THE NEW JERSEY CONSTITUTION: A CHARTER TO BE CHERISHED

*The Honorable Daniel J. O'Hern**

To quote Professor Bob Williams, the convention that met in the summer of 1947 on the Rutgers campus in New Brunswick produced what has been viewed as "among the best of state constitutions."[1] The New Jersey Constitution not only established a strong governor who serve successive terms, but also established that the governor was the only official elected on a statewide basis. Furthermore, the gubernatorial veto was strengthened, and the executive branch was simplified and brought directly under the governor's control. The Bill of Rights was modernized under the new constitution to provide equal rights to women, an anti-discrimination provision, and collective bargaining rights for labor. The judiciary was streamlined, responding finally to a century of attempted reforms, under a chief justice who served as administrative head of all the courts. In addition, the terms of legislators were extended to two and four years, and the budget process was simplified by the requirement of a single, annual appropriations bill. It is a pleasure to speak of such a document.

I recall when I arrived at law school, shortly after the McCarthy era, Professor Powell, who taught at the law school I attended, was asked to take an oath to support the constitution. He said, "Well, it supported me all my life, why not take an oath to support it."

Among the comments made to the 1947 Constitutional Convention in New Jersey, I found most appealing a comment from former Governor Morgan Larson. He said, "I think the constitution should be as short as possible, as clear as possible and . . . have fewer commas and more periods. It might not be as readable and as good from a literary standpoint, but you would understand it better." "Long sentences," he warned, "can sometimes become ambiguous and that is where the trouble has been."

And so it was done for the most part, and I think it was a wonderfully well-

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[1]ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 16 (1990).

written constitution. The monographs that appear in the proceedings of the convention show the excellent work that went into the constitution's preparation. We tend today to think of these framers as giants. Judge Sidney Goldmann, a legend among judges, was one of the drafters of the constitutional articles, along with Nathan Jacobs, later a member of our Court.

I thus have a deep respect for the Constitution of the State of New Jersey. If there is one thing that a symposium like this could achieve, it would be to encourage the public to cherish and treasure the Constitution of the State New Jersey and not seek to amend it in occasional moments of displeasure.

Renewed interest in the importance of state constitutions was engendered by a 1976 address of Justice Brennan to the New Jersey State Bar Association.[2] He identified and traced a new movement in which state courts had begun to interpret their constitutional provisions as providing more protections to their citizens than the present Supreme Court finds in federal constitutional provisions.

I myself have been reluctant to interpret state constitutional guarantees as more protective than identically-worded federal guarantees for two reasons: (1) because of a deeper respect for the Constitution of the United States and the Supreme Court of the United States, and 2) because of a pragmatic concern that the reservoirs of the state constitution may be drained by overconsumption.

In *State vs. Hempele*,[3] a case involving a privacy interest in garbage, I wrote,

> For me, it is not enough to say that because we disagree with the majority opinion of the Supreme Court, we should invoke our State Constitution to achieve a contrary result. It sounds plausible, but one of the unanticipated consequences of that supposed of that supposedly benign doctrine of state-constitutional rights is an inevitable shadowing of the moral authority of the United States Supreme Court. Throughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties.[4]

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[2]William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[3]120 N.J. 182, 576 A.2d 793 (1990).

[4]*Id.* at 226, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part).

In *Hempele*, I further wrote,

> The most distinct aspect of our free society under law is that all acts of government are subject to judicial review. Whether we have agreed with the United States Supreme Court or not, we have cherished most its right to make those judgments. In no other society does the principle of judicial review have the moral authority that it has here. Where else could a court order its nation's head of state to submit to the regular processes of law? Where else could a court order a president during wartime to divest himself of steel mills? Where else could a court order a governor to stand aside despite that governor's own understanding of constitutional doctrine?[5]

Such cases involve tremendous collisions of force, and only the respect that the people have for the United States Supreme Court enables it to make such decisions. "Of course, the Supreme Court has blinked on occasion in its long history. Not many can be proud today of the way Japanese Americans were treated during World War II."[6] But those are few and rather far between. "There are such occasions in our history when only enormous reservoirs of public trust would have enabled the Court to sail against the winds of popular disapproval."[7]

> The great moral disasters of the twentieth century in Germany, Russia, Cambodia, and Argentina all occurred in societies in which there was no genuine rule of law, no appeal of last resort, no guarantee of liberties. Trials, if there were any, were but propaganda tools of the State.
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> Respect for law flows from a belief in its objectivity. To the extent possible, we ought not personalize constitutional doctrine. When we do otherwise, we vindicate the worst fears of critics of judicial activism. The Fourth Amendment is the Fourth Amendment. It ought not to mean one thing in Trenton and another across the Delaware River in Morris-

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[5] *Id.* at 226-27, 576 A.2d at 815 (O'Hern, J., concurring in part and dissenting in part) (citing United States v. Nixon, 418 U.S. 683 (1974); Cooper v. Aaron, 358 U.S. 1 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 373 U.S. 579 (1952)).

