suggest some of the practical consequences should we decide to take those principles seriously. The suggestion to take seriously the principle that state bills of rights come first is by no means uncontroversial.

II. HISTORY

State bills of rights are first in two senses: first in time and first in logic.

It is common knowledge that the rights all Americans prize, whether or not they wish to see them enforced, come from the first

1. These comments are particularly true in Maryland. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976), wherein the Court of Appeals of Maryland adopted the theory of strict tort liability under RESTATEMENT (SECOND) OF TORTS § 402A (1966) for some products liability cases. See also *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978), abrogating the common law doctrine of interspousal immunity for outrageous intentional torts. For casenotes on *Phipps* and *Lusby*, see 6 U. BALT. L. REV. 295 (1977) and 8 U. BALT. L. REV. 584 (1979), respectively.

ten amendments of the United States Constitution. It is common knowledge, but of course it is false.

It was not unheard of in 1776, long before the drafting of the Federal Constitution, for the revolutionaries of that day to declare in the charters of their new states that the liberty of the press should be inviolably preserved, or that warrants to search any place or to seize any person or property must be based on information under oath and describing the place or the person. Nor was it unusual in these charters to grant every criminal defendant a right to a speedy trial before an impartial jury, with the assistance of counsel, to confront and question the witnesses against him, not to be compelled to give evidence against himself, nor to be subjected to excessive bail or fines nor to cruel or unusual punishment.² I am sure you do not need a visitor from a wilderness hardly known to exist before 1804 to quote to you from Maryland's Declaration of Rights of November, 1776. By 1783, thirteen states, all but Rhode Island, had adopted written constitutions. The majority of them contained most of the catalogue of civil liberties included in Virginia's Declaration of Rights, and Maryland's, and Delaware's, and Pennsylvania's. But they were by no means identical. That was no accident. During the months preceding independence, political leaders debated the case for having the Continental Congress prepare uniform constitutions for the states. They finally rejected this idea in favor of calling upon each state to write a constitution satisfactory to itself.³

Far from being the model for the states, the Federal Bill of Rights was added to the Constitution to meet demands for the same guarantees against the new central government that people had secured against their own local officials. Moreover, the states that adopted new constitutions during the following decades took their bills of rights from the preexisting state constitutions rather than from the federal amendments. For example, Oregon's constitution in 1859 adopted Indiana's copy of Ohio's version of sources found in Delaware and elsewhere.

The Federal Bill of Rights did not supersede those of the states. It was not interposed between the citizen and his state. When the fifth amendment was invoked against the City of Baltimore in 1833, John Marshall replied that its adoption "could never have occurred to any human being, as a mode of doing that which might be effected by the state itself."⁴ Only the Civil War made it clear that it might sometimes be necessary to use federal law as a mode of doing that

2. See, e.g., MD. CONST., DECL. OF RIGHTS arts. 19, 20, 22, 23, 38.

3. F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 52-56 (1930).

4. *Barron v. Mayor of Baltimore*, 32 U.S. 242 (1833).

which a state could but did not effect for itself — the protection of some of its citizens against those in control of its government.

It is the fourteenth amendment that has bound the states to observe the guarantees of the Federal Bill of Rights. I do not underestimate that crucial role of the fourteenth amendment. But the effect has gone beyond assuring that state officials respect the rights guaranteed by federal law. It has led many state courts and the lawyers who practice before them to ignore the state's law, enforcing only those personal rights guaranteed by federal law, or to assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal analogues.

We tend to forget how recently the application of the Federal Bill of Rights to the states developed. Throughout the nineteenth century and the first quarter of the twentieth, state courts decided questions of constitutional rights under their own state constitutions. In 1925, it was only a hypothesis that the states were bound by the first amendment.⁵ That was really settled only after 1937.⁶ Fifth amendment guarantees against compulsory self-incrimination and double jeopardy did not bind the states until 1964 and 1969, respectively.⁷ I shall not go through the catalogue; most of the decisions binding the states to observe the procedures of the fourth, fifth, and sixth amendments date from the same period.⁸ Of course, the states had all these guarantees in their own laws long before the Federal Bill of Rights was applied to the states. State courts had been administering these laws, sometimes generously, more often not, for a century or more without awaiting an interpretation from the United States Supreme Court.

Historically, the states' commitment to individual rights came first. Restraints on the federal government were patterned upon the states' declarations of rights. Even in modern times the United States Supreme Court has sometimes looked to that original history to interpret a federal clause.⁹ But today, most state courts look to interpretations of the Federal Bill of Rights for the meaning of their

5. See *Gitlow v. New York*, 268 U.S. 652 (1925); cf. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (first amendment *not* used to invalidate Oregon statute which would effectively close religious primary schools).

6. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

7. See *Benton v. Maryland*, 395 U.S. 784 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964).

8. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the exclusionary rule).

9. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968). An earlier, interesting example arising in Maryland was *In re Provoo*, 17 F.R.D. 183 (1955).

own state constitutions, in the rare cases when they consider them at all.

III. THE LOGIC OF FEDERALISM

Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law. For lawyers, the point is quickly made. Whenever a person asserts a particular right, and a state court recognizes and protects that right under state law, then the state is not depriving the person of whatever federal claim he or she might otherwise assert. There is no federal question.

Every state supreme court, I suppose, has declared that it will not needlessly decide a case on a constitutional ground if other legal issues can dispose of the case. The identical principle applies when examining that part of the state's law which is in its own constitution. In my view, a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time. The same court probably would not let itself be pushed into striking down a state law before considering that law's proper interpretation. The principle is the same.¹⁰

Let us avoid any misunderstanding. The United States Constitution is the supreme law of the land. Nothing in the state's law or constitution can diminish a federal right. But no state court needs or, in my view, ought to hold that the law of its state denies what the Federal Constitution demands, without at least discussing the guarantees provided in its own bill of rights. In fact, Justices of the Supreme Court frequently invite a state court to do just that, usually when those Justices disagree with the majority's decision of the federal issue presented. As Chief Justice Burger once observed, "for all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject."¹¹ Justices Brennan and Marshall, disappointed at decisions that have reversed

10. Justice Marshall has suggested that the United States Supreme Court refrain from reversing a state judgment in favor of a defendant relying on constitutional grounds "unless it is quite clear that the state court has resolved all applicable state law questions adversely to the defendant and that it feels compelled by its view of the federal constitutional issue to reverse the conviction at hand." *Oregon v. Hass*, 420 U.S. 714, 729 (1975) (dissenting opinion); see Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass*, 82 DICK. L. REV. 273 (1978). I have stated elsewhere that lower federal courts also should inquire into state constitutional guarantees when plaintiffs attack state action on federal constitutional grounds. See Linde, Book Review, 52 OR. L. REV. 325 (1973).

11. *Wisconsin v. Constantineau*, 400 U.S. 440 (1971) (Burger, C.J., dissenting).

state courts when they protected a claim under the fourteenth amendment, have issued frequent reminders that the state courts could have reached the same decisions under the state constitution.¹²

Granted, a state court might often reach the opposite result under the state constitution and bend only to the external compulsion of the fourteenth amendment. A state constitution does not always protect whatever the Federal Constitution protects. But a state court should put things in their logical sequence and routinely examine its state law first, before reaching a federal issue.

IV. EXAMPLES: FIRST AMENDMENT RIGHTS WITHOUT THE FIRST AMENDMENT

Let me illustrate these principles with a few examples.

Judge Levine had a special interest in freedom of expression. His specialty was its relationship to the law of defamation. As everyone knows, the law of defamation became a matter of constitutional law only in 1964, when the United States Supreme Court decided *New York Times Co. v. Sullivan*.¹³ Everyone knows this, but again, it is false. From the first declarations of rights in 1776 to the present day, freedom of the press in state constitutions has often been coupled with specific provisions for the trial of libel cases. The problem facing the United States Supreme Court since 1964 has been how to square recovery for defamation with the first amendment. The first amendment, of course, made no reference to defamation, because tort law was not within the powers granted to Congress at all.

The Oregon Supreme Court has had the same experience in defamation cases that I am sure every court has had since 1964. We have received elaborate briefs debating whether the plaintiff is or is not a public figure, what degree of recklessness with the truth can constitute malice, whether the constitutional protection is limited to so-called "media defendants,"¹⁴ and so on. The scholarly literature on these first amendment issues is so extensive that it has largely displaced the discussion of libel and slander as a branch of torts. But the briefs and the literature rarely, if ever, mention the state constitutions.

Yet the Oregon Supreme Court, like some others, had to decide a constitutional issue of defamation law well before the *New York*

12. *E.g.*, *Idaho Dept. of Employment v. Smith*, 434 U.S. 100 (1977); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Texas v. White*, 423 U.S. 67 (1975). *See also* *New Jersey v. Portash*, 440 U.S. 450 (1979).

13. 376 U.S. 254 (1964).

