

ENHANCED STATE CONSTITUTIONAL RIGHTS: INTERPRETING TWO OR MORE PROVISIONS TOGETHER

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There are many unique interpretation issues and techniques in state constitutional law that do not, or only rarely, arise under the different history and text of the United States Constitution.¹ One such technique that has not been explored in the literature is applying two or more state constitutional provisions together as “enhancing” each other.² There are some important examples of this approach by state supreme courts. In this short Essay I propose to make a preliminary analysis of these cases.

When the New Jersey legislature reenacted a capital punishment statute in 1982,³ my Rutgers Law School colleague, Marc Feldman, and I decided to write an amicus brief presenting an exclusively *state* constitutional argument as to why the death penalty was unconstitutional in New Jersey.⁴ When the United States Supreme Court upheld state capital punishment statutes that had been reworked after its earlier declaration that they were unconstitutional,⁵ the Court concluded that even if the death penalty was not a deterrent to murder, it could be upheld if states considered it “retribution.”⁶ Therefore, we spent a lot of time creating an argument that, even though New Jersey’s cruel and unusual punishment clause read the same as the Federal Constitution’s clause,⁷ there must be a reason why using the death penalty in New Jersey could not be justified by retribution.⁸ The new law’s sponsor had admitted that

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1. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 313–56 (2009). But Professor Jim Gardner reminded me of Justice Douglas’s “penumbras” and “emanations” from the various federal Bill of Rights provisions in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

2. Professor Gardner also suggested, correctly, that this is a variant of interpreting statutes *in pari materia*.

3. Aaron Scherzer, *The Abolition of the Death Penalty in New Jersey and Its Impact on Our Nation’s “Evolving Standards of Decency,”* 15 MICH. J. RACE & L. 223, 225 (2009).

4. Brief & Appendix on Behalf of Amici Curiae at 1, 6–10, *State v. Ramseur*, 524 A.2d 188 (N.J. 1987) (No. 21,579).

5. *Gregg v. Georgia*, 428 U.S. 153, 155 (1976).

6. *Id.* at 183 (motive of retribution “may be unappealing to many . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men”).

7. N.J. CONST. art. I, § 12; ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 76–77 (2d ed. 2012).

8. Brief & Appendix on Behalf of Amici Curiae, *supra* note 4, at 9–10.

it did not serve as a deterrent.⁹ We had to argue that even if the death penalty was constitutional under the Federal Constitution, and if it was only for retribution, it would not be valid under New Jersey's constitution.¹⁰ Finally, we developed the argument that our constitution's cruel and unusual punishment clause (Article I, Section 12) should be modified or enhanced by *reading it together* with Article I, Section 1 (both adopted in 1844).¹¹ This latter clause, interestingly, had been the basis for the New Jersey Supreme Court's landmark decision in *In re Quinlan*.¹² In that 1976 decision, the court held that the state could not force a person in a "debilitated and allegedly moribund" state to remain alive without a compelling state interest¹³:

We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life. We perceive no thread of logic distinguishing between such a choice on Karen's part and a similar choice which, under the evidence in this case, could be made by a competent patient terminally ill, riddled by cancer and suffering great pain; such a patient would not be resuscitated or put on a respirator in the example described by Dr. Korein, and a *fortiori* would not be kept *against his will* on a respirator.¹⁴

We reasoned that under the cruel and unusual punishment clause, enhanced by the *Quinlan* interpretation of Article I, Section 1 requiring a compelling state interest to *keep someone alive*, should not a compelling state interest be required to *put someone to death*?¹⁵ We fleshed out this argument in our amicus brief for the NAACP Legal Defense and Education Fund and ACLU of New Jersey before the New Jersey Supreme Court.¹⁶ We were granted oral argument before the court, and my

9. Edward Devine, Marc Feldman, Lisa Giles-Klein, Cheryl A. Ingram & Robert F. Williams, *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 386 n.51, 392 n.86 (1984).

10. Brief & Appendix on Behalf of Amici Curiae, *supra* note 4, at 9–10.

11. N.J. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."); WILLIAMS, *supra* note 7, at 56, 76; Brief & Appendix on Behalf of Amici Curiae, *supra* note 4, at 28–33, 50–51.

12. 355 A.2d 647 (N.J. 1976).

13. *Id.* at 651.

14. *Id.* at 663.

