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SYMPOSIUM ON ECONOMIC LIBERTIES AND STATE CONSTITUTIONS: KEYNOTE ADDRESS

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Thank you, Tom, for that very kind introduction. I just hope I haven't turned off my phone here, I'm learning to take notes on my phone but I'm a little awkward with it so when you hear embarrassed silences from the podium that's because my notes have been replaced by the picture of my grandchild that usually appears on my phone.

I'm delighted to have the privilege of speaking here today. It's a rare privilege for me because although I've been invited to speak before, this may be the first time I've actually been invited to speak on something I know a little about. It doesn't usually inhibit me—I'm perfectly willing to speak on almost any length on anything, no matter how ignorant I am, but I do know a little bit about state constitutional law, having taught that course at Cardozo for some years, and

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therefore I didn't feel I had to spend quite as many hours coming up with something to say as I otherwise would. And indeed I had already written my notes on the topic I'm going to cover today into a book chapter, which I think got distributed. I'm not really expecting that any one of you is foolish enough to read it, but I think you can probably get a hold of a copy if this intrigues you.

Now of course, as you've noticed, so far I've mentioned only half of the subject of today's symposium, state constitutional law. This is a symposium about economic liberties and state constitutions, and as Anthony Sanders very well said, in general those had practically nothing to do with each other for quite a long time. And indeed, as I said, though I know something about state constitutional law and I knew a little about economic liberties —before this symposium came along, it hadn't really occurred to me that the two might be connected. I'm not going to try to tie them together; I'm sure other speakers will do that. I'm going to talk about state constitutional law, and particularly about the doctrine that's sometimes called "state constitutionalism," and sometimes called "new federalism" —I don't really like either term but I usually use new federalism. It's been used to expand not so much economic liberties as other kinds of liberties: freedom of speech, freedom from unreasonable search and seizure, the right to remain silent, the favorite liberties of the American liberal agenda, and less real liberties that are worth preserving. The courts that have practiced the new federalism tend to be as hostile as most American progressives are to the idea of economic liberty. Still, what works for one liberty can work for another, and if I talk to you about the new federalism and tell you what it is and how it has worked, that may turn out to be enlightening on the question of how state constitutions protect or should be interpreted to protect economic liberty.

I'm going to start with some perfectly obvious things that everybody knows. Every state constitution has a bill of rights in it, and many of them essentially parrot the Federal Bill of Rights. That's unfair, as some people are quick to point out, because there were state

constitutions before there was a federal constitution, so to some if you're talking about Massachusetts, New York or North Carolina, or Virginia, it is really more accurate to say the Federal Bill of Rights parrots the state one, but most of the others I think are undoubtedly copied from the federal version. It doesn't really matter, the point is that they're to a very significant extent identical. If the Federal Constitution says you can't be deprived of life, liberty or property without due process of law, and the state constitution says you're not going to be deprived of life, liberty or property without due process of law, we have what looks to the naked eye like duplicate protections of rights.

Now originally there was an excellent reason that both these things were needed; because for the first, I guess, 100 to 150 years of the existence of this republic, or the Constitution, the federal bill of rights restrained only the federal government, and I believe that's in a theoretical way still thought to be true.

But of course it was decided in the 20th Century that almost all of the provisions of the Federal Bill of Rights are incorporated in the Due Process Clause of the 14th Amendment, which does bind the states. And therefore, in that indirect way the protections of liberty in the Federal Constitution are binding on the states. So what do we need the State Bill of Rights for? They became essentially redundant to the extent that they duplicated federal rights. By the way, that's not 100%—there are in many state constitutions clauses you won't find in the Federal Constitution. There's some really interesting ones. There's one that says the courts shall always be open, to no person will we deny justice—it is a lot of fun to see what state courts have done with that over a century or two, but that is not the subject of my talk today.

