

“SUBMITTED TO THE PEOPLE”: THE AUTHORITY OF THE ELECTORATE TO SHAPE STATE CONSTITUTIONAL RIGHTS

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There are a few topics, or a few principles, that you should keep in mind as I launch into my presentation. There has been mention of the ease with which the New Jersey Constitution can be amended compared to the Federal Constitution. Remember that a court in its interpretation can amend that constitution with greater ease. A court can take a case, brief it, and argue it in a matter of months, decide it in a matter of a few more months, and change constitutional boundaries. This is the tension upon which I will focus - not the state versus the federal supreme court, but judicial review versus public amendment of the state constitution.

Professor Williams made mention of a presumption,¹ that is, should there be a presumption that the federal court is correct in its interpretation? Ask the same question when a state court interprets its state constitution—should there be a presumption that the court is correct in deciphering what our state constitutional liberties are all about? I also ask you to consider Professor Hartnett’s references to the rights of the people, and that ultimately we are the guardians of our liberties.²

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The view expressed in these remarks are those of Mr. Moczula and do not necessarily reflect the opinions held by the Attorney General or the Office of Passaic County Prosecutor.

¹See Robert F. Williams, *Two Visions of State Constitutional Rights*, 7 SETON HALL CONST. L.J. 833 (1997).

²Edward A. Hartnett, *Popular Sovereignty, Constitutional Interpretation, and the New Jersey Constitution of 1947: A Reply to Justice O’Hern and Professor Williams*, 7 SETON HALL CONST. L.J. 839 (1997).

In his excellent biography of Charles Dickens, Fred Kaplan relates that in 1849, Dickens, in his late thirties and driven by a strong opposition to public executions, advocated the eventual abolition of the death penalty. Dickens' focus was on the accused. As time passed, however, Dickens' idealism on the subject of capital punishment "had diminished in the face of what seemed incontrovertible evidence of the recalcitrance of the habitual criminal."³ By 1863, when he was in his early fifties, while still of the opinion that public execution was a "savage horror," Dickens had come to view capital punishment "to be necessary in extreme cases, simply because it appears impossible otherwise to rid society of certain members of whom it *must* be rid, or there is no living on this earth."⁴ His focus was now on the victimization of society.

Fast forward to the 20th century. The New Jersey Supreme Court, in validating our capital punishment statute, explains the competing policies implicated: "In defendant's view, to inflict the death penalty for retributive reasons is 'to devalue life' and 'to abandon respect for the individual.' Society, however, apparently regards the *nonimposition* of the death penalty in certain instances as a failure to uphold the value of human life, namely, the life extinguished by the murderer."⁵ The court renews this theme five years later when it defines and implements comparative proportionality review of capital cases:

Opponents believe that we diminish ourselves when the State, representing organized society, takes a life without having established a system of certain predictability. Proponents believe that we diminish our common humanity as well when we do not respect the principle of just retribution for the taking of an innocent murder victim's life. Even the most profound search for an essence of law must confront the reality of human experience.⁶

How do these concepts fit into a symposium celebrating the New Jersey Constitution? They identify society's role in the interpretive process. Society, the people, the public, are necessary actors and players in state constitutional analysis. Our experience with capital punishment has demonstrated that the forum for definition of state constitutional rights has not been and will not be exclusively within the judiciary. The people of this state, by direct vote, are

³FRED KAPLAN, DICKENS: A BIOGRAPHY 477-78 (1990).

⁴*Id.* at 478 (emphasis in original).

⁵*State v. Ramsey*, 106 N.J. 123, 179, 534 A.2d 188, 215 (1987) (emphasis in original).

⁶*State v. Marshall (II)*, 130 N.J. 109, 220, 613 A.2d 1054, 1115 (1992).

equally authorized to institute constitutional change.

