

## THE NEW JERSEY CONSTITUTION: POSITIVE RIGHTS, COMMON LAW ENTITLEMENTS, AND STATE ACTION

*Helen Hershkoff\**

During the last half of the twentieth century, the New Jersey Supreme Court built an impressive reputation for its “intellectually rigorous and forcefully progressive” interpretations of state constitutional law.<sup>1</sup> The court’s status as a jurisprudential entrepreneur rests, in part, on decisions that involve social and economic life—most notably, its enforcement of the positive right to an adequate education.<sup>2</sup> However, the court’s commitment to material well-being has not stopped at the border of state action. In contrast to federal doctrine,<sup>3</sup> the New Jersey Supreme Court has shown a willingness to reconfigure contract and property rights in light of public policies that emanate from state constitutional norms. These cases, involving such issues as whether private property owners can bar leafleting, protect rights that typically are not enforceable against non-government actors and so usually are trumped by common law entitlements. In this Essay, I draw a connection among the New Jersey Supreme Court’s treatment of

---

\* Member, Professional Board of Editors, *State Constitutional Commentary*; Professor of Law and Co-director, Arthur Garfield Hays Civil Liberties Program, New York University School of Law. I am grateful to Stephen Loffredo and Robert F. Williams for their comments on an earlier version of this Essay.

<sup>1</sup> Gerald J. Russello, *The New Jersey Supreme Court: New Directions?*, 16 ST. JOHN’S J. LEGAL COMMENT. 655, 655 (2002); see Stewart G. Pollock, *Foreword: Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution*, 29 RUTGERS L.J. 675, 676 (1998) (“After half a century, the New Jersey Judiciary still leads the nation.”); see also Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267, 1268 (2004) (calling the New Jersey Constitution “a model and a beacon for other state constitutions and for young post-colonial nations seeking to form sound and reliable constitutional orders”).

<sup>2</sup> See Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 839, 841–42 (1998). The concept of jurisprudential entrepreneurship refers to a court generating an “independent interpretive approach to state law issues” that influences other courts on a national level. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1140–41 (1999).

<sup>3</sup> See generally Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 20–21 (1993) (comparing the federal state action doctrine with that of several states).

social and economic rights, its departure from federal state action doctrine, and its reconfiguration of common law entitlements as a special feature of its state constitutional practice.

The New Jersey Supreme Court's commitment to social and economic well-being can be seen in its willingness to interpret and to enforce social welfare claims that often are regarded as nonjusticiable.<sup>4</sup> Some of these claims are grounded in the text of the New Jersey Constitution, which provides the source for positive rights that are said to be absent from the Federal Constitution.<sup>5</sup> The state constitution's education clause is best known; article VIII, section 4 commits the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools"<sup>6</sup> and the court has interpreted this right to require the redistribution of public funds from one school district to another if needed to secure an adequate education for the state's children.<sup>7</sup> In addition, the New Jersey Constitution grants private employees the right to "organize and bargain collectively."<sup>8</sup> Not all important social welfare rights are enumerated in the New Jersey text. For example, the state constitution lacks an explicit right to public assistance or to shelter.<sup>9</sup> Yet the New Jersey Supreme Court,

---

<sup>4</sup> See Hershkoff, *supra* note 2, at 1175–83 (discussing but rejecting arguments that social welfare claims are nonjusticiable).

<sup>5</sup> See, e.g., *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (describing in dicta the Federal Constitution as a "charter of negative rather than positive liberties").

<sup>6</sup> N.J. CONST. art. VIII, § 4, ¶ 1.