I'm talking about the bills of rights to the extent that they are either very close or complete duplicates of each other. And in that case as I say once you have incorporation what do you need them both for? And it was indeed, for quite a long time I think, thought that the state constitutions and their constitutional protections had become superfluous and they were indeed ignored. My favorite example of

that is a case called *Perez v. Sharp*, which is one of the great heroic moments, I suppose, of state courts. That was a case in California in the 1940s in which a—I think a pretty courageous California Supreme Court—held that interracial marriage was constitutionally protected. A pretty bold holding, and even a reactionary like me can admire both the courage and the moral principle that led to that decision. And when I started to teach state constitutional law, I said this is going to be my shining example—I'm going to spend a lot of time on this case.

And then I went and read it and you know what? It doesn't say word one about the state constitution. You wouldn't know that California had a constitution from reading *Perez v. Sharp*. What were they interpreting? God knows. My admiration for the courage and moral fiber that it took to render that decision is matched only by my complete bewilderment of how the court got there. It's not easy to do it if you ignore the state constitution and you are applying the Federal Constitution—*Plessy v. Ferguson* was the law. Separate but equal was the law. There was no constitutional right for black and white kids to go to school together and now the California Supreme Court says that they've got a right to marry each other. They relied on the UN Charter—I'm not kidding. They talked about the UN Charter, they talked about—God knows what they talked about. I'm not usually big on manipulating—I'm not big on result-oriented jurisprudence and I'm not big on ignoring text and structure and history and all that stuff to get a result. But maybe once in a while you can do it, and if ever it could be justified, surely *Perez v. Sharp* was such a case. But, in light of today's purpose, what it really illustrates to me now is what a new idea it was when some twenty five or thirty years later, state courts began to rediscover their constitutions.

And what had happened was, not to be too subtle about it, essentially a political development. There was a Warren Court, once upon a time, which had a very expansive view of certain of the liberties in the bill of rights. I don't think they were much in love with property rights. In fact, the Warren Court did more to eviscerate the

Takings Clause of the 5th Amendment than any other court did. But if you're talking about the right of an alleged criminal to remain silent or to be protected from an unreasonable search or seizure or freedom of speech or freedom of religion, they found those rights all over the place. (That's back in the 50s when liberals were still in favor of freedom of religion.) Then there was a political change—President Nixon appointed four justices of the Supreme Court and Chief Justice Warren was succeeded by Chief Justice Burger. Those who thought the Warren Court had gone too far were quite happy. And those who didn't think it had gone too far were quite unhappy, and thought that our rights were being traduced, and that our Constitution was being mutilated by these evil reactionaries—who weren't half as reactionary as the Justices we have now of course. But compared to Chief Justice Warren and Justice Brennan and their merry men, it was quite a change. It was at that point that the state courts began to discover "Hey, we have Constitutions. And if we don't like what the U.S. Supreme Court is doing with the federal Constitution – if we think they have misinterpreted the federal Constitution – nothing requires us to assign the same interpretation to our state constitutions.

We are the final arbiters of what our Constitution says, not the United States Supreme Court, and if they get it wrong, that's their problem, we're going to get it right. Now that idea received a great advance in 1977, when Justice Brennan wrote a law review article, not perhaps the most scholarly article that's ever appeared in a law review, but a very clear appeal to state court judges to keep it up and do more of it. Justice Brennan said: "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing the citizens of their states even more protections than the Federal provisions, even those identically phrased." To me it's clear, the purpose of new federalism, what the judges who essentially invented it or began to practice it thought they were doing, what Justice Brennan wanted them to do, was error correction—was to correct what they thought were the Supreme Court's errors. Sounds a little strange perhaps to say that state courts are correcting errors that the Supreme Court made, but if two separate sovereigns

are interpreting two different instruments, two different fundamental documents, there's absolutely no reason they have to agree all the time. And if you put aside the issue of whether you're happy you're with the Warren Court or you're happy with the Burger Court (I happen to be somewhat happier with the Burger Court), but if you worry less about that, and more about the principle, the principle is clearly right!