14. *See id.*

Times case.¹⁵ The Oregon Constitution since 1859 has provided that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation."¹⁶ Unlike a due process clause, this remedies clause is derived from chapter forty of Magna Carta, rather than chapter thirty-nine.¹⁷ Maryland's 1776 Declaration of Rights made the same promise of a remedy for injuries done to one's person or property, but it did not mention injury to one's reputation.¹⁸ The question in Oregon was whether a statute that limited the recovery for libel when a newspaper printed a retraction violated this guarantee of a remedy for injury to reputation. The court held that the particular statute did not do so.

Along with the guarantee of a remedy against defamation, the Oregon Constitution includes an equally ancient guarantee of freedom of expression. Article I, section 8 reads: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."¹⁹ Maryland has a similar clause.²⁰ Recently our court has had a number of cases in which juries awarded punitive damages for libel.²¹ Some of the briefs debated whether the facts met the tests laid down by the Supreme Court in *Gertz v. Robert Welch, Inc.*,²² and whether *Gertz* applied to defendants who did not belong to what the first amendment calls the "press." Finally, one defendant threw into this long discussion of Supreme Court cases a citation to Oregon's article I, section 8, albeit without much discussion.

15. See *Holden v. Pioneer Broadcasting Co.*, 228 Or. 405, 365 P.2d 845, *cert. denied*, 370 U.S. 157 (1961).

16. OR. CONST. art. I, § 10.

17. Chapter 39, the "due process" clause of the Magna Carta, guarantees that "[n]o free man shall be taken or imprisoned or disseized or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land." Chapter 40, upon which the quoted Oregon constitutional provision is based, reads: "To no one will we sell, to no one will we deny or delay right or justice." MAGNA CARTA, 1215, chs. 39, 40.

18. MD. CONST., DECL. OF RIGHTS art. 19 grants only: "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, . . ."

19. OR. CONST. art. I, § 8.

20. See MD. CONST., DECL. OF RIGHTS art. 40: "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

21. See *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979); *Adams v. State Farm Mut. Auto Ins. Co.*, 283 Or. 45, 581 P.2d 507 (1977); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977).

22. 418 U.S. 323 (1974). Under *Gertz*, the Supreme Court would not allow states to permit a non-public person to recover punitive damages for defamation "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

In deciding this case,²³ we noted that section 8 does not speak of a special freedom of the press. Nor, for that matter, does it distinguish between different subjects of comment. It forbids any law restricting anyone's right to speak, write, or print freely on any subject whatever, though it holds him responsible for the abuse of this right. We put this section together with the guarantee of a remedy for injury done to a plaintiff in his reputation. We concluded that the two provisions are two sides of one coin: a person who defames another is responsible for the actual injury he does to another. But he cannot be held liable for punitive damages, because punitive damages by definition are punishment on behalf of society and not compensation for the plaintiff's injury. The result was to exclude punitive damages in all defamation cases in Oregon, without regard to the distinctions between types of plaintiffs and defendants and degrees of fault that are found in the first amendment cases.

You may or may not find this decision sound. It might be good law under the Maryland Constitution or it might not be. That very independence of the states' laws, in fact, is my main point. What is interesting is that our court had no earlier occasion to decide the question; it had never been raised. On the same day this decision came down, we affirmed punitive damages in another libel case.²⁴ In that case, the defendant made no objection to such damages in the trial court, presumably because he saw no help in the federal first amendment cases.

Apart from defamation, our court has protected what are usually called first amendment freedoms without depending on the first amendment. In 1975, the court held under article I, section 8 of the Oregon Constitution that limits on political campaign spending unlawfully restricted the right to speak, write, or print freely on any subject whatever.²⁵ The United States Supreme Court followed suit under the first amendment a year later in *Buckley v. Valeo*.²⁶ Again, a claim can lose under Oregon's article I, section 8 as well as under the first amendment.²⁷ But our court is willing to look at these as two

23. *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777 (1979).

24. *Troutman v. Erlandson*, 286 Or. 47, 593 P.2d 793 (1979).

25. *Deras v. Myers*, 272 Or. 47, 535 P.2d 541 (1975).

26. 421 U.S. 1 (1976).

27. Since this speech was delivered, the Oregon Supreme Court has relied on OR. CONST. art. I, § 8 (see text accompanying note 19 *supra*) to hold that a disorderly conduct statute on its face restricted freedom of speech because the statute was directed at the use of offensive words rather than at any harm caused thereby. *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980).

When a newspaper demanded access to juvenile court proceedings, apparently not guaranteed by the first amendment under *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Oregon Supreme Court held that public access to all court proceedings was assured by OR. CONST. art. I, § 10 that "[n]o court shall be secret, but justice shall be administered, openly . . ." *State ex rel Oregonian Publishing Co. v. Deiz*, 289 Or. 277, 613 P.2d 23 (1980).

separate issues. It is careless of counsel not to pursue them both independently, as some later examples will show.

