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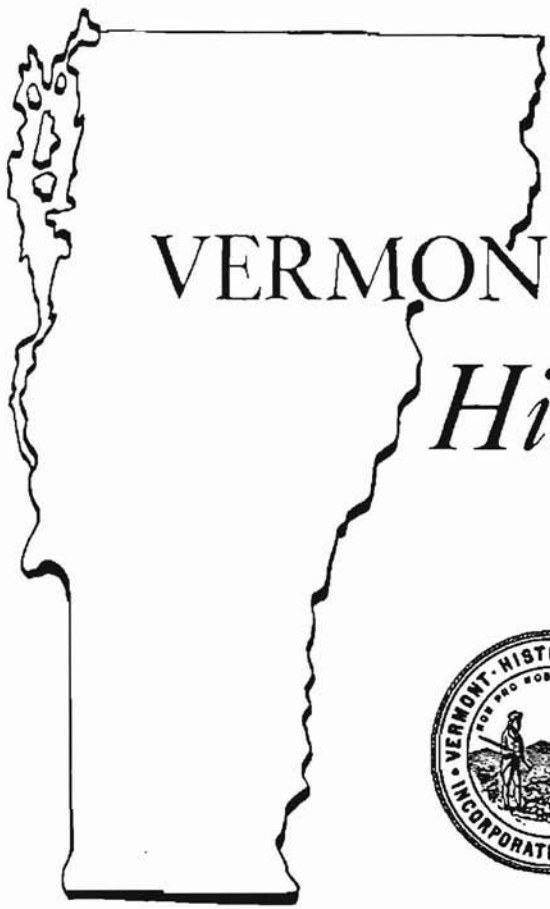

VERMONT *History*

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Clio in the Courtroom

By THOMAS L. HAYES

This printed version is based on a transcript of Justice Hayes's oral presentation to the Vermont Historical Society's conference, "Clio in the Courtroom," held April 5, 1986. While I have deleted repetition, transitional clauses characteristic of speech, and extraneous words, I have tried to render the words of Justice Hayes as faithfully as possible. I would like to thank Sam Hand and Charon True for their help in locating the case reports and legal articles mentioned by Justice Hayes, which are listed at the end of this article. Marshall True, ed.

As I was writing the *Jewett* opinion and reflecting on the state constitution, my mind turned to some of the great lawyers of the past of whom it could be said, as Milton said of Shakespeare, "Thou hast created in thy wonder and astonishment a monument." I thought first of Judge Theophilus Harrington, presiding over a court in Vermont, who was accosted by a slave owner seeking to recover a slave who had run away to Vermont. Judge Harrington asked the slave owner, "What proof do you have?" The slave owner produced a bill of sale and the judge asked, "Is that all?" When the slave owner responded, "What more proof do I need?" Judge Harrington said, "A bill of sale from Almighty God." I think this was an assertion of state judicial independence, a sense that because the Vermont constitution abolished slavery Vermonters did not have to acknowledge property rights in slaves.

Working on the *Jewett* opinion, I also thought of Thomas Jefferson, a Virginia lawyer, who wrote the imperishable words of the Declaration of Independence, and John Adams, a Massachusetts lawyer, who had the courage to defend Captain Preston who was charged with crimes arising out of the Boston Massacre. But chiefly I thought about William H. Seward. In 1846 Seward took on the unpopular defense of a free black named [William] Freeman. Freeman, who was both deaf and mentally

incompetent, had been charged with the murder of four people outside Auburn, New York, in 1846. Mobs had threatened Freeman, and the sheriff had narrowly avoided a lynching. As mobs howled, Seward's friends advised him about the adverse effects this case might have on his career. Seward ignored the cries of the mob and the advice of his friends and gave Freeman the full measure of his advocacy. He told the jury that in a civilized state even the most degraded human was entitled to a fair trial and in his closing Seward said; "In due time, gentlemen of the jury, when I shall have paid the debt of nature, my remains will rest here in your midst with those of my kindred and neighbors. It is very possible that they may be unhonored, neglected, spurned. But perhaps years hence, when the passions and excitement which now agitate this community shall have passed away, some lone exile, some Indian, some Negro, may erect over them a humble stone and thereon this epitaph, 'He was faithful.'" Seward, of course, went on to be Secretary of State for Abraham Lincoln and after his death the words "He was faithful" were etched upon his marble tombstone.

Are we men and women of the legal profession lawyers in the great tradition of Seward? Are the historians here in the great tradition of Seward? Are those laypeople who are here in the great tradition of Seward? Would we face our duty in a time such as that? We are here, I think, because we are concerned about the duty that is ours—as judge, as lawyer, and as citizen.

Briefly the message of the *Jewett* opinion was to tell lawyers in Vermont, "Don't always look to the federal cases; look to them, but if they don't answer your problem look to your Vermont constitution. Indeed, look to it first." I think we have too long looked to the Potomac as the ultimate source of redress for our rights, for safeguarding our liberties. We had forgotten that we should have an element of state judicial independence. On the supreme court, we were concerned about the decline of federalism and state judicial opinion. We saw lawyers come into court familiar with all the federal cases; they could talk about *Mapp v. Ohio*, or *Leon* or *Gideon* but they never did any analysis of the Vermont state constitution.