That it's error correction. Justice Brennan wasn't coy about: "state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court." And he says keep disagreeing and keep fighting the good fight. The new federalism was to a large extent, I think it's fair to say, a weapon—if not a political, a judicial political battle between liberals and conservatives; and it was a liberal weapon. The word "liberal," of course, is used in so many senses that its almost meaningless, but I'm using it in the sense that it's most often used in the United States—I mean, the Democrats are the liberals, the Republicans are conservatives, you get the idea.

I'm fine with the principle. I may not agree with Justice Brennan's application of it. I may think the Supreme Court's decisions that he thinks were wrong were entirely right, but the idea that it's better to be right than wrong after all, and that you don't have to be wrong if you can be right, if you're interpreting your own constitution—that's perfectly sound. It's really not even debatable. But it's not quite as simple as that. And perhaps, if there's a message I'm trying to convey with this talk, this is it: it is not a good idea, in my opinion, for state courts to go crazy with new federalism and that's quite apart from the issue of whether the Supreme Court decisions are right or wrong. There are a few reasons why the state courts might very often want to interpret their own constitutions in line with the federal decisions.

One, perhaps the simplest one, so simple I realized I'd left it out of my article, but it's obvious enough, is maybe the Supreme Court's not wrong. Maybe they're not dumber than you are. Yeah, you know, those guys, those guys and women now on the Supreme Court,

they're not idiots and they have fancy clerks that went to fancy law schools, and the New York Court of Appeals, or the Iowa Supreme Court or the South Dakota Supreme Court is not necessarily going to improve the jurisprudence by throwing away the Supreme Court precedent and striking off on their own. I'm obviously the last person to scorn state courts of last resort, and there are certainly many fine opinions which I've read in the course of my study of state constitutional law; there are also some really awful ones. I mean, whatever your view on the questions involved, you can find some attempts by state courts to create their own constitutional jurisprudence that are absolute trainwrecks and don't make any sense. My favorite, a now completely forgotten case, but rather celebrated at the time, was Baker v. State, a Vermont decision, which instituted civil unions in Vermont, at a time when civil unions were thought of as a great progressive advance, instead of, as they are now, essentially retrograde, a barrier to gay marriage. When I taught state constitutional law, I spent much more time than it deserved on *Baker v. State*, just because there was so much wrong with that opinion. Whether you like the result or not, it's a complete disaster. Then I read a law review article about the decision, in which the author of the decision basically brags of the disaster. He says, 'well maybe it wasn't absolutely perfect, maybe we could have written it a more elegant, jurisprudential product, but for political reasons we wanted to make sure that nobody understood this decision, because that would bring it into the political arena. He certainly did accomplish that—keeping it out of the political arena—but he made it confusing, marvelously so.

Anyway, so, sometimes the Supreme Court does a better job—and that's one reason why state court shouldn't rush into this arena. And another is that even if you can improve, even if the state court can improve what the Supreme Court is doing, it makes life confusing. It's a little hard to explain. I've said that it is perfectly appropriate for state courts to be correcting the United States Supreme Court, but that is hard to sell—it's hard for people on the street to figure out what is going on. It doesn't really promote respect for the law. In fact it promotes the idea that, which unfortunately may have a grain of

truth to it, that judges just use the Constitutions as a blank piece of paper and write their prejudices into it. Even though it's not a well kept secret, I don't think it's a good idea to fuel that kind of cynicism more than we have to.

And then there is a more specific objection to this new federalist approach. It works only one way. It used to be called the liberal ratchet, because people used to assume that the liberals were the only people who favored rights. That is really a misnomer. But, the point is, that if the United States Supreme Court decides against the person claiming rights under the federal Constitutions, well then, if that's an error, the state court can correct it and give the victim of this deprivation the right that he has been denied. But it doesn't work the other way. If the federal Supreme Court gives you more rights than you are entitled to, you've got them. You've got them in every state in the union, and no state supreme court can take it away. So, if you are sympathetic as I tend to be, to individual liberty, you can call it a "rights protective ratchet." But's it's also antidemocratic. That is the very nature of what you are doing. If you are expanding constitutional rights, you are limiting democratically elected government's power to do what their constituents elected them to do. I'm not saying that democratically elected governments are all that great. Sometimes there should be limits on what they are allowed to do. But I think there have been excesses in that direction.