V. PUTTING THE PRINCIPLE INTO PRACTICE

Let us examine what putting first things first means in practice, both for courts and for the practitioner.

When a state court deals with constitutional claims that do not currently occupy the United States Reports, the state court is quite accustomed to making its own analysis under the state constitution. Commonplace examples are issues of the condemnation of property for public use or alleged disparities of assessments for taxation. But when the issue arises in an area in which the Supreme Court has been active, lawyers generally stop citing the state's own law and decisions to the state court, and the court abandons reference to the state constitution. Such reference to the state constitution reappears only when counsel and the state court wish to extend a constitutional right beyond the decisions of the Supreme Court and to do so without facing possible reversal on certiorari. In other words, the normal and logical sequence is reversed: counsel and court first determine whether the state has violated the Federal Constitution, and only when it has not done so do they reach a question of state law. That practice stands the Constitution on its head.

The tactic of using the state constitution only selectively is best illustrated by two famous California cases concerning equal protection. In *Serrano v. Priest*,²⁸ the California Supreme Court held that the amount spent on public schools could not depend on the different tax bases available to rich and to poor local school districts. The opinion was written in the terminology of federal equal protection doctrine, with only a passing reference to California's own article I, section 21.²⁹ That section forbade laws granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens. This is a common provision which is older than the fourteenth amendment and independent of its context of race discrimination. Before the *Serrano* litigation was concluded, the United States Supreme Court rejected the same equal protection claim in *San Antonio Independent School District v. Rodriguez*.³⁰ Thereafter, the California court reaffirmed its original holding under the California clause.³¹

One might think that, having discovered the clause in the California Constitution prohibiting laws granting to any class of

28. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

29. CAL. CONST. art. I, § 21 (current version at § 7).

30. 411 U.S. 1 (1973).

31. *Serrano v. Priest* (*Serrano II*), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

citizens privileges which are not equally open to all citizens on the same terms, the California court either would have found the clause relevant to Allen Bakke's attack on the preferential admissions system at the medical school in Davis,³² or that the court would at least discuss why not. Indeed, California amended its constitution in 1974 to provide expressly that the "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."³³ But that discussion of equality of privileges did not occur. In *Bakke v. Regents of the University of California*,³⁴ the California court studiously bypassed all preliminary issues of state law and placed its decision squarely on the fourteenth amendment, so as to invite Supreme Court review of this controversial issue. The court did not seem concerned about the implication that the law of California offered Mr. Bakke no protection for a right to which the court, rightly or wrongly, believed him to be entitled.³⁵

From the lawyer's standpoint, the state's bill of rights may seem utterly irrelevant when the federal precedents are squarely in his favor. Nevertheless, it is a mistake to ignore the state guarantee. In the early 1970's, lawyers invariably took every civil liberties case to the federal district court. One very good lawyer did just that in *Tanner v. Lloyd Corp., Ltd.*³⁶ The plaintiffs in that case were denied the right to distribute anti-war leaflets in a large shopping center in Portland. On the basis of existing Supreme Court decisions, both the federal district court³⁷ and the Court of Appeals for the Ninth

32. *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

33. CAL. CONST. art. I, § 24.

34. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1977), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978).

35. Since this speech was delivered, the California Supreme Court has applied the state constitution rather than the federal equal protection clause as well as statutory law to hold that a public utility company unlawfully discriminated against employment of homosexuals. *Gay Law Students Ass'n v. Pacific Telephone & Telegraph*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

Other recent California decisions relying on state constitutional provisions include: *Van Atta v. Scott*, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980) (bail practices invalidated under state due process clause); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980) (ordinance prohibiting five or more unrelated persons from residing in single-family home violated state constitutional right of privacy); *San Francisco Labor Council v. Regents of Univ. of Cal.*, 26 Cal. 3d 785, 608 P.2d 277, 163 Cal. Rptr. 460 (1980) (statute requiring university to pay prevailing wages in community violated state constitutional provision establishing independence of university); *People v. Rucker*, 26 Cal. 3d 368, 605 P.2d 843, 162 Cal. Rptr. 13 (1980) (evidence of interviews between defendant and police violated state constitutional privilege against self-incrimination).

36. 308 F. Supp. 128 (D. Or. 1970), *rev'd*, 407 U.S. 551 (1972).

37. *Id.*

Circuit³⁸ sustained the claim under the first amendment; no one bothered with the Oregon Constitution. By the time the Supreme Court granted certiorari and reversed its prior direction,³⁹ it was of course too late.