Upon commencing its review of death sentences imposed under our present law, the New Jersey Supreme Court quickly signaled its authority and intention to use the state constitution to "provide an additional, and, where appropriate, more expansive source of protections against the arbitrary and nonindividualized imposition of the death penalty."⁷ It was not long before the court acted on its commitment. A year later, in *State v. Gerald*,⁸ the justices struck down as violative of the state constitution that prong of the capital punishment statute that allowed the penalty of death for a defendant convicted of purposely or knowing causing "serious bodily injury resulting in death," as opposed to a person "causing death." And last year, in *State v. Martini*,⁹ the court held that the New Jersey Constitution's requirement of "consistency and reliability" in enforcement of the death penalty required the litigation of a petition for post conviction relief, despite a defendant's desire to end further review of his case and be executed. In the court's view, "[t]he public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants."¹⁰

But just who is, or what is, this interested "public"? I suspect that if we conducted a statewide poll, the vast majority of respondents would feel that John Martini, whose death sentence has already undergone exhaustive judicial review, should be granted his wish to die. When a court speaks in terms of providing our citizens with more expansive protections under the state constitution, of whom is this citizenry comprised? The answer to me is obvious. The state constitution is a living document for all, not just for the judiciary.

We have seen evidence of this theme in the capital context. In 1992, the people of New Jersey, dissatisfied with the court's interpretation of the state constitution in *Gerald*, amended the constitution to specifically provide that it was not cruel and unusual punishment to impose the death sentence on someone who purposely or knowingly inflicted serious bodily injury that resulted in death.¹¹ The vote for this amendment was a staggering 1,835,203 to 664,258.¹² Legislation has recently been introduced to amend the state consti-

⁷*Ramseur*, 106 N.J. at 190, 524 A.2d at 221; see also *State v. Koedatich*, 112 N.J. 225, 251, 548 A.2d 939, 952 (1988).

⁸113 N.J. 40, 69, 549 A.2d 792, 807 (1988).

⁹144 N.J. 603, 614, 677 A.2d 1106, 1112 (1996).

¹⁰*Id.* at 605, 677 A.2d at 1107.

¹¹N.J. CONST. art. I, ¶ 12 (eff. December 3, 1992).

¹²NEW JERSEY LEGISLATIVE MANUAL 929 (1996)

tution to allow a mentally competent capital defendant to waive post conviction relief proceedings, in direct conflict with the Supreme Court's decision in *Martini*.

The problem I perceive is that while court opinions that forge new paths in criminal law on state constitutional grounds are, for the most part, (there are exceptions) hailed as bold or innovative, attempts to amend the constitution are routinely greeted with skepticism and criticized as ill-conceived and misdirected. This criticism is unduly harsh. No branch of government has a premium of insight into the values of our society. The New Jersey Constitution is first and foremost the people's document, and the people of this state have legitimate authority to define the liberties which their constitution grants them.

The judiciary must take great care in carrying out the responsibility of interpreting the New Jersey Constitution for the benefit of New Jersey's citizens. In an oft-quoted passage by Justice Pashman (Judge Pashman at the time that this passage was written), "the greatest danger to people from the exercise of judicial power is that there may be a usurpation by the courts of the people's right to express in law, by overwhelming numbers in their elected legislators, their collective reasoning."¹³

It is not my intent to in any manner diminish the substantial and critical role of our courts in state constitutional interpretation; nor is it my purpose to label any particular court opinion invoking the New Jersey Constitution as either wrong or right. I merely wish to underscore that state constitutional interpretation is not a one-dimensional process. Our Supreme Court has candidly recognized that "[i]n this business of drawing lines, [it] claim[s] no monopoly on constitutional wisdom."¹⁴ The court has also acknowledged having "no monopoly on justice."¹⁵ Rather, the court "share[s] it with many, and not just the Legislature and the Executive."¹⁶ The "many" must necessarily include the very citizens for whom the state constitution was enacted. We must never forget that the state constitution grants to "all persons ... certain natural and unalienable rights, among which are those of enjoying and defending life ... and of pursuing and obtaining safety and happiness."¹⁷

¹³State v. Muhammad, 145 N.J. 23, 42, 678 A.2d 164, 174 (1996) (quoting New Jersey Sports & Exposition Auth. v. McCrane, 119 N.J. Super. 457, 476-477, 292 A.2d 580, 591 (Law Div. 1971), *affd. as modified*, 61 N.J. 1, 292 A.2d 545 (1972)).