I could and maybe I should end my speech here, but I'm not going to. I've got a lot more material. But if you don't listen to anything else, listen to this: New federalism error correction, and that's okay with due moderation. That's the only real point that I have to communicate.

But, what happens is the state courts practicing new federalism will not say that it is an error correction. I guess sometimes they will, but they don't like to say it all that bluntly. I mean, it is ok for Justice Brennan to say that the Supreme Court is screwing up the law, but when my former court or the Supreme Court of California says that, it sounds a little presumptuous. So, there is a tendency to find other

reasons for interpreting the state bill of rights in a way differently from the federal bill of rights, even though the provisions seem to be identically worded.

I asked last night whether I was allowed to use the word "bullshit" in this talk and I was told the answer was yes. But I'm not going to. I think that would be inappropriate. But when I say nonsense, you know what I mean. There is a great deal of nonsense in opinions on new federalism, and in the article that has been distributed, I go in agonizing detail through the leading cases in New Jersey and in New York—the New York one was decided before my time—on how you go about and deciding whether you can depart from the United State's Supreme Court's interpretation of a bill of rights provision. What I say in the article is that they have criteria; they have a list of 7, 8 criteria in these opinions. The criteria approach is quite popular. And about 95% of the criteria are total nonsense and the other 5 are maybe not nonsense.

I'm not going to go through the whole list, but my favorite of what I think is total nonsense is the history and traditions of our people. "Oh, you know, when we are deciding whether the New Jersey Constitution means something different—the New Jersey due process clause, the New Jersey search and seizure clause means something different from the federal due process clause, the federal search and seizure clause—we look to the history and traditions of New Jersey." Give me a break. There aren't any. "We look into the New Jersey soul." There is no New Jersey soul. Take my word for it. I mean no offense to New Jersey: they're very nice people, but they're like you and me over there. They're not, you know, it just isn't a foreign country. It is not Nepal.

This passion for criteria is really an attempt to find that there are what one law review article called "different but equally correct" interpretations of the same language in the two constitutions. The theory is you can say that this search was a reasonable search under the federal Constitution and an unreasonable search under the New York or New Jersey Constitution. And both decisions are right. One of the many bad reasons for suggesting that both decisions are

right—I've got to say the worst—is the custom and traditions of our people. Professor Gardner, who's written on this topic, gave this (I thought) the nice title of romantic sub-nationalism—the idea that New Jersey or South Dakota is a little nation unto itself. There's an opinion in Alaska—and Alaska is kind of different maybe. In Alaska they decided that they protected, I don't know, marijuana or some controlled substance, the use of it in Alaska more than the federal constitution, "but that's because we're, you know, we're rugged individuals out here in Alaska in the wide open spaces." Okay, I can almost buy that. But New Jersey? I mean, give me a break. The custom and traditions of our peoples means we're Democrats and we don't like what the Republican judges are doing. We're blue states—that's all it means. And those are the customs and traditions of our people.

There are a couple of "criteria" that are less ridiculous. When I say a couple, I mean a couple—two. And one of course is "the text." If the language of the provisions is different, you know, no one's going to give you an argument that different provisions can't be interpreted differently, and if I could just make my grandchild's picture go away I will find exactly where in my notes I have examples of that. There are a number of state constitutional provisions that do differ, and sometimes in what seems like in fairly significant ways, from the federal provisions. And when I started teaching it, I was sort of intrigued by this. I kept trying to find a pair of cases where, because of the differences in text, you could really say that both decisions were right, that the judges weren't really disagreeing, that they were simply interpreting different words. And you can start to get there.