I would guess that if the plaintiff from the outset had invoked the Oregon Constitution's free speech and assembly provisions, these provisions would have been interpreted consistently with the existing first amendment precedents in the plaintiff's favor. After the reversal under the first amendment, lawyers who had litigated a similar shopping center case in state court and had relied on the lower federal court's decision against the Lloyd Center tried belatedly to switch their argument to the Oregon Constitution, but they found that the Oregon court was reluctant to contradict the Supreme Court's *Lloyd Corp.* decision.⁴⁰ California, incidentally, has done so under its constitution.⁴¹

Many other cases show that what is sound in theory is also intensely practical. In recent years, state courts have often found themselves reversed by the Supreme Court when they decided in favor of some individual right on the basis of the United States Constitution.⁴² An Alabama court, for instance, held that an employer could not be made to pay an employee while on jury duty.⁴³ The Pennsylvania Supreme Court held that a gross receipts tax on parking lots took the operators' property without due process.⁴⁴ The Idaho court thought that its unemployment benefit rules violated the equal protection clause.⁴⁵ These decisions indeed may not have been good fourteenth amendment law and deserved to be reversed. But I venture to say that in every case the court could have cited the state's own constitution for its holding. Some years ago, for example, in *Maryland Board of Pharmacy v. Save-A-Lot, Inc.*,⁴⁶ Judge Levine

38. *Tanner v. Lloyd Corp., Ltd.*, 446 F.2d 545 (9th Cir. 1971), *rev'd*, 407 U.S. 551 (1972).

39. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), *rev'g* 446 F.2d 545 (9th Cir. 1971).

40. *See Lenrich Assocs. v. Heyda*, 264 Or. 122, 504 P.2d 112 (1972); 52 OR. L. REV. 338 (1973).

41. *See Robins v. Pruneyard Shopping Center*, 22 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 48 U.S.L.W. 4650 (U.S. 1980).

42. The Supreme Court has reversed state supreme courts under these circumstances more than 20 times since the October, 1972, term. The most recent decisions reaching this result include *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *Fare v. Michael C.*, 442 U.S. 707 (1979); and *North Carolina v. Butler*, 441 U.S. 369 (1979).

43. *Gadsden Times Publishing Corp. v. Dean*, 49 Ala. App. 45, 268 So. 2d 829, *cert. denied*, 289 Ala. 743, 268 So. 2d 834 (1972), *rev'd*, 412 U.S. 543 (1973).

44. *Alco Parking Corp. v. City of Pittsburgh*, 453 Pa. 245, 307 A.2d 851 (1973), *rev'd*, 417 U.S. 369 (1974).

45. *Smith v. Idaho Dept. of Employment*, 98 Idaho 43, 557 P.2d 637 (1976), *rev'd*, 434 U.S. 100 (1977).

46. 270 Md. 103, 311 A.2d 242 (1973).

reaffirmed the doctrine that in Maryland due process requires statutes to have a substantial relation to some identified objective, notwithstanding what the Supreme Court might say. I have little enthusiasm for that doctrine,⁴⁷ but I am the first to say Maryland is entitled to it under its own constitution. Without the Maryland Constitution, the court might have found itself reversed, as the North Dakota court was when it thought it was following an old federal due process case that had escaped being expressly overruled in the 1940's.⁴⁸

The lesson, I suggest, is that a claim under the state's own law must be more than a perfunctory afterthought. First things first. Indeed, when a court ties a state constitutional guarantee as a tail to the kite of the corresponding federal clause, it may simply find the state ground ignored on certiorari, as happened recently in *Delaware v. Prouse*.⁴⁹ But the habit that developed in the 1960's of making a federal case of every claim and looking for all law in Supreme Court opinions dies hard.

Eager legal aid lawyers once came to our court trying to fit a woman's right to operate a day care center within the due process analysis of *Goldberg v. Kelly*.⁵⁰ Only after the argument did our own examination show that she was entitled to prevail under the state administrative procedure act, which counsel apparently had not read.⁵¹

In another recent case, a defendant charged with speeding demanded the maintenance records of the radar sets used by the Portland police.⁵² The case was argued below and in our court as a federal due process claim under the Supreme Court's rule in *Brady v.*

47. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195 (1976).

48. See *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

49. 440 U.S. 648 (1979). Justice White's opinion states:

The [Delaware] court analyzed the various decisions interpreting the Federal Constitution, concluded that the Fourth Amendment foreclosed spot checks of automobiles, and summarily held that the state constitution was therefore also infringed. . . . Had state law not been mentioned at all, there would be no question about our jurisdiction, even though the state constitution might have provided an independent and adequate state ground. . . . The same result should follow here where the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments.