15. See Brief & Appendix on Behalf of Amici Curiae, *supra* note 4, at 51–52.

16. See *id.* at 51–59.

colleague argued this interpretive point strenuously.¹⁷ We also had been working with students on a faculty/student special project in our law journal, and we published our analysis.¹⁸ We wrote,

This assertion is based upon two mutually supportive and interlocking state constitutional provisions: Article I, paragraph 12, with its prohibition against cruel and unusual punishment, and Article I, paragraph 1, with its conceptions of due process and personal dignity and autonomy.¹⁹

Regrettably, despite some real discussion at oral argument, the court rejected our position.²⁰

After that, I did not think carefully about this technique of argument for quite some time. I did take notice, however, in 1996 when the Connecticut Supreme Court used the technique in its well-known decision concerning segregation in the Hartford schools. In *Sheff v. O'Neil*²¹ the court read its state constitutional equality guarantee in light of its right-to-education clause. Chief Justice Ellen Peters wrote,

For the purposes of the present litigation, we decide only that the scope of the constitutional obligation expressly imposed on the state by article eighth, § 1, is informed by the constitutional prohibition against segregation contained in article first, § 20. Reading these constitutional provisions *conjointly*, we conclude that the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity and requires the state to take further remedial measures.

Two factors persuade us that it is appropriate to undertake a *conjoint* reading of these provisions of our state constitution. One is the special nature of the affirmative constitutional right embodied in article eighth, § 1. The other is the explicit prohibition of segregation contained in article first, § 20.²²

The *Sheff* decision reminded me of our earlier New Jersey argument, and as I read decisions from around the country over the next years, I began to watch more carefully for the use of this technique of interpretation, which reads two or more provisions as enhancing each

17. *Id.* at 51–59.

18. *See* Devine, Feldman, Giles-Klein, Ingram & Williams, *supra* note 9, at 376, 393.

19. *Id.* at 376.

20. *State v. Ramseur*, 524 A.2d 188, 213 & n.12 (N.J. 1987).

21. 678 A.2d 1267 (Conn. 1996).

22. *Id.* at 1281 (emphasis added).

other. Then I noticed that, like Connecticut, the West Virginia court in 1979 had used this technique.²³ It elaborated in 2006:

We conceive that both our equal protection and thorough and efficient constitutional principles can be applied *harmoniously* to the State school financing system. Certainly, the mandatory requirement of “a thorough and efficient system of free schools,” found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State.

Because education is a fundamental constitutional right in this State, then, under our equal protection guarantees any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.²⁴

We also held in *Pauley* that “[b]ecause education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State’s educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.”²⁵

The California Supreme Court had used a similar technique in its 1976 landmark school finance case, viewing three education clauses as enhancing the equality provisions to conclude that education was a fundamental right.²⁶ New Jersey, by contrast, decided not to rely on its equality doctrine, choosing instead to rely on its education clause (“Thorough and Efficient education”).²⁷

The Montana Supreme Court regularly interprets its search and seizure clause as enhanced by its textual privacy guarantee.²⁸ In another context that would have helped in our New Jersey death penalty case, Montana interprets its cruel and unusual punishment clause as enhanced by its provision guaranteeing human dignity.²⁹

23. See *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

24. *Id.* (emphasis added).

25. *Bd. of Educ. of Kanawha v. W. Va. Bd. of Educ.*, 639 S.E.2d 893, 899 (W. Va. 2006) (quoting *Pauley*, 255 S.E.2d at 861).

26. *Serrano v. Priest*, 557 P.2d 929, 949–50, n.42 (Cal. 1976). I am indebted to David Carillo for pointing this out to me.

27. *Robinson v. Cahill*, 303 A.2d 273, 294 (N.J. 1973).

28. *State v. \$129,970*, 161 P.3d 816, 821 (Mont. 2007) (“The right to privacy in Article II, Section 10 of the Montana Constitution *augments* the protection against unreasonable searches and seizures.”) (emphasis added).

29. See *Quigg v. Slaughter*, 154 P.3d 1217, 1223 (Mont. 2007).

In 1997 the Montana Supreme Court noted (in the context of thermal imaging) that, although it often followed *federal* constitutional search and seizure doctrine, its state constitutional provision, which “mirrors” the Fourth Amendment, was “supplemented” in 1972 when the voters ratified an explicit privacy provision.³⁰ “Thus, Montana’s Constitution affords citizens *broader protection* at the hands of the government in search and seizure cases than does the Federal Constitution.”³¹ The court referred to the debates in the 1972 Constitutional Convention indicating that the new textual privacy clause was a response to the newly developing electronic surveillance at that time.³² It concluded that a compelling state interest would have been required to justify a search warrant (which was not obtained) because thermal imaging involved the type of privacy infringement the constitutional debates covered.³³ According to the argument that the two clauses, interpreted together, provided “broader protection” than would otherwise have been available under Montana’s search and seizure clause alone, the court recognized greater protection than the Federal Constitution.³⁴ The Montana court had, as early as 1984, stated,

There has been unnecessary emphasis placed on distinguishing right to privacy cases from search and seizure cases. The right to privacy is the cornerstone of protections against unreasonable searches and seizures. Thus, a warrantless search can violate a

30. *State v. Siegal*, 934 P.2d 176, 183 (Mont. 1997) (citing MONT. CONST. art. II, § 10); *see also State v. Stakers*, 489 P.3d 489, 494 (Mont. 2021) (same).