The Fifth Amendment says no person "shall be compelled in any criminal case to be a witness against himself . . . ." The Utah Constitution says "The accused shall not be compelled to give evidence against himself . . . . " Well, that's different, isn't it? And the Utah Supreme Court said, "Yeah, that's different, and therefore, even though, under the federal Constitution, the Fifth Amendment doesn't protect you against having to give a handwriting exemplar,

because you're not being a witness against yourself. But in the Utah Constitution you're certainly giving evidence against yourself in giving a handwriting exemplar." You know what? Not really. It sounds good for a minute, but in fact, can't be what the Utah constitution means. You're saying you can't make the guy appear in a lineup? You can't get a blood sample? What are you supposed to do? You can't enforce the criminal laws? And Utah gave up on that, and overruled that decision.

When the California Supreme Court threw out capital punishment, they did it because their cruel and unusual punishment clause was different. In fact, it wasn't a cruel and unusual punishment clause. It was a cruel *or* unusual punishment clause, and the difference—and they made a big difference between "and" and "or". They didn't rest the whole decision on that, but they did rely on it. But come on, give me a break. You're not *really* saying that the authors of the California Constitution meant that in the disjunctive. That if it's either cruel *or* unusual it's unconstitutional. What about the ones that are unusual but not cruel? Are they unconstitutional? No, that's silly. And it was by no means the only basis for that decision. That was the Rose Bird Court back in the 70s which threw out capital punishment, and the voters promptly restored it by referendum.

I'm not going to go through them all, but you can do something similar with the confrontation clause.

The harder you look at the cases, the less you think the text controls, at least in the pairs of cases that I've looked at. They really aren't different but equally correct results. They're judges seizing on minor and probably insignificant differences in languages to produce a different result. A recent example of that that I just came across that I kind of love is the Iowa Supreme Court last year interpreting their search and seizure clause, which to the naked eye might look identical to the federal search and seizure clause—which, uh, Richard, you can recite it by heart, can't you?—that the right of the people to be secure in their papers, personal possessions . . . *(At this point, Richard chimes in from off camera to recite the clause)* . . . . Okay, I knew he could do it. But, that's not what it says in Iowa, because in Iowa they have

a semicolon rather than a comma before the "and," and the Court takes this very seriously. The semicolon shows that the latter is an illustration of the former, and therefore their constitution means something different from the federal constitution, and therefore you cannot search the home of the probationer in Iowa on reasonable suspicion, even though you can in the cases where there's a mere comma. They don't rely entirely on that of course; they rely on forty-six other things, too. But, I am just sort of amazed that they would even try the semicolon argument.

The other argument is somewhat more complicated—the other that I say does have to be taken seriously. It is the argument from structure, which is that the United States has a federal system, and the states don't. The United States Supreme Court may be somewhat more restrained in giving a broad scope to its Bill of Rights because it's restraining other sovereigns and its decisions have nationwide effects, while the state courts obviously can be more uninhibited. And, in principle, that's not a bad argument. There is a pair of cases that seems to illustrate it: *Serrano v. Priest* in California and *East Texas School District v. Rodriguez* in the United States Supreme Court. The *Serrano* case and the *School District v. Rodriguez* case were school-finance cases. The United States Supreme Court said that our United States Constitution does not require equal funding of all school districts, and the California Supreme Court said that our constitution does. And in both of them you'll see a paragraph about structure. The United States Supreme Court said, we have a federal system, we don't want to fashion this rigid rule on the whole country. And then the California Supreme Court said, yeah, but we don't have that problem so we are fashioning this rigid rule on California.

It's logical but it's not really what's going on. If you read the two cases you'll realize it's not what's really going on. In fact, if you read the California Supreme Court decision in the second *Serrano v. Priest* case, the contempt they have for the *East Texas School District* decision really shows through. I mean, they were obviously thought that the Supreme Court was dominated hidebound reactionaries who didn't

want poor kids to get an education. It was perfectly clear that there was real disagreement. This was not a pair of results that people thought different but equally correct. And I haven't yet found a pair. I actually do the experiment. I will say to students, to colleagues, to people I talk to about this subject (which is more than you might imagine), people have a great tolerance for talking about things—I say, show me a pair of cases where the Supreme Court went one way and, on an identical, or identically virtual clause, the state supreme court went the other way, and look me in the eye and tell me you agree with both decisions. No one's ever done that. Maybe there's a pair of two cases somewhere, but no one has ever risen to that challenge. Which leads me back to my point that what's happening is that the state courts are correcting what they see as the errors of the United States Supreme Court, and that everything else in these opinions is just a way of concealing that fact.

