

Symposium: The Bill of Rights Yesterday and Today: A Bicentennial Celebration

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Randall T. Shepard

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A BILL OF RIGHTS FOR THE WHOLE NATION

RANDALL T. SHEPARD*

The story of how we came to have a Bill of Rights as a series of amendments to the United States Constitution is a familiar tale to lawyers, judges, and historians, and is one known by many Americans outside these professions. The campaign to ratify the Constitution faced a formidable handicap that was present in the fear which many Americans harbored about the powers of the proposed new national government. To assure these citizens that the new government would not overreach so as to trample on individual liberties, leading Federalists promised that an early duty of the first Congress would be the submission of a Bill of Rights for consideration by the states.

This Bill of Rights was designed, of course, as a restraint on the national government.¹ Efforts to insert provisions in the Bill of Rights limiting the states' authority were specifically rejected by the First Congress in 1791.² It was, after all, the new and stronger national government proposed in the Constitution which gave Americans hesitation. People had little fear that governments close to home in state capitals would deprive them of their freedoms.³

Part of the reason that Americans were little worried about state governments was because most state constitutions written in the post-revolutionary period contained bills of rights. These predated both the national Bill of Rights and the Constitution of 1787.⁴ The earliest bill of rights was the Virginia Declaration of Rights, which was adopted even before the Declaration

* Chief Justice of the Indiana Supreme Court, A.B., Princeton University, 1969; J.D., Yale University, 1972.

1. The words commencing the First Amendment, "*Congress shall make no law,*" suggest that the Bill of Rights was to apply only to Congress. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134-36 (1977) [hereinafter BERGER]. Chief Justice John Marshall made short work of a claim that the Fifth Amendment applied to states in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833): "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and would have expressed that intention." See also *Duncan v. Louisiana*, 391 U.S. 145, 173 (1968) "[E]very member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate against the states." (Harlan, J., dissenting).

2. 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1053 (1971) [hereinafter SCHWARTZ].

3. See LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 32-33 (1958).

4. BERGER, *supra* note 1, at 135.

of Independence.⁵ Experience demonstrated that these documents were effective shields of freedom. State courts built a remarkable record of protecting the liberties of their citizens; from the Indiana Supreme Court's fight against slavery⁶ to Wisconsin's providing counsel to indigent defendants.⁷

As the nation began, Americans erected the national Bill of Rights to protect them from the central government and state constitutions to protect them from local governments. Over the last 200 years, we have migrated to a system in which the national Bill of Rights is more commonly deployed against states than against the federal government. The cause of this migration can be explained best in one word: race. Race was certainly at the heart of the birth of the Fourteenth Amendment, from which springs the modern doctrine of incorporation. The sponsors of the Fourteenth Amendment were largely motivated by a desire to protect the Civil Rights Act of 1866.⁸ They sought to "embody" the Act in the Constitution so as to remove any doubt about its constitutionality and to place the Act beyond the power of a later Congress to repeal.⁹ The Framers of the Fourteenth Amendment, however, did not regard the Amendment as making any particularly dramatic shift in authority between the national and state governments, except to the extent that the power of the national government would be available to assure that the southern states recognized and protected the basic rights of former slaves.¹⁰

Clearly, the Fourteenth Amendment was not intended to expand the basic authority of Congress. The leading architect of what became Section 1¹¹ of the Fourteenth Amendment was Representative John A. Bingham, an Ohio Republican, whose original proposal plainly expanded the authority of Congress. It read:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all

5. 1 SCHWARTZ, *supra* note 2, at 234.

6. *State v. Laselle*, 1 Blackf. 60 (Ind. 1820).

7. *Carpenter v. Dane*, 9 Wis. 249 (1859).

8. 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982 (1988)).

9. BERGER, *supra* note 1, at 23.

10. The Amendment was intended to protect newly freed slaves' rights to personal security and their freedom to move about and own property, but no more. BERGER, *supra* note 1, at 36. For a contrary view, see MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 118-20 (1986) (arguing that the framers of the Fourteenth Amendment actually intended for it to make the Bill of Rights applicable against the states).

