PROCESS, PERSPECTIVE, AND PRECEPT IN THE NEW FEDERALISM

*The Honorable Howard H. Kestin**

Each of us feels challenged to say something profound, if not also memorable, about the new federalism as it bears upon an understanding of the New Jersey Constitution. So as not to disappoint, I will make a few comments about what we refer to generically as First Amendment freedoms in the context of New Jersey Constitution applications. After so many wonderful, broad themes as we have heard thus far, the topical focus we are about to adopt may be an aid to the digestion.

I do need to begin with a general observation, however. More than a matter of orientation, it entails a confession by way of full disclosure. When I was teaching constitutional law, I always preached that, in constitutional adjudication, on the federal level or the state level, whether federal constitutional rights or state constitutional rights are implicated, process is at least as important as substance. The substantive rule at any given moment is subject to change, or to fact-based distinctions. And, often, it does change in the case at hand. But the processes and the generalized perceptions through which a court adjudicates constitutional issues are more durable. They tend not to change at all. And if they do, the process is slow and evolutionary.

The adjective standards that govern the ways in which a court approaches constitutional questions are, therefore, at least as important for their impact, if not more so, as the substantive rules that govern at any particular moment. So, by the way, are the techniques of presenting such issues for consideration. One cannot hope to succeed in arguing a case with a central constitutional issue if one does not have a thorough knowledge of constitutional history and mature discernment about how and why particular substantive rules have come to be articulated. These, then, are the three sisters of constitutional law, in order of importance—process, perspective, and only then, precept.

I submit that the most important differences that bear upon the new federalism concern the ways in which the respective courts deal with issues such as case or controversy, ripeness and mootness, standing, separation of powers, political questions, and the like. These concepts embody largely discretionary

*Judge, New Jersey Superior Court - Appellate Division.

rules; and, even more generally and importantly, they engage some of the most basic premises from which the court making the adjudication proceeds. It is important to know, aside from whatever differences of substantive rule may exist - or may come to be articulated - between the United States Constitution and the New Jersey Constitution, that the respective supreme courts have rather different approaches to some basic principles governing the decisional process, and rather different premises from which they proceed. The time allotted to me does not permit comprehensive analysis, but I warrant to you that our state concepts of case or controversy (such as it is), standing, separation of powers, and the rest, are quite different from those that govern on the federal level.

The term case or controversy, for example, has no provenance in the New Jersey Constitution. Our Supreme Court has held that the federal case or controversy concept does not apply in New Jersey.[1] The New Jersey Constitution, in Article 6 Section 3 Paragraph 2, speaks of the exercise of judicial power "in all causes." On the other hand, we have at least as strong an aversion to advisory opinions as the federal courts do, a position that springs, at least on a federal level, from the case or controversy concept.

Standing is another area in which there is a real difference. Our state courts adhere to more liberal concepts of standing than govern in the federal courts. This is important to the extent that even federal constitutional claims can be adjudicated in a state court more readily than in federal courts—subject, of course, to being overruled by the United States Supreme Court if standing is seen to bear too closely upon application of the substantive rule, or itself has constitutionally substantive emanations in the circumstances. Of course, to the extent a New Jersey constitutional rule affords more protection than a federal constitutional rule does, access to claim it is also easier to achieve.

Separation of powers is another area in which there are some intriguing differences. I submit that separation of powers concepts in New Jersey jurisprudence are less restrictive than those that pertain on the federal level.

The point is that it is important to know the contours of the field that one is playing on. One cannot purport to be dealing knowledgeably in the new federalism without learning a lot about the ways in which essential adjective principles apply differently in state courts than they do on the federal level.

Well, that is the line that I have been trying to sell for years. Now that I have voiced this *cri de coeur* because of its special relevance to the new federalism, let me turn to some brief comments, within the few moments I have remaining, about First Amendment-type rights.

Although in respect of free exercise of religion the protections of the state

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[1]Salorio v. Glaser, 82 N.J. 482, 490-91, 414 A.2d 943, *cert. denied*, 449 U.S. 874, *appeal dismissed*, 449 U.S. 804 (1980).

and federal constitutions tend to be identical, the New Jersey Supreme Court, in *Right to Choose v. Byrne,*[2] pointed out that the United States Constitution tends to be more pervasive in its protections against establishment of religion,[3] an insight that, as a matter of historical perspective, came as no surprise. Recent evidence can be found in the clear reluctance with which the New Jersey Supreme Court applied the less forgiving federal standard in *Ran-Dav's County Kosher, Inc. v. State.*[4]

In free speech, assembly, and petition matters, federal standards and state standards are generally in harmony, but there are some differences. Expressive exercises on private property which has a public use is one such exception, where greater protection is afforded to the expressive exercise under the New Jersey Constitution than is recognized under the United States Constitution.[5] This, of course, is subject to correction by the United States Supreme Court, an unlikely eventuality in the face of the holding that "a state's constitution may furnish an independent basis that surpasses the guarantees of the federal constitution in protecting individual rights of free expression and assembly."[6] As unlikely as it may now seem, however, the United States Supreme Court may some day hold that, at least in some circumstances, as a matter of United States constitutional law, the private property interest is equivalent to or greater than the expressive right, *i.e.* fundamental. Such a holding would foreshadow a change - a diminution - in the deference accorded state constitutions in matters of this type.

Finally, press rights, too, tend to be controlled by federal standards. But again, there may be some difference in particulars. One example may be found in standards for distinguishing between public persons and private persons in defamation actions.[7] Also, press shield law protections seem to be more ex-

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[2]91 N.J. 287, 450 A.2d 925 (1982).

[3]One possible exception to this generalized perception may be gleaned from a footnote in Marsa v. Wernik, 86 N.J. 232, 239-40 n.2, 430 A.2d 888 (1981), concerning the equal protection emanations of establishment principles.

[4]129 N.J. 141, 608 A.2d 1353 (1992).

[5]*Compare, e.g.*, New Jersey Coalition Against War in the Middle East v. JMB Reality Corp., 138 N.J. 326, 650 A.2d 757 (1994), *with* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

[6]*New Jersey Coalition*, 138 N.J. at 391, 650 A.2d at 789 (Garibaldi, J., dissenting) (citing *PruneYard*, 447 U.S. at 81).

[7]*Compare, e.g.*, Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (1995), *with* Gertz v. Welch, Inc., 418 U.S. 323 (1974).

pansive as a matter of state constitutional law than under the United States Constitution;[8] and issues of public access to governmental processes continue to develop.

By way of synthesis, an old lesson takes on increased importance in the light of the new federalism. It applies equally to issues of substance - such as those we refer to as First Amendment freedoms and those bearing upon criminal procedure - and to matters of process. The moral is: one needs to know one's court as well as one's constitution.

[8]*Compare* the respective lines of cases emanating from *In re* Myron Farber, 78 N.J. 259, 394 A.2d 330, *with* those emerging from Branzburg v. Hayes, 408 U.S. 665 (1972).