I referred a few minutes ago to a recent decision of the Iowa Supreme Court, because I made fun of them for talking about the semicolon. But, it is in fact not just an object of fun—it is a fairly interesting opinion. As I mentioned, it raised the question of whether, if you are on probation, that enables law enforcement authorities, police, to raid your house on suspicion, without a warrant. The Supreme Court held yes it does, in U.S. v. Nice. If you are on probation, your Fourth Amendment rights are reduced to that extent. You and I are not on probation, so you need a warrant to search our homes. But if you are on probation, then they can come in on reasonable suspicion. And in *State v. Short*, the Supreme Court of Iowa rejected that. This produced, among the seven judges, five opinions and a 4-3 decision. Of the five opinions, three are of some interest to us. I'm just going to, in closing, touch on them for a minute.

The majority opinion of Justice Appel is quite frank and maybe the guy should be my hero because he does not engage in the kind of nonsense that I've been deprecating for the last few minutes. He does say "Look, when the Supreme Court is right, it's right. When it's wrong it's wrong. And when they're wrong we're going to do it right and there is all there is to it." And he mocks the idea of criteria. He

says criteria are "a solution in search of a problem," which I found to be a nice phrase. And my first thought was to admire this opinion.

I nevertheless found the opinion a little off-putting. There' a certain tone of superiority. I don't know who's right about whether probationers' homes can be searched: I haven't even thought about the question. I could be persuaded either way. But the scornful way in which the Iowa court speaks of Supreme Court doctrine did sort of put me off. "The jurisprudence of the United State Supreme Court in the search and seizure area has been characterized by scholars (citing Akhil Amar) as not just complex and contradictory but often perverse," and a little later he says: "If these authorities are only half right, incorporation of the body of federal law into the Iowa Constitution will incorporate confusion, not certainty." So he's not going to follow those idiots: they have messed up the law for years. And maybe he's right, but my confidence that the Iowa Supreme Court is going to do all that much better than the United States Supreme Court isn't high. I have the instinctive feeling that he, or they, ought to back off a little on their self-confidence that they can build a new world of luminous logical search and seizure law.

Of the three dissents in the case (there was one concurring opinion, and three dissents), there are two that touched on this issue, by Justice Waterman and Justice Mansfield. They joined each others' dissents, but I nevertheless find them different. I prefer Justice Mansfield's. Although Justice Waterman, to give him credit, does take a shot at romantic sub-nationalism, which I will read if I can find it. He quotes Professor Gardner, the inventor of the term "Romantic Subnationalism": "The notion of significant local variation in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse." All right, good for him, he's right. Then he's going to stand up for criteria anyway and a page later he's quoting a concurring opinion from the South Dakota Supreme Court which says that we should examine the text and the history and "the matters of unique state tradition or concern," so he's back to romantics sub-nationalism. I sympathize with his desire to rein in what the

majority is doing in that case, but I gotta tell you his criteria aren't going to do it. The criteria are just ways of getting you to any result you want.

Justice Mansfield, I thought, wrote a more straight-forward opinion and a pretty good one. He quotes the majority as saying that we owe our citizens "our best independent judgment of the proper parameters of state constitutional commands," and therefore that we are not going to pay any attention to what the Supreme Court said. And Justice Mansfield says "I respectfully suggest we owe the citizens of the state a bit more than this. We owe them our best independent judgment to be sure, but that independent judgment should be tempered with respect for those who came before us and grappled with the same issues." And then he says "Needless to say, this approach, as amorphous it may be, involves at least some degree of deference to federal precedent." That's really about all he says in the way of doctrine and that's as far as I can get by way of doctrine. When should state supreme courts follow United States Supreme Court decisions interpreting the bill of rights, even if they may doubt their correctness? Not always, but quite a bit of the time. And that's all there is to it. And now I'll take any questions.