11. Sections 2, 3, and 4 of the Amendment were closely related to readmission of the former Confederate States and their representation in Congress. Section 2 restructured representation in the House. Section 3 prohibited participation in government by former officeholders under the Constitution of the United States, who later engaged in the rebellion. Section 4 repudiated the confederate debt.

privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.¹²

Opponents of the Fourteenth Amendment criticized Bingham's proposal precisely because it granted too much power to Congress, arguing that this sweeping grant of power to the national legislature was a serious invasion of state sovereignty and an alteration of the basic fabric of the federal system.¹³ They also criticized the Amendment on the grounds that it gave Congress the right to define the liberties of the citizens according to Congress' will.¹⁴ These complaints led to a compromise on Section I of the Fourteenth Amendment, the final version of which makes a general declaration of constitutional principle ("No State shall make or enforce any law which . . . ") and adds to congressional authority the power "to enforce by appropriate legislation, the provisions of this article."¹⁵

The democratic accommodation reflected in this restrained language remained intact during the first several decades after the Fourteenth Amendment was adopted. The courts of the land honored the accommodation by deploying the Fourteenth Amendment to protect the basic freedoms afforded in the Civil Rights Act¹⁶ and declining to use the Amendment for more sweeping purposes.¹⁷ For most of the first fifty or seventy-five years, courts were loathe

12. CONG. GLOBE, 39th Cong., 1st Sess. 1083 (1866).

13. *Id.* at 1065.

14. *Id.* at 1090-91.

15. U.S. CONST. amend. XIV, §§ 1, 5.

16. See e.g., *Ex parte Virginia*, 100 U.S. 339 (1880) (denying habeas corpus petition by state court judge under federal indictment for excluding blacks from jury lists; under the Fourteenth Amendment, the judge was correctly held to answer); *Virginia v. Rives (Ex parte Virginia)*, 100 U.S. 313, 322-23 (1880) ("It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discharging defendant who violated facially benign California statute which in practice discriminated against Chinese laundries). "[W]hatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners . . . by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 374.

17. In the familiar *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court declared that the Fourteenth Amendment did not amplify the rights, privileges, or immunities of the citizens of the several states. As late as 1884, the Court declared that "due process of law" in the Fourteenth Amendment referred to the "law of the land in each state, which derives its authority from the inherent and reserved powers of the State . . ." *Hurtado v. California*, 110 U.S. 516,

to regard the Fourteenth Amendment as a basis for expanded judicial authority. Around the turn of this century, judges began to assert that the Fourteenth Amendment gave them the power to enter orders against state and local governments for violations of the federal Bill of Rights.¹⁸ It was not until 1925, for example, that the U.S. Supreme Court held that the First Amendment limited a state's regulation of free speech and free press.¹⁹ Free speech issues, however, did not lead judges in this century to use the Fourteenth Amendment in ways that were neither intended nor foreseen by the Americans who adopted it in the nineteenth century. The reason for this expanded use is the same reason the Amendment was enacted in the first place: race. The civil rights movement of the 1950s and 1960s brought case after case to the Supreme Court, seeking redress for grievances suffered by blacks at the hands of segregation-minded whites. Many of these grievances arose in criminal cases where the prosecutor, the victim, the judges, and the jury were all white and the defendant was black. Even the highest state courts in the south were unwilling to take cognizance of the potential for injustice inherent in such situations.

The Supreme Court was rightly suspicious of the treatment blacks received in the courts of the deep south. Some of those courts played a particularly prominent role in civil rights litigation. Indeed, one might argue that the Fifth and Sixth Amendments became incorporated because of the old Supreme Court of Alabama. Think of how many cases from that era have the word Alabama in the caption: *Boykin v. Alabama*, *Powell v. Alabama*,²⁰ to name just two, come to mind. Faced with an apparent unwillingness to protect the rights of blacks, the Supreme Court expanded the incorporation doctrine at a breakneck pace between the arrival of Justice Fortas and the arrival of Chief Justice Burger. In retrospect, it seems impossible that the Court might have declined to act on grounds of doctrine to extend to all citizens the most basic treatment

535 (1884).

18. *Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (Fourteenth Amendment due process applied to state court proceeding on taking of land).

19. *Gitlow v. New York*, 268 U.S. 652 (1925) (First Amendment freedom of speech and press are among the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment).

20. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Powell v. Alabama*, 287 U.S. 47 (1932). Indeed, as authors G. Alan Tarr and Mary Cornelia Aldis Porter wrote in *STATE SUPREME COURTS IN STATE AND NATION* 89 (1988), the Supreme Court of Alabama in the days of the segregated South may have "provided a particularly singular catalyst for the fashioning of federal constitutional principles." (citing *Powell*, 287 U.S. 47 (right to assistance of counsel in preparing for trial)); see also *Boykin*, 395 U.S. 238 (standards for determining voluntariness of guilty plea); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel laws restricted by First Amendment); *NAACP v. Alabama*, 377 U.S. 288 (1964) (right of association); *Norris v. Alabama*, 294 U.S. 587 (1935) (right to an unbiased jury).

available to the majority of citizens in most states.²¹

If the cause of the Fourteenth Amendment's enactment in 1866 was race and the cause of its transformation in the 1960s was race, its continued use as positive law for purposes which have nothing to do with race can rightly be challenged as illegitimate. Moving well beyond this objective of fighting racism, the federal judiciary in particular has used the Fourteenth Amendment and its original corollary, the Civil Rights Act, to put center on the docket a wide variety of claims which have nothing to do with race, or life or death -- matters such as who shall be the valedictorian of the senior class of Newton County (Georgia) High School.²²

When courts use the incorporation doctrine and Section 1983 to run libraries,²³ regulate the use of state courtrooms for commercial purposes,²⁴ bar political parties from nominating candidates,²⁵ and even impose taxes,²⁶ they detract from another right that Americans possess: the right to self-government through public officers who make decisions and take responsibility for them, rather than through officers who know the courts will actually decide what they may do or must do.²⁷ More than eighty years ago, while he was President of Princeton University, Woodrow Wilson warned of the consequences of government by judicial edict:

Moral and social questions originally left to the several States can be drawn into the field of federal authority only at the expense of the self-dependence and efficiency of the several communities of which our complex body politic is made up. You cannot atrophy the parts

21. The need for continued supervision of state governments under the incorporation doctrine appears to have greatly diminished. The diversification of the bench in the South, for instance, a movement bound to be accelerated as the result of Voting Rights Act litigation, suggests that minorities in the South can fend for themselves. See *Clark v. Roemer*, 111 S. Ct. 2096 (1991). See also TARR and PORTER, *supra* note 20, at 264 n.48. By 1984, blacks were serving on the supreme courts in Alabama, Arkansas, Florida, and North Carolina. *Id.*

22. *U.S. Judge Picks Valedictorians, Ruling Calls for Black, White Seniors to Share Top Honors*, CHI. TRIB., June 7, 1991 § 1, at 3. Even Anthony Lewis has noticed this increased level of intervention. *Why Judges Act*, N.Y. TIMES, May 13, 1991, at A15 ("A striking development in our political system over recent decades has been the increasing involvement of federal judges in state and local problems.")

23. *Kreimer v. Bureau of Police for Town of Morristown*, 765 F. Supp. 181 (D.N.J. 1991).

24. *Amato v. Wilentz*, 753 F. Supp. 543 (D.N.J. 1990).

25. *Trinsey v. Pennsylvania*, 766 F. Supp. 1338 (E.D. Pa. 1991), *rev'd*, 941 F.2d 224 (3d Cir. 1991).

26. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

27. When the Supreme Court was acting to thwart the will of the New Deal, Felix Frankfurter warned that such court decisions cause a "general weakening of the sense of legislative responsibility." See Pusey, *infra* note 34, at 313.

without atrophying the whole. Deliberate adding to the powers of the federal government by sheer judicial authority . . . both saps the legal morality upon which a sound constitutional system must rest, and deprives the federal structure as a whole of that vitality which has given the Supreme Court its increase of power. It is the alchemy of decay.²⁸

Judges who undertake these activities necessarily tend to declare that they do so only as vindicators of individual rights. What courts mostly do day by day is coerce individuals to the will of the majority. Thus, judges who formulate their duty in this way convert many public policy debates into the language of competing rights and thus make these debates look like something ripe for judicial decree rather than for resolution by democratic processes. A judge who regularly protests that "the constitution made me do it," ought to look in the mirror and ask whether he really means, "I think things will be better if I do it." When the authors of the Constitution decided to guarantee to each state a republican form of government, they did not have in mind government by judges.²⁹

Whatever one might think about the value of far-reaching applications of the Bill of Rights to the states, I submit that one side effect has been a diminution of the judiciary's role as enforcers of the Bill of Rights against overreaching by the federal government. Justice O'Connor asserted in *South Dakota v. Dole*³⁰ that "the immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers."³¹ I am afraid that she was wrong. The doctrine of enumerated powers, central to the Federalists' argument that the national government would not trample individual rights,³² died no later than 1942. That was the year the Supreme Court decided *Wickard v. Filburn*.³³

28. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 195, 196 (1908).

29. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

30. 483 U.S. 203, 218 (1987) (O'Connor, J., dissenting). South Dakota had two decent arguments for its right to regulate the age at which its citizens could drink alcohol. One argument was that from the time of the first federal road program in 1905 until 1984, no one had imagined that regulating the drinking age was "necessary and proper" to Congress carrying out its authority to build roads under Article I, Section 8, Clause 7 of the Constitution. The other argument was that the 21st Amendment repealing prohibition seemed to grant authority to regulate to states: "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

31. *South Dakota v. Dole*, 483 U.S. at 218 (O'Connor, J., dissenting).

32. THE FEDERALIST No. 45, at 258 (James Madison) (Erastus Howard Scott ed., 1894).

33. 317 U.S. 111 (1942).

The Department of Agriculture cited farmer Roscoe Filburn of Ohio for growing more wheat than regulations allowed. Filburn was using the extra wheat to make bread for his family. The new and improved post-Court-packing Supreme Court³⁴ said the Congress and the Department had the authority to do this. After all, the Court said that if Filburn was not making bread, he would be buying bread and some of the wheat for that bread might have come from outside Ohio. The wheat Filburn grew thus impacted the interstate market and the Congress was authorized to regulate interstate commerce. Decisions like *Wickard v. Filburn* were highly popular with those who had expressed dissatisfaction with the earlier willingness of the Court to exercise the Court's authority by limiting the authority of Congress.³⁵

In modern times, asserters of government power use a simpler idea to uphold the government's ability to regulate, the spending power. This is essentially the theory of the Civil Rights Restoration Act of 1988,³⁶ designed to overrule *Grove City College v. Bell*³⁷ by authorizing the Department of Education to regulate all of a college's program if any portion of its program receives federal assistance. It should be noted that this is a door that swings both left and right.³⁸ *Rust v. Sullivan*³⁹ is decried by many as a violation of the right of doctors to advise patients however they believe best. Rust had about as much luck with this contention as farmer Filburn did.

34. Common wisdom has it that after surveying FDR's 1937 effort to pack the Court, Chief Justice Charles Evans Hughes and Justice Owen J. Roberts began voting to sustain the New Deal, an about-face sometimes called the "switch in time that saved the nine." Hughes, at least, denied that he had felt pressured, saying "there was not the slightest change in my viewpoint as a result of the President's action as to the Supreme Court." Merlo J. Pusey, Letter to the Editors, 62 *YALE L.J.* 313 (1953).

35. Before joining the Court, Justice Felix Frankfurter wrote in 1930: "Since 1920 the Court has invalidated more legislation than in fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected in decisions nullifying minimum wage laws for women in industry, a standard-weight bread law to protect buyers from short weights and honest bakers from unfair competition, a law fixing the resale price of theatre tickets by ticket scalpers in New York, laws controlling exploitation of the unemployed by employment agencies and many tax laws. . . . Merely as a matter of arithmetic this is an impressive mortality rate. But a numerical tally of the cases does not tell the tale. In the first place, all laws are not of the same importance. Secondly, a single decision may decide the fate of a great body of legislation. . . . Moreover, the discouragement of legislative efforts through a particular adverse decision and the general weakening of the sense of legislative responsibility are destructive influences not measurable by statistics." Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 *CURRENT HIST.* 235, 239 (1930).

36. Pub. L. No. 100-259, 102 Stat. 28 (codified at 42 U.S.C. § 2000-4A (1988)).

37. 465 U.S. 555 (1984).

38. My constitutional law professor at Yale, Charles Black, was among the first sons of the New Deal to recognize this potential. Reflecting on the decline of analysis and the rise in result-oriented decisions in the Warren Court, Black wondered, "What if all this is turned on us?" Address, *The Judicial Power as Guardian of Liberties*, Wayne State University (Oct. 16, 1976).

39. 111 S. Ct. 1759 (1991).

As a social compact, the Constitution was a promise of a national government that would be unlikely ever to transgress individual rights because those duties granted to it were so narrow and limited that carrying them out was unlikely ever to result in transgression. James Madison could not foresee, however, a government whose budget covers 1200 pages and describes a government that undertakes to regulate the most minute areas of our lives — what's in the breakfast cereal,⁴⁰ how wide are the streets,⁴¹ how toys are designed,⁴² and what school children eat at lunch.⁴³ Certainly, the point at which Americans debate the right to privacy suggests a remarkable modern view of government power. Think of the case names that provoke this debate: *Griswold v. Connecticut*,⁴⁴ *Roe v. Wade*,⁴⁵ *Bowers v. Hardwick*.⁴⁶ These cases involve government regulation of human procreation and sexuality. This has become the zone at which we dispute whether there is any area of human activity which government cannot invade. Accepting that as a legitimate dividing point for the debate over privacy, however, concedes to government the power to invade any but the most intimate human functions. One might expect in a free society that the line might be drawn more favorably to individual liberty.