My great interest in the Vermont constitution developed about ten years ago. [Justice William H.] Bill Hill and I used to talk about cases that had been lost—in our judgment—because lawyers had not looked to the language of their own state constitution. Even on the supreme court we saw cases lost because attorneys either had not briefed or had inadequately briefed the Vermont constitution.

On the supreme court we debated what to do about this. I did not want our court to be known as the court that allowed the accused to go to jail

because a lawyer was not fully prepared. I believe that a court is more than a passive broker between conflicting interests. A court supervises the administration of justice and if defendants were losing their liberty and attorneys were risking malpractice suits because the state constitution had not been briefed when it was a potential form of relief, we had to act. There was some discussion on the court about publishing a law review article advising lawyers to look to the state constitution, but I had the feeling that if we took that course the article would be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school. I believed an article would not get our message across. Ultimately the court agreed that if we were to tell our lawyers: "Look to your Vermont constitution and, when you do, brief it adequately," we could do so only in a judicial opinion.

Also at the time I wrote the *Jewett* opinion, the problem that is addressed extended beyond the Vermont bar into law schools and legal scholarship. The last major treatise on state constitutional law was written in 1927, and only about twelve law schools in the country were teaching anything about state constitutional law. Remember what Jefferson said? "A nation that expects to be ignorant and free expects what never was and never will be." The *Jewett* opinion was intended as a message to the Vermont bar, the Vermont Law School, and law schools throughout the country that a revival of state judicial independence was needed. Some states had already asserted that their constitutions afforded their citizens rights greater than those existing under the federal constitution and we thought that law schools should start telling their students that and courts should tell lawyers that.

Why were we so concerned with state constitutional law? After 1972 we had seen a whittling away of the federal protection afforded the accused in criminal cases. The rights of the defendant had been attacked on many fronts; as Professor Donald Wilkes suggests: "First, the United States Supreme Court has weakened the Selective Incorporation Doctrine, that Bill of Rights provisions extended to the state have just as broad a meaning in state courts as they have in federal courts." Moreover, Wilkes writes, ". . . the court has severely restricted the scope of federal rights criminal defendants are guaranteed by the Bill of Rights and by the Fourteenth Amendment." In the fifteen years prior to the *Jewett* opinion, state appellate courts issued more than 250 opinions holding that the constitutional minimums provided by the national Supreme Court interpreting the federal constitution were insufficient to satisfy the most stringent requirements of state law.

Unfortunately, this resurrection of state judicial independence is at the periphery of the scholar's vision. If lawyers are not skilled in briefing state

constitutional issues, if law students are not taught about their state constitutions, and if judges are not familiar with briefs based on state constitutions, we face a crisis in defense of our liberties. I think it is up to us—lawyers, scholars, and judges—to decide whether the coming decade will be the golden age of liberty or the years the locusts have eaten. I am afraid that the United States Supreme Court will continue to relax the incorporation doctrine, and that our liberties will receive less protection under the federal constitution. Hypothetically, the Supreme Court could decline to apply selected provisions of the federal Bill of Rights in the states as fully as it applies them to the federal government. If rights are cut back under the federal constitution, where can we find protection?

The movement for state judicial independence argues that we should look to our state constitutions. We have become so accustomed to the incorporation doctrine that we have almost come to believe that it has been with us since the adoption of the Fourteenth Amendment in 1868. But it was not until 1897 that the court first used the Fourteenth Amendment to extend some Bill of Rights protection to the states. Moreover, it was more than two decades later when the court extended First Amendment rights to freedom of speech to the states. Finally in 1949, in *Wolf v. Colorado*, the Fourth Amendment, prohibiting unreasonable searches and seizures, was extended to provide protection against state action.

Yet in 1901, the Vermont Supreme Court, looking at the state constitution, held that a letter found during a warranted search for stolen goods had to be excluded from evidence because it compelled the accused to be a witness against himself. Although the court later overruled that decision, in writing the *Badger* decision Justice William Hill returned to that 1901 decision and, in one of the more significant cases in the field of search and seizure, gave new vitality to that old Vermont Supreme Court case.

More than a century before *Gideon v. Wainwright*, the Wisconsin Supreme Court, on the basis of its state constitution, required counties to appoint counsel for indigent defendants at county expense. Similarly the holding in *New York Times Company v. Sullivan* was foretold many years earlier by interpretations of free speech protections in state constitutions by state courts in Kansas and Illinois. Indeed even before John Marshall became chief justice of the Supreme Court, state supreme court justices had used the doctrine of judicial review at the state level in defense of civil liberties. I bring these matters to your attention because too many of us believe that state constitutional law reflects federal decisions when the reverse has often been true. We have too long regarded the federal government as the great umbrella.