<sup>7</sup> See *Robinson v. Cahill*, 303 A.2d 273, 295, 297–98 (N.J. 1973). The court ordered a specific distribution method in *Robinson IV*. See *Robinson v. Cahill (Robinson IV)*, 339 A.2d 193, 204 (N.J. 1975). Soon after this decision, the court vacated its order because the legislature enacted a new constitutional public law for the distribution of funds. See *Robinson v. Cahill (Robinson V)*, 355 A.2d 129, 139 (N.J. 1976) (noting that the law is constitutional only if fully funded). Although an injunction was issued preventing state officers from distributing the funds after *Robinson V*, the court dissolved the injunction after the new distribution system was fully funded. See *Robinson v. Cahill (Robinson VII)*, 360 A.2d 400, 400 (N.J. 1976). A subsequent case dealt with the same problem faced by the *Robinson* Court. See *Abbott v. Burke*, 575 A.2d 359, 408 (N.J. 1990) (holding that the distribution of educational funding did not provide students in poor urban districts with a proper education and new legislation was needed to accomplish adequate distribution). Despite the progress made through the *Robinson* decisions, some critics question its actual success. See G. Alan Tarr, *Robinson v. Cahill and the New Judicial Federalism*, 59 ALB. L. REV. 1753, 1753–54 (1996) (calling *Robinson* "important" and "noteworthy" but "a failure" because it failed to "initiate an equalization of funding among New Jersey school districts").

<sup>8</sup> N.J. CONST. art. I, ¶ 19. See generally ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 46–47 (1990) (stating that the New Jersey Supreme Court has "consistently and unambiguously" held that the New Jersey Constitution creates a "valid, self-executing, legal basis for a cause of action alleging interference with the rights to organize and bargain collectively even in the absence of statutory law authorizing such suits").

<sup>9</sup> See Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right*

finding that “homelessness represents something uniquely devastating to the human spirit,” has refused to accept a twelve-month limit on rent subsidies imposed by state law.<sup>10</sup> Moreover, the court has held that the state’s failure to provide Medicaid funding for abortions, other than when medically necessary to save the mother’s life, violates the New Jersey Constitution.<sup>11</sup> In these decisions, the court scrutinizes government inaction as well as action in order to effectuate the provision of socially essential goods.<sup>12</sup>

The New Jersey Supreme Court’s commitment to social and economic concerns goes beyond the boundary of government action. Not only does the court conceive of government as a provider of important goods and services, but also it appreciates the modern role of the “activist state” as a regulator of the private sector.<sup>13</sup> A notable example is the court’s treatment of racial segregation that is alleged to be caused by market conditions. Unlike the Federal Constitution, the New Jersey Constitution contains an anti-segregation clause which the New Jersey Supreme Court has interpreted as mandating a “constitutional imperative” against segregation: “[w]hether due to an official action, or simply segregation in fact, our public policy applies with equal force against the continuation of segregation in our schools.”<sup>14</sup> Rather than leave the achievement of racial equality to the vicissitudes of private preference, the New Jersey Supreme Court has refused to acquiesce in market conditions that exacerbate racial segregation. Similarly, the court has drawn on the public policy emanating from

---

to *Housing*, 1 HOFSTRA L. & POL’Y SYMP. 111, 125–26 (1996) (discussing the absence of a right to welfare in the New Jersey Constitution).

<sup>10</sup> *L.T. v. N.J. Dep’t of Human Servs.*, 633 A.2d 964, 974–75 (N.J. 1993); see also Cary Winslow, *A Case of Compassion: Justice O’Hern’s Opinion in L.T. v. New Jersey Department of Human Services*, 30 SETON HALL L. REV. 1073, 1073–75 (2000) (examining the *L.T.* opinion). But see *Sojourner A. v. N.J. Dep’t of Human Servs.*, 828 A.2d 306, 317 (N.J. 2003) (holding that the state’s policy of refusing to increase cash public assistance payments to reflect the number of children in a household does not violate the state constitution).

<sup>11</sup> *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982). Justice Pashman, concurring, stated: “The freedom to choose whether or not to bear a child is of such fundamental importance that I believe our Constitution affirmatively requires funding for abortions for women who choose them and cannot otherwise afford them.” *Id.* at 944 (Pashman, J., concurring) (footnote omitted). But see *Harris v. McRae*, 448 U.S. 297, 325–26 (1980) (holding that the government is not obliged to fund the reproductive choices of indigent women).