The courts have given Congress real reason to think its powers are the same as the British Parliament. The number of statutes found by courts to be beyond the authority of the Congress in the post-New Deal period are precious few indeed.⁴⁷ Is this truth justified in some objective sense because the

40. Sections 201, 401, 409, 403, 701 and 706 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 321, 341, 343, 348, 371 and 376 (1991) authorize the requirements for specific standardized cereal flours and related products found at 21 C.F.R. § 137 (1991).

41. 23 U.S.C. § 109 (1988) authorized the Secretary of Transportation to issue design standards for highways found at 23 C.F.R. § 625 (1991).

42. The Consumer Product Safety Commission issues regulations for a seemingly infinite amount of goods, including electrically operated children's toys. 16 C.F.R. § 1505 (1991).

43. Regulations implementing the National School Lunch Act, 42 U.S.C. § 1751 (1988), are found at 7 C.F.R. § 210 (1986).

44. 381 U.S. 479 (1965) (criminal statute proscribing use of contraceptives held invalid as unconstitutional invasion of marital privacy).

45. 410 U.S. 113 (1973) (right to privacy encompasses a woman's decision whether to have an abortion).

46. 478 U.S. 186 (1986) (due process clause of Fourteenth Amendment does not confer right to homosexuals to engage in acts of consensual sodomy).

47. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating provisions of the Balanced Budget and Emergency Control Act of 1985 (popularly known as the Gramm-Rudman-Hollings Act) for violating separation of powers doctrine); *INS v. Chadha*, 462 U.S. 919 (1983) (One-house congressional veto provision in Immigration and Nationality Act held unconstitutional). However, what Congress cannot directly regulate under its enumerated powers it can nonetheless coerce through its spending power. The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1 (1936), where the Supreme Court resolved a long-standing debate over the scope of the Spending Clause and determined that "the power of Congress to authorize expenditure of public

members of Congress are less prone to overreach? Is it because the founding fathers really intended courts to be rights police for governments close to home and not for the national government? Obviously the answer is no on both counts.

As the federal courts have departed from the task of enforcing the Bill of Rights against the federal government, state courts in the last decade have moved strongly to retake the role expected of them at the time of the adoption of the national Bill of Rights: using state constitutions and state bills of rights to protect Americans from government overreaching.⁴⁸ This renaissance in state constitutional rights litigation was called for some twenty years ago in the *Valparaiso University Law Review*.⁴⁹ Justice Brennan gave substantial impetus to the movement when he issued an open invitation to state supreme courts to use their own courts "to impose higher standards governing police practices under state law than is required by the Federal Constitution."⁵⁰ State courts had become accustomed in the era of rampant incorporation to resolving almost every case involving individual rights by resorting to federal authority. Among the important parts of this new effort has been to persuade lawyers to present state court claims without a "litany of federal buzz words."⁵¹ Enormous progress is being made on this front. The level of state constitutional litigation is growing dramatically, and the jurisprudence of state constitutional law is becoming ever more sophisticated.

Thus, I suggest that during the third American century, the Bill of Rights will continue to have some utility for American states. More important, however, will be the bills of rights which American states enacted in the eighteenth century. More important still to the rights of Americans will be the enforcement of the Federal Bill of Rights against the government it was intended to protect us against, the Federal Government.

moneys for public purposes is not limited by direct grants of legislative power found in the Constitution." *Id.* at 66. Thus, Chief Justice Rehnquist wrote in *South Dakota v. Dole*, "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." 483 U.S. 203, 207 (1987). Therefore, it is no surprise that "[t]he Court has rejected every federalism-based challenge to conditions on federal subsidies since the New Deal." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1417 (1989).

48. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989). State courts are not the only branches of state government building a record of innovation and renewal. Neal Peirce, *State Leadership for the Nation*, 64 ST. GOV'T 27 (1991).

49. Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969).

50. *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

51. *State v. Jewett*, 500 A.2d 233, 235 (1985).

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