¹⁴State v. Hamm, 121 N.J. 109, 129, 577 A.2d 1259, 1269 (1990).

¹⁵Dougherty v. Department of Human Services., 91 N.J. 1, 10, 449 A.2d 1235, 1239 (1982).

¹⁶*Id.*

¹⁷N.J. CONST. art. I, ¶ 1 (emphasis added).

Former United States Supreme Court Chief Justice Warren Burger emphasized the power of the people to react to disparate constitutional interpretations. "With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement."¹⁸ The vitality of a state constitution depends not only upon the state court's power to interpret and expand its provisions, but also on the citizens' authority to enact amendments, and, when appropriate, restrictions in direct response to a court's constitutional interpretation.

The public has spoken on what may be the most significant state constitutional amendment to date: the victims' rights amendment. The amendment requires that victims of crimes be "treated with fairness, compassion, and respect by the criminal justice system."¹⁹ The victims' rights amendment, passed by a vote of 1,222,928 to 223, 248,²⁰ also entitles crime victims to "those rights and remedies as may be provided by the legislature."²¹ In 1995, the legislature invoked this constitutionally enhanced authority to pass a law permitting the introduction of victim impact evidence at the penalty phase of a capital case.²² Legislative efforts were premised upon the principle that "[j]ustice, though due the accused, is due to the accuser also."²³ Last summer, our court upheld the constitutionality of the Victim Impact Statute and recognized the law's strong state constitutional roots. Interestingly enough, the majority opinion stated that the court may very well have come to a contrary opinion in the absence of a state constitutional victim rights amendment.²⁴

Of particular relevance to my remarks is Chief Justice Robert Wilentz's concurring opinion in *Muhammad*, which I believe is the final opinion indi-

¹⁸*Florida v. Casal*, 462 U.S. 637 (1983) (Burger, C.J., concurring in the denial of *certiorari*).

¹⁹N.J. CONST. art. I, § 22 (eff. December 5, 1991).

²⁰NEW JERSEY LEGISLATIVE MANUAL 929 (1996).

²¹N.J. CONST. art. I, § 22 (eff. December 5, 1991).

²²N.J. STAT. ANN. 2C:11-3(c)6.

²³*State v. Muhammad*, 145 N.J. 23, 45-46, 678 A.2d 164, 175 (1996) (quoting *Snyder v. Massachusetts*, 54 S. Ct. 330, 338 (1934)).

²⁴*Muhammad*, 145 N.J. at 44, 678 A.2d at 174-75.

vidually authored by this exemplary leader who will be honored later today. The Chief Justice wrote to express his personal "misgivings on the resolution . . . of the admissibility of victim impact evidence in the sentencing phase of capital trials," premised on his belief that such evidence "has no place in a rationally conducted sentencing proceeding."²⁵ But his opinion also signaled what I interpret as a clear recognition that New Jersey's citizens are the primary developers of state constitutional policy:

I find the conclusion inescapable that New Jersey voters, by approving the amendment to our constitution, intended to allow the Legislature to adopt the victim impact statute.... [A]s far as I am concerned, the spirit and intent of that constitutional amendment was clear: the voters intended to authorize any and all aid or support for victims of crime and their families that was not prohibited by the United States Constitution. Certainly victim impact evidence in the sentencing phase of capital trials fits within that class. I believe it would be clearly inconsistent with sound constitutional interpretation to hold otherwise.²⁶

As we celebrate the 50th anniversary of our constitution, let us remember that it remains a document of the people, to be "submitted to the people."²⁷ The people have the authority to signal their agreement or disagreement with interpretations of state constitutional provisions which are performed on their behalf, as well as to initiate changes even in the absence of the catalyst of a court opinion. This process, with its inherent checks and balances, should be respected, not condemned. As the New Jersey Supreme Court recently reaffirmed: "The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."²⁸

²⁵*Muhammad*, 145 N.J. at 59-60, 678 A.2d at 182-83 (Wilentz, C.J., concurring).

²⁶*Id.*

²⁷N.J. CONST. art. IX, ¶ 1.

²⁸*Muhammad*, 145 N.J. at 45-46, 678 A.2d at 175-76.