31. *Siegal*, 934 P.2d at 183 (emphasis added).

32. *Id.* at 191–92.

33. *Id.* at 192; *see also State v. Young*, 867 P.2d 593, 597 (Wash. 1994) (“[T]here is no strong need for national uniformity on infrared surveillance that outweighs the State’s very strong interest in protecting an individual’s right to privacy, particularly in the home.”); *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998) (“Sections 14, 54 and 241 have been interpreted to work *in tandem* and to establish a limitation upon the power of the General Assembly to limit common law rights to recover for injury or death. The fact that these provisions might not have been ‘*conceived as some sort of package*’ does not prevent them being *construed together to arrive at a separate principle.*”) (emphasis added) (citation omitted) (quoting Thomas P. Lewis, *Jural Rights Under Kentucky’s Constitution: Realities Grounded in Myth*, 80 KY. L.J. 953, 972 (1992)); *Martinez-Cuevas v. Deruyter Bros. Dairy, Inc.*, 475 P.3d 164, 171–73 (Wash. 2020) (interpreting the anti-special-privileges clause with the clause mandating protective legislation for employees in dangerous employment); *Deminski v. St. Bd. of Educ.*, 858 S.E.2d 788, 793 (N.C. 2021) (“Notably, these two [education] provisions work in tandem”). But see *Calloway Cnty. Sheriff’s Dept. v. Woodall*, 607 S.W.3d 557, 568 (Ky. 2020), in which the Kentucky Supreme Court “conflated” its equality clause with the ban on special laws but concluded that it had “misconstrued” the two.

34. *Siegal*, 934 P.2d at 183.

person's right of privacy and thereby violate the right to be free from unreasonable searches and seizures.³⁵

Similarly, in *Quigg v. Slaughter*³⁶ in 2007, the Montana court determined that differences in treatment and programs in private and government prisons did not violate the federal or state constitutional cruel and unusual punishment clauses.³⁷ The court noted, however, just as with search and seizure, the voters in 1972 had supplemented the cruel and unusual punishment clause with a textual "human dignity" provision.³⁸ It cited a 2003 decision in which it stated,

Just as we read the privacy provision of the Montana Constitution *in conjunction* with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion, so too do we read the dignity provision of the Montana Constitution together with Article II, Section 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution. The federal constitution does not expressly provide for the right to human dignity.³⁹

The *Quigg* court distinguished the earlier decision on the grounds that it did involve facts that deprived that inmate of human dignity.⁴⁰ The *Walker* court did, however, accept the argument that two clauses should be read "in conjunction" with each other.⁴¹ In each of these Montana situations, an earlier state constitutional provision was supplemented by a later provision that could apply to the same facts.

I included a short paragraph on this technique of interpretation in my 2009 treatise, *The Law of American State Constitutions*.⁴² Finally, in a currently pending, major statewide school desegregation case in New Jersey,⁴³ the three provisions being asserted in the lawsuit were joined by a fourth count that sought to challenge the New Jersey situation (one of

35. *State v. Solis*, 693 P.2d 518, 522–23 (Mont. 1984).

36. 154 P.3d 1217 (Mont. 2007).

37. *Id.* at 1222–23.

38. *Walker v. State*, 68 P.3d 872, 882–83 (Mont. 2003).

39. *Id.* at 883 (emphasis added); *see also Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1313 (Mont. 1986), *superseded by constitutional amendment*, MONT. CONST. art. II, § 4.

40. *Slaughter*, 154 P.3d at 1223.