<sup>12</sup> See *L.T.*, 633 A.2d at 971, 973; *Right to Choose*, 450 A.2d at 937.

<sup>13</sup> See Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 440 (2002).

<sup>14</sup> *N. Haledon Bd. of Educ. v. Passaic County Manchester Reg’l High Sch.*, 854 A.2d 327, 336, 339 (N.J. 2004) (quoting *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 692 (N.J. 2000)).

the New Jersey Constitution to grant privacy rights to private employees.<sup>15</sup>

In other doctrinal areas, the court likewise has rearranged common law entitlements when they pose a barrier to the effectuation of speech or associational rights that are vital to democratic life. Sometimes the court uses a common law approach that effectively extends state constitutional protections to the private sphere. In *State v. Shack*, the court held as a matter of common law that legal services lawyers could not be barred from meeting with migrant farm workers in a camp site owned by their employer.<sup>16</sup> The court explained:

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.<sup>17</sup>

Later, in *Doe v. Bridgeton Hospital Association*, the court refused to permit property rights to interfere with a woman's right to reproductive choice, holding that a private non-sectarian hospital could not refuse on moral grounds to permit its facilities to be used for abortions.<sup>18</sup> Like an innkeeper or common carrier, the hospital's use of its property is "subject to control for the common good."<sup>19</sup> Similarly, in *State v. Schmid*, the court found that Princeton University, a private university, could not exclude from its property an individual seeking to distribute political literature.<sup>20</sup> Further, in *Uston v. Resorts International Hotel*, the court held that a casino

---

<sup>15</sup> See *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 16–17 (N.J. 1992). The court earlier interpreted the state constitution to comprise a public policy exception to the employment at-will doctrine, so that private employees, not covered by state statutory antidiscrimination rules, are barred from engaging in gender-based discrimination. See *Peper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 477 (N.J. 1978); see also James G. Fannon, *The Public Policy Exception to the Employment At Will Doctrine: Searching for Clear Mandates in the Pennsylvania Constitution*, 27 RUTGERS L.J. 927, 946–48 (1996) (discussing state constitutions as a possible source of public policy exceptions under the employment at-will doctrine).

<sup>16</sup> 277 A.2d 369, 373–75 (N.J. 1971).

<sup>17</sup> *Id.* at 372.

<sup>18</sup> 366 A.2d 641, 647 (N.J. 1976).

<sup>19</sup> *Id.* at 645, 646.

<sup>20</sup> 423 A.2d 615, 633 (N.J. 1980).

operator could not exclude from the blackjack table an individual who used card counting to increase his chances of winning.<sup>21</sup> Rejecting the casino owner's claim "that it could exclude [the card counter] because it had a common law right to exclude anyone at all for any reason,"<sup>22</sup> the court held that property owners have "no right to exclude people unreasonably" when they otherwise "open their premises for public use."<sup>23</sup> The court also has held that a regional shopping center could not bar leafleting "on societal issues,"<sup>24</sup> again, rearranging common law property rights to promote important democratic values.

Perhaps the court's boldest intervention into the background norms of common law entitlement involves its efforts to deploy municipal zoning power to ensure adequate housing for low-income state residents—the so-called "Mt. Laurel experiment."<sup>25</sup> As one commentator explains, comparing the importance of these cases to that of *Brown v. Board of Education*:

While the Warren Court aimed its equitable powers primarily at public institutions like school boards, which were readily made parties to lawsuits and were amenable, in principle if not in fact, to judicial de[c]rees, the justices who joined in crafting *Mount Laurel*, especially *Mount Laurel II* [which designed and enforced the court's remedy], sought to influence the behavior, not merely of public officials but of thousands of private market actors not before the court—housing developers, home seekers, renters, everyone who participated in New Jersey's housing market.<sup>26</sup>

In a recent article, Professor Mark Tushnet turns a comparativist's eye toward the decisions of the Canadian Supreme Court and explores the relation in that nation's constitutional law among social welfare rights, state action, and judicial review—three

---

<sup>21</sup> 445 A.2d 370, 376 (N.J. 1982).