[6] *Id.* at 227 (O'Hern, J., concurring in part and dissenting in part) (citing Korematsu v. United States, 323 U.S. 214 (1944)).

[7] *Id.*

ville, Pennsylvania.[8]

Thus, I believe that absent clear language to the contrary in our constitution or a long-standing tradition of greater concern for the right involved, when the issue at stake touches upon the national identity, the New Jersey Supreme Court should yield to the judgment of the United States Supreme Court. Judge Gibbons once wrote that "in enforcing the Federal Constitution . . ., the [Supreme] Court is the voice of the more encompassing national community."[9]

On the other hand, when the Supreme Court moves from side to side in deciding questions of constitutional criminal procedure, a state court should be free to establish rules that it believes will simplify its administration of law. I believe that the New Jersey Supreme Court's decision in *State v. Hartley*[10] is an effort at that type of decision. In that case, the court held that when there is a cessation of a custodial interrogation, police must readminister *Miranda* warnings before interrogation of a suspect resumes.[11]

In addition to the reasons of principle that I expressed, my more pragmatic reason for concern about the invocation of state constitutional doctrine is the ease with which state constitutions may be amended. Almost all of us are creatures of our own experience. And the ease with which the New Jersey Constitution can be amended was brought home to me forcefully when I served as Counsel to Governor Brendan Byrne. If my memory serves me correctly, it was the majority leader of the Assembly who expressed concern over the Governor's exercise of a pocket veto. The pocket veto was a practice under which the Governor, although required by the constitution to sign a bill within a prescribed number of days, would not be presented a bill until he requested it from the legislature. So, when used at the end of a second year of a legislative session, a Governor's delay in requesting a bill could defeat a bill that had passed both houses. Following a 1981 decision in *Gilbert v. Gladden*,[12] an amendment was adopted to restructure this provision by requiring the speedy presentation of bills to the governor.

Although the Governor was opposed to this, the amendment passed. A simple majority resolution in each house for two successive terms will place an

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[8]*Id.*, 576 A.2d at 816.

[9]John J. Gibbons, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260, 275 (1981).

[10]103 N.J. 252, 511 A.2d 80 (1986).

[11]*Id.* at 287, 511 A.2d at 98.

[12]87 N.J. 275, 432 A.2d 1351 (1981).

amendment on the ballot. I do not believe that voters will always grasp the significance of constitutional amendments.

An example recently made by the *Seton Hall Law Review*[13] concerned the proposed constitutional amendment to overturn our Court's decision in *State v. Gerald*.[14] In *Gerald*, the court held that it could not sustain a death sentence for a serious bodily injury murder because it offended the cruel and unusual punishment clause of the New Jersey Constitution.[15] The constitution was amended to hold that a sentence of death for serious bodily injury or murder did not offend the cruel or unusual punishment clause of the New Jersey Constitution.[16] But the debate over the amendment did not at all focus on the state of mind necessary to convict an actor of capital punishment, but on the merits of capital punishment itself. The result was a constitutional amendment that could have been flawed because it would violate the Federal Constitution that requires, at a minimum, deliberate indifference to the death of a victim as the culpable mental state for capital murder. A simple amendment to the statute that achieved the same effect.

The California Constitution has been amended to prohibit the California Supreme Court from interpreting its own constitution to afford any greater protection under the state constitution in matters of criminal procedure than under the United States Constitution as interpreted by the United States Supreme Court. Similar amendments have prohibited the California Court from exceeding federal standards in other areas. In my view such frequent amendments trivialize the importance of a constitution. They tend to blur the difference between a routine legislative action and the drafting of a constitution that is a charter of government.

I do not mean that a constitution should be kept under glass, never to be

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[13]*See* Joseph E. Krakora, *The Death Penalty in New Jersey: A Defense Lawyer's Perspective*, 26 Seton Hall L. Rev. 1573, 1575 (1996).

[14]113 N.J. 40, 549 A.2d 792 (1986).

[15]*Id.* at 69, 549 A.2d at 807.

[16]*See* N.J. CONST. art. I, ¶ 12. The amendment provides:

> It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposefully or knowingly causing serious bodily injury resulting in death who committed the homocidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything or pecuniary value.

Id. The effective date of the amendment was the day it was passed, December 3, 1992.

altered. There are profound changes in a society that will require change of the constitution as, for example, to guarantee the abolition of slavery, to guarantee women the right to vote, or to restructure legislative bodies to meet one-person one-vote requirements. The point is simply this: ours is a wonderful constitution. It is among the best of state constitutions. We should all be guardians of it - teachers, lawyers, prosecutors, public defenders, legislators, judges, and members of the executive branch. Change it only when you must, not when you wish.