Id. at 652-53. Justice White expanded this proposition: "Moreover, every case holding a search or seizure to be contrary to the state constitutional provision relies on cases interpreting the Fourth Amendment and simultaneously concludes that the search or seizure is contrary to that provision . . ." *Id.* at 652-53 n.5. See also *New Jersey v. Portash*, 440 U.S. 450, 460-61 (1979) (Brennan, J., concurring).

50. 397 U.S. 254 (1970).

51. *Reynolds v. Children's Servs. Div.*, 280 Or. 431, 571 P.2d 505 (1977).

52. *State v. Spada*, 286 Or. 305, 594 P.2d 815 (1979).

Maryland,⁵³ which dealt with prosecution suppression of evidence favorable to the defense. After the argument, it occurred to us that the records were apparently available to anyone on request under the state's public records law. We asked the parties for additional memoranda. The state agreed that the records were, indeed, available; all defendant had to do was pick them up for himself instead of demanding that the district attorney get them for him. Defense counsel's response was that this might be so, but that the "threshold question" in the case was the duty of the state in light of the United States constitutional standards; the merits of other legal ways of getting the information were irrelevant.

As I say, that perspective dies hard. In both of these cases, we happened to notice on our own motion that the state law protected the interest at stake. But if we had not noticed the state issues on our own, the shaky federal due process claims might well have failed.

What this should mean in practice is simply good lawyering, both at the bar and on the bench. If we expect to get careful attention to a state statute, we should give equally careful attention to the state constitution. This is easier said than done. A generation of lawyers brought up on United States Supreme Court opinions seems literally speechless when we ask from the bench, as we sometimes do, how we should decide a constitutional question if the Supreme Court has never addressed it. Yet a lawyer must ask himself precisely that question if he wants the court to take seriously his argument under the state constitution.

Some state constitutions have recently added new guarantees that do not repeat clauses in the Federal Constitution. One is an express guarantee of a right of "privacy." State courts and counsel cannot escape facing the issue of what that term means. In Alaska, it includes a constitutional right to smoke marijuana in your home.⁵⁴ Another provision peculiar to state constitutions is the equal rights amendment now adopted in Maryland⁵⁵ and many other states. I note that your highest court has carefully compared the Maryland text with somewhat different versions elsewhere and has concluded that the amendment is not subject to the kind of analysis which the Supreme Court uses under the equal protection clause.⁵⁶

53. 373 U.S. 83 (1963).

54. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

55. MD. CONST., DECL. OF RIGHTS art. 46.

56. *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980) (decided subsequent to this speech); *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977). See *Comment, The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342, 351-52 (1980).

The same is true when the state's provision is textually the same as one in the Federal Constitution. In such a case, as the Hawaii Supreme Court has said, an "opinion of the United States Supreme Court . . . is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by the Hawaii Constitution."⁵⁷ Remember, the state clause was usually first, at least when traced to the state where it originated. But to make an independent argument under the state clause takes homework — in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result. Counsel would do well to begin his memoranda and briefs with a fresh, well-considered argument to the court why he should win under the state constitution and relegate all the old, familiar shorthand about first, fourth, fifth, or sixth amendment rights, "automobile exceptions," "Miranda warnings," "clear and present danger," and the rest of the federal phraseology to a short final section. Once these federal claims are properly invoked with supporting citations, the court will have to deal with them in any event.

VI. CONCLUSION

Let us conclude by considering whether independent attention to the states' bills of rights is a good thing. As I have said, logically it is not a matter of lawyer's tactics or judicial strategy. If the state in fact has a law protecting some claimed right, the law should be followed, and if it applies to the case, there is no federal question.

On first impression, the idea of constitutional rights that are not pronounced by the United States Supreme Court, rights that are not common to all Americans but differ from state to state, may strike people as vaguely disquieting. This is partly the consequence of the nationalization of news coverage, which centers national attention on Washington, D.C., and which reduces and homogenizes the public's view of law to whatever end results come out of the Supreme Court, without regard to the Court's legal premises.

As lawyers we know very well that individual rights differ from state to state. That is what a federal system means. But even lawyers have difficulty in thinking about constitutional law as something apart from Supreme Court opinions. This is because, like the news media, the law schools have nationalized legal education, and constitutional law books deal exclusively with the opinions of the United States Supreme Court. Perhaps, if we could develop more

57. *State v. Kaluna*, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

constitutional law courses that are built around the issues and the choices which exist throughout our fifty-one constitutions and that would treat the opinions of judges as historic but not infallible struggles with those issues and choices, then more new lawyers could live up to Judge Levine's admonition to the new lawyers admitted to the Maryland Bar to give their attention to the Maryland Constitution.⁵⁸ Moreover, if state constitutions are again taken seriously by the courts and the lawyers who appear before them, they will eventually be taken seriously again by state legislatures, administrative agencies, city councils, school boards, and by the attorneys general, city solicitors, and private counsel who advise them, even outside litigation as such.