<sup>22</sup> *Id.* at 373.

<sup>23</sup> *Id.* at 375.

<sup>24</sup> See N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994).

<sup>25</sup> Peter Buchsbaum, *Mount Laurel II: A Ten Year Retrospective*, N.J. LAW., Oct. 1993, at 13, 15; see also *S. Burlington County NAACP v. Twp. of Mount Laurel*, 366 A.2d 713, 724 (N.J. 1975) (holding that the town must, "by its land use regulations, presumptively make realistically possible" an opportunity for lower income housing); *S. Burlington County NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 460 (N.J. 1983) (holding that the town failed to provide an opportunity for low-income housing and directing strict judicial supervision of the town's compliance efforts).

<sup>26</sup> See John Charles Boger, *Mount Laurel at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1452 (1997).

doctrines he regards as “but a means to achieve the same goal,”<sup>27</sup> that of realizing “constitutional norms dealing with the level and distribution of important goods.”<sup>28</sup> In the United States, federal doctrine on these issues converges to divest government of responsibility for the well-being of its citizens: the Federal Constitution is interpreted to hold no affirmative right to government assistance;<sup>29</sup> the state action doctrine immunizes private activity from redistributionist concerns;<sup>30</sup> and judicial review endorses the legislature’s hands-off attitude toward economic matters by largely deferring to majoritarian decisions.<sup>31</sup>

New Jersey has charted a different path than the federal course, one that points to a richer and more robust understanding of the needs of citizenship and of the interdependence of private and public realms. The New Jersey Supreme Court not only has attempted to enforce social and economic rights as a matter of state constitutional law, but also it has refused to enforce common law entitlements when they interfere with activities that are vital to democratic life—speech, association, privacy, and the stability of adequate housing—even when these issues arise in such mundane situations as card counting at a casino. In an analogous context, Judith S. Kaye, Chief Judge of the New York Court of Appeals, aptly refers to “a common law infused with constitutional values.”<sup>32</sup>

Despite often expressed concerns that social and economic rights draw a judiciary into the thicket of political controversy, the New Jersey Supreme Court has done its work without loss of prestige or capital.<sup>33</sup> The court’s approach, in contrast to federal constitutionalism as currently understood, offers important lessons of how law might effectively mitigate the distorting effects of wealth

---

<sup>27</sup> Tushnet, *supra* note 13, at 444.

<sup>28</sup> *Id.* at 443.

<sup>29</sup> See Hershkoff, *supra* note 2, at 1133.

<sup>30</sup> See Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 433 (1990) (explaining that the state action doctrine, coupled with a negative rights conception of the Fourteenth Amendment, shields the government from “any affirmative duty to facilitate the exercise of a fundamental right against state or private infringement”).

<sup>31</sup> See Hershkoff, *supra* note 2, at 1157–59.

<sup>32</sup> Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 738 (1992).

<sup>33</sup> See G. Alan Tarr & Robert F. Williams, *Decidedly Co-Equal: The New Jersey Supreme Court*, <http://www-camlaw.rutgers.edu/statecon/occpap1.pdf> (last visited Jan. 8, 2006) (observing that the New Jersey Supreme Court has not faced “serious political repercussions” and that “[n]o governor has refused to reappoint sitting justices because of disagreements with their decisions, and even the Court’s most controversial rulings have not been overturned by constitutional amendment”).

2006]

New Jersey's Positive Rights

559

on democratic values.<sup>34</sup> As an aspect of state constitutional tradition, the court's interpretive stance comprises a significant trait that other states might aspire to emulate.

---

<sup>34</sup> See Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1371-74 (1993) (discussing the ways in which private wealth can undermine democratic values).