41. *Id.*

42. WILLIAMS, *supra* note 1, at 354.

43. *See Latino Action Network et al. v. State of New Jersey*, RUTGERS UNIV.: THE INCLUSION PROJECT, <http://theinclusionproject.rutgers.edu/our-projects/equity-in-education/latino-action-network-et-al-v-state-of-new-jersey/> [https://perma.cc/R9CD-DLMX] (last visited Oct. 22, 2021).

the most racially segregated school systems in the nation) by reading all three of the state constitutional provisions together, enhancing each other to outlaw segregated schools:

- 1) New Jersey's 1844 equality provision;⁴⁴
- 2) The 1875 provision requiring the state to provide a "thorough and efficient education;⁴⁵ and
- 3) The 1947 provision explicitly banning segregation "in the public schools."⁴⁶

The argument is that these provisions should be "stacked," according to their chronological evolution, something like this: Our early provision guaranteeing, among other things, equality was supplemented in 1875 when the voters adopted the provision requiring a thorough and efficient education with an equality element to it,⁴⁷ therefore enhancing or augmenting the earlier 1844 equality provision in the education context (like *Sheff*). Finally, the 1947 ban on segregated public schools made explicit the earlier 1844 and 1875 concerns of equality and education. One might ask, "How can you have an equal, thorough, and efficient education that is segregated?"

This preliminary review of cases employing the "conjoint," "harmonious," "interlocking," or "in tandem" technique of interpreting two or more state constitutional clauses together can deal with different sets of such provisions. In our New Jersey death penalty challenge we relied on two clauses that were adopted in the same 1844 constitutional convention.⁴⁸ There was no constitutional history, however, indicating that the two should be interpreted together. Still, it was a good argument.

By contrast, in the school finance cases and in the pending New Jersey segregation case, the provisions were added over time, as Jon Marshfield has argued, as the original conception of *state* constitutional rights.⁴⁹ Although not the case in either the school finance cases or in the New Jersey segregation case, there might be constitutional history indicating that the provisions were intended to supplement each other. This was the case when the Pennsylvania Constitution was amended in 1967 to supplement the 1776 equality clause with a modern provision protecting

44. N.J. CONST. art. I, § 1; *see WILLIAMS, supra* note 7, at 56, 76.

45. N.J. CONST. art. VIII, § IV, cl. 1; *WILLIAMS, supra* note 7, at 187–89.

46. N.J. CONST. art. I, § 5; *WILLIAMS, supra* note 7, at 63–64.

47. I referred to this type of education clause as a "specific and limited equality provision." Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1214–15 (1985).

48. Brief & Appendix on Behalf of Amici Curiae, *supra* note 4, at 8.

49. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. (forthcoming 2022) (manuscript at 29–53).

citizens from discrimination in the exercise of their civil rights.⁵⁰ There is even a cogent argument that an entire state constitution can be interpreted together.⁵¹

The techniques of interpretation discussed herein are related to, and grow out of, situations in which more than one state constitutional clause applies to the same claim. But it is quite distinct from that common situation described by the Indiana Supreme Court:

Our conclusions today do not suggest that protection from multiple punishments in a single prosecution falls beyond the constitutional pale. To the contrary, legislators and prosecutors do not necessarily have free rein to authorize multiple punishments or to indict on multiple overlapping offenses. The Indiana Bill of Rights offers a larger framework of constitutional guarantees designed to protect Hoosiers “from the excesses of government.” Chief Justice Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 Ind. L. Rev. 575, 576 (1989). Our constitution also authorizes independent appellate review and revision of a criminal sentence found “inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B) (implementing article 7, sections 4 and 6 of the Indiana Constitution). Substantive double-jeopardy protections in Indiana operate *in harmony with*, not in isolation from, these *supplemental* constitutional protections. And their importance to our decision today warrants more than passing reference.⁵²

This is also different from Akhil Amar’s concept of “intratextualism.”⁵³

Helen Hershkoff and Nathan Yaffe have warned that this technique will not always lead to progressive results. They describe a Wisconsin case that “stacked” an education clause and a uniformity clause to prohibit sharing of revenue from rich districts to poorer ones.⁵⁴

50. WILLIAMS, *supra* note 1, at 215–16; Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 361–66 (1993).

51. See David B. Cruz, *Equality’s Centrality: Proposition 8 and the California Constitution*, 19 REV. L. & SOC. J. 45, 57–58 (2010); see also *Commonwealth v. Alexander*, 243 A.3d 177, 206–07 (Pa. 2020) (privacy right not limited to privacy clause itself).

52. *Wadle v. State*, 151 N.E.3d 227, 250 (Ind. 2020) (emphasis added).

53. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (“In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase.”).

54. *Buse v. Smith*, 247 N.W.2d 141, 146–47, 155 (Wis. 1976); see Helen Hershkoff & Nathan D. Yaffe, *Federalism and Federal Rights Minimalism: Overlooked Effects on State Court Education Litigation in Wisconsin*, 2021 WIS. L. REV. 1011.

Applying this technique of interpreting two or more state constitutional provisions “conjointly” illuminates a little-recognized approach. Hopefully it will be investigated further.