There is, of course, a contrary view. Diversity between state and federal constitutional rights complicates the work of lawyers and courts, particularly below the state supreme court. The law is complicated enough. There is little to be gained in return for the trouble. The game is not worth the candle.

The experience on our Oregon court is that state law, including the state constitution, generally gets independent attention, with one exception. The exception comes when guarantees against police conduct have to be enforced by the exclusion of evidence.⁵⁹ I do not include all the rights relating to criminal procedure. The court has sometimes given independent importance to the guarantee against double jeopardy.⁶⁰ We have held that the Oregon Constitution guarantees trial by jury in all criminal cases, not excluding so-called petty offenses.⁶¹ In Maryland, as Judge Levine observed, juries must be unanimous,⁶² though the Supreme Court has allowed 10-2 verdicts in Oregon as far as federal due process is concerned.⁶³ Oregon required indictment by grand jury long after many states allowed prosecution on an information. But when it comes to the fourth amendment and to police questioning of suspects, the majority of the court pretty much lets the United States Supreme Court tell us what

58. Address by Judge Levine to newly admitted members of the Maryland Bar (December 1977).

59. Oregon adopted the exclusionary rule long before *Mapp v. Ohio*, 367 U.S. 643 (1961). See *State v. McDaniel*, 115 Or. 187, 231 P. 965, *aff'd on rehearing*, 237 P. 373 (1925); *State v. Laundry*, 103 Or. 443, 204 P. 958, *rehearing denied*, 206 P. 290 (1922).

60. See, e.g., *State v. Brown*, 262 Or. 442, 497 P.2d 1191 (1972).

61. *Brown v. Multnomah County Dist. Ct.*, 280 Or. 95, 570 P.2d 52 (1977).

62. *State v. McKay*, 280 Md. 558, 375 A.2d 228 (1977).

63. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

our state constitution does or does not mean.⁶⁴ Some justices are reluctant to state an independent position on searches or confessions because it might go further to suppress evidence than the Supreme Court requires.

That course has logical difficulties. If we construe the search and seizure clause of our state constitutions to follow the latest Supreme Court holding under the fourth amendment, for instance with respect to search of an automobile trunk, what is the state's law when the Supreme Court changes direction in the next automobile search case? What should a lower court do: follow the last previous decision under the state constitution or a later, more permissive one by the United States Supreme Court?

On the other hand, we have suppressed evidence when a police search violated a state statute,⁶⁵ just as one of Judge Levine's opinions suppressed a statement obtained when a suspect was not taken before a magistrate.⁶⁶

In short, our practice, like that of many state courts, has been inconsistent. Perhaps the question whether a state court should decide cases under its own bill of rights will rarely change a result. Nevertheless, I think, as Judge Levine did, that the revival of state court concern with state bills of rights is important.

First, decisions applying the state's own bill of rights can make people aware of their responsibility for the law of their state. State statutes and constitutions are easily amended. Sometimes they are

64. See *State v. Greene*, 285 Or. 337, 591 P.2d 1362 (1979); *State v. Flores*, 280 Or. 273, 570 P.2d 965 (1977); *State v. Florance*, 270 Or. 169, 527 P.2d 1202 (1974).

Since this speech was delivered, however, the Oregon Supreme Court has repeatedly relied on independent state grounds to enforce procedural as well as substantive rights of suspects or defendants in criminal cases, including the suppression of prosecution evidence. See *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980) (statute prohibiting possession of a "billy" held contrary to constitutional right of "the people . . . to bear arms for the defense of themselves, . . ."); *State v. Scharf*, 288 Or. 451, 605 P.2d 690 (1980) (breath test evidence of intoxication inadmissible after denial of counsel); *State v. Mendacino*, 288 Or. 231, 603 P.2d 1376 (1979) (confession to psychiatrist prior to arraignment held tainted by previous inadmissible confessions); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979) (right to counsel when counsel seeks to talk to defendant in custody, unless such right is voluntarily and intelligently waived); *State v. Rathbun*, 287 Or. 421, 600 P.2d 392 (1979) (double jeopardy bars retrial caused by bailiff's improper remarks to jury); *State v. Roper*, 286 Or. 621, 595 P.2d 1247 (1979) (constitutional venue in county where conspiracy was formed); *State v. Sims*, 287 Or. 349, 599 P.2d 461 (1979) (same); *State v. Smyth*, 286 Or. 293, 593 P.2d 1166 (1979) (right to confront foreign witness).