One significant difference between the Vermont constitution and the

federal constitution is that the latter presents the Bill of Rights in terms of what the government may not do while the former makes affirmative grants of power to individuals and positive declarations of their rights. Consequently, state constitutions, like Vermont's, can be seen as citadels to protect citizens against private interference as well as state action. For example, under 42 U.S. Code 1983, if you bring an action claiming interference with your federal constitutional rights you must prove state action to recover a judgment or to get an injunction. Do you need to prove state action under the Vermont constitution? If your liberties have been transgressed by a corporation, by a union, or by a private association do you have no redress under the Vermont constitution? That is a question that has never been decided by the Vermont Supreme Court.

I believe that state constitutional provisions are fountainheads that provide new causes of action and new defenses for civil litigants. The U. S. Supreme Court has held that the First Amendment does not protect the right to hand out political leaflets in a privately owned shopping center. However, courts in New Jersey and California have held that under their state constitutions the distribution of political leaflets is protected in quasi-public areas like university campuses and shopping centers. There has been no indication that these state constitutional decisions about free speech should be struck down on the federal level. Justice Stewart G. Pollock of the New Jersey Supreme Court, one of the leaders in the arena of state constitutional law, has argued "A state may add to those [federal] rights but may not subtract from them. The Bill of Rights in the United States constitution establishes a floor for basic human liberty. To carry forward that metaphor, the state constitution establishes a ceiling. Although a state may supplement federally granted rights, it may not diminish them through a more restrictive analysis of the state or federal constitution." A host of new civil actions and a like number of new criminal defenses have arisen around the country based on the notion that state constitutions establish a ceiling for individual rights and liberties.

Many state courts have given criminal suspects greater rights under their constitutions than they have under the federal constitution. Alaska, California, and Hawaii have granted greater safeguards to the criminal suspect regarding the scope of a search when there is a lawful arrest after a traffic stop. These states have specifically rejected following the United States court decision in *U.S. v. Robinson*. In Montana, the accused at trial may contest a search conducted by a private party; no such contest is sanctioned by federal case law. California, Hawaii, and Pennsylvania, on state constitutional grounds, have refused to go along with the Supreme Court doctrine that statements taken in violation of *Miranda* could be used to impeach a defendant who took the witness stand. Eight states

have said that in determining whether a confession by a defendant was voluntary there has to be proof beyond a reasonable doubt.

Additionally, some state courts have extended the legitimacy of the expectation of privacy to include telephone billing records, unlisted telephone numbers, and bank records. In these states, government probing into an individual's affairs is far more limited than it is under federal protection.

What does this tell us about Vermont's constitution? I have a number of comments. Our Vermont constitution talks about no Vermonter being compelled to give evidence against himself while the federal constitution speaks about no one being compelled to give testimony against himself. What does it mean that the men who drafted Vermont's constitution used the word "evidence," not "testimony?" Does evidence extend beyond testimony? Or is evidence just a loose way of referring to testimony? The Supreme Court of Georgia looked at similar language in its constitution and concluded that evidence meant more than testimony. Also the Vermont constitution's search and seizure provision does not include the word "unreasonable" as the Fourth Amendment of the United States constitution does. Do these provisions, therefore, have a different meaning? Also the Vermont search and seizure provision contains the word "possessions," and the Fourth Amendment does not. Indeed the U.S. Supreme Court has used the absence of the word "possessions" to deny certain Fourth Amendment protections. Does this imply that if "possessions" were there that the rights sought to be protected might have been secured? In this area is the Vermont constitution more protective of the individual? Similar questions might be raised about Vermont's free speech provisions or its freedom of religion provisions where the wording is totally different than the wording under the federal constitution. Many of us who have looked at the state constitution believe that it offers a wonderful opportunity for lawyers to help educate the bench and to help educate the public as to when and where the scope of rights afforded by that document are greater than under the federal constitution. Vermont has a fine constitution. In the fields of search and seizure, self-incrimination, and free speech, our constitution is the equal of any and the superior to a great many, and it does not make much sense when you are bringing a lawsuit or you are involved in a criminal case to look only to the federal protections.

Lawyers and laymen need to work together to shed light on the constitution of Vermont. I have believed ever since I was a young man that one person can make a difference and that one person might well be you. It might be the historian who uncovers some bit of information that will illuminate a particular provision of the Vermont constitution; it might be a citizen and history buff who could tell us what our founding fathers

meant when they put those provisions in the Vermont constitution that protect our liberties. There are a thousand ways that we can do our part and I feel that each one of us can make some difference.

The tiny steps we take in Vermont may be seen as rivulets coming down a mountain, which along the way will join others to make a stream, and that stream will join still others to become a larger body of water, and so it is with the small advances we make together for the expansion of human liberty. What happens in Vermont will be looked at in Rhode Island when it has a similar problem, and so on. Decisions taken under Vermont's constitution may give courage to another state to come to the same or similar resolution under its constitution. We should not always look to Washington, distant Washington, for guidance to interpret the law. I hope that it will never be said of us that liberty vanished because we failed to stretch forward a saving hand while there was still time. Perhaps history will say of us that, working together, members of the historical society, students, lawyers, and judges kept liberty aglow in Vermont at a time when the flame flickered in Washington. I should like it to be said of us—as it was once said of Seward—"They were faithful."

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*Justice Hayes did not document his speech. I have provided citations to representative works by the authors he mentioned and to the court cases he discussed. M.T., ed.