65. *State v. Valdez*, 277 Or. 621, 561 P.2d 1006 (1977).

66. *Johnson v. State*, 282 Md. 314, 384 A.2d 709 (1977). *But see State v. Shipley*, 232 Or. 354, 375 P.2d 237 (1962).

amended to reinstate capital punishment⁶⁷ or to allow discrimination in housing,⁶⁸ as happened in California. Sometimes they are amended to add an equal rights amendment or a right of privacy.⁶⁹ Whatever they may be, they lead all of us to face closer to home some fundamental values that the public has become accustomed to have decided for them by the faraway oracles in the marble temple.

If we had to choose, we might be reluctant to put much of the bill of rights to a referendum. Fortunately, we do not have to choose. The irreducible national standards, as declared from time to time by the United States Supreme Court, bind us in any event. No state can choose to reject them. But neither are the people of any state bound to be satisfied with the minimum standard allowed to all.

The second reason is so old it is hardly remembered: constitutions are rules for government. We have recalled here that the people of Maryland and the other original states first adopted their own declarations of rights and thereafter insisted that these be honored also by the new national power they created over them all. If federal officials doubted what rights they were bound to respect, these were basically the rights declared in one form or another from Massachusetts to Georgia.

In modern times, these axioms have been reversed. It became the assumption, not without cause, that the states would have to learn constitutional law from Washington, D.C. Yet there have been occasions when the older view would have stood us in good stead. I do not recall many constitutional lawyers inquiring, five years ago, whether the chief executive of a state could demand an injunction against newspaper publication of papers prepared in a government department, or whether he could order police burglaries in pursuit of some important state interest, or whether his appointees could assert executive privilege against questions in a court or a legislative committee, all powers that the President claimed to be inherent in the executive office. Yet the obvious answers would have been enlightening about the American law of executive power when a source of enlightenment was badly needed. Similarly, what reason is there for confidence that the national version of the first amendment, or the fourth, or the fifth, will always be the best the nation could want?

67. See, e.g., CAL. CONST. art I, § 27. This section was enacted on November 7, 1972, following the California Supreme Court's decision in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972), which declared the death penalty a violation of California's constitutional protection against cruel or unusual punishment.

68. See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

69. E.g., MD. CONST., DECL. OF RIGHTS art. 46 (equal rights amendment); ALASKA CONST. art. I, § 22 (right to privacy).

Congressmen, Senators, Presidents, go to Washington from state governments. Even some federal judges have been state judges. Might it not be a good idea if they came from a living tradition of respecting the constitutions and the bills of rights of their states and went to Washington expecting the federal government to do as well?

For that perspective, however, we would have to turn our constitutional law right side up and once again put first things first. The lead, I suggest, must come not only from law schools, but also from state courts and from the lawyers who appear before those courts.⁷⁰

70. The thesis argued in these remarks has given rise to an extensive modern literature, including the following: Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Falk, *Foreward: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in Oregon v. Hass*, 82 DICK L. REV. 273 (1978); Graves, *State Constitutional Law: A Twenty-Five Year Summary*, 8 WM. & MARY L. REV. 1 (1966); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Lipson, *Serrano v. Priest*, I and II. *The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F. L. REV. 697 (1976); Mosk, *The Constitution of California in the Era of the Burger Court and States' Rights*, L.A. DAILY J., Dec. 19, 1973, Report Section, at 26-29; Rees, *State Constitutional Law For Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299 (1978); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421, 437-43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L. J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L. J. 729 (1976); Comment, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1 (1975); Comment, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals*, 9 SW. U.L. REV. 1157 (1977); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); Note, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.C.L. L. REV. 271 (1973); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L. J. 481 (1975); Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318 (1968); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977); Note, *Expanding Criminal Procedure Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909 (1976).

Since this speech was delivered, these titles have appeared: Deukmejian & Thompson, *All Sail and No Anchor — Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Symposium, *An Examination of the Wisconsin Constitution*, 62 MARQ. L. REV. 483 *passim* (1979). Much of this literature discusses, however, whether and why state constitutions should have independent attention rather than how this should be done in practice. There is obviously much room for textual, historical, and principled analysis of the several states. See, e.g., Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970). One good starting point for historical sources is SHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971), reviewed in Linde, Book Review, 52 OR. L. REV. 325 (1973).