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The Power of State Constitutions in Protecting Individual Rights

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The Power of State Constitutions in Protecting Individual Rights*

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There may appear to be a species of heresy in mentioning alternatives to the United States Constitution during the period when we are celebrating the bicentennial of that remarkable document. My only response to any such criticism is that human liberty is so fundamental that every avenue for its preservation must be explored. As Justice Jackson wrote, "[w]e can afford no liberties with liberty itself."[1]

Many trees have been felled to make the paper, and much ink is being spilled, to provide the recent published articles extolling the undoubted virtues of the United States Constitution. This is good. I applaud the inflated interest in our great charter. Indeed, one hopes some of the homage is heard and understood in a number of relatively dark places in our nation.

There are times, however, when dependence on the United States Constitution does not meet all the convolutions of a problem. Under those circumstances one may find it expedient to look up to international instruments, or down to state constitutions. Since I have been asked to discuss the latter, I will not dwell at any length on the former, except to note that there have been times, and there will be more, when courts will rely on international documents that have the force of treaties for authority to protect individual rights.

Let us discuss the trend in state constitutional law. In so doing my comments will be somewhat of a potpourri. Even if I were presumptuous enough to believe I could, of necessity I will have no opportunity to delve into any aspect in depth.

At the onset let me be realistic and recognize there are some ominous signs in the field of state constitutional law. Rising crime rates, particularly violent crime, is not the most healthy environment in which to suggest the virtue of expanding individual rights. A

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** Justice of the California Supreme Court

1. United States v. Spector, 343 U.S. 169, 180 (1952).

heinous assault, forcible rape or child molestation arouse little public compassion. In such circumstances some state legislators yield to public clamor and seek to provide for the accused only the barest minimum of basic rights. The minimum, of course, is in general what the federal constitution and the United States Supreme Court provide.

Not only do legislators respond to what they perceive to be a public demand, but in those states which have direct legislating by the people—through the initiative—often there is such direct action. We in California had that experience when a measure, known as Proposition 8, was drafted by emotionally-charged groups, placed on the ballot, given the seductive title of "Victims' Bill of Rights," and, well, who could oppose rights for victims? That the measure turned the clock back on decades of thoughtful legislation and judicial interpretation was given little, if any, consideration.

Yet this 200th anniversary year, as we observe the masterful product and intent of our constitutional architects, we have a duty to contemplate their concept of a federal republic. Basically, they declared time and again that they were creating a national government of limited powers, that it was the states which had the duty to protect the well-being of individuals.

True, a Bill of Rights—ten amendments—was added shortly after 1787 at the insistence of those who recalled the tyranny of the colonial masters and would not subscribe to the Constitution unless the criminally accused were assured due process and other minimum guarantees. But at no time did the framers place a limit, or a cap, on the protections the states could provide their citizens. Indeed, the implication was clear that they fully anticipated the states would act. As Justice Brandeis put it many years later, the states may be political science laboratories, to experiment, to improvise, to test new theories. If a state experiment succeeds, others may follow. If it fails, only one of 50 states is affected.[2]

One lesson we can learn is this: our founding fathers had faced violence in the revolutionary war, just as we face violence in the streets today; our founding fathers experienced quartering of soldiers in their homes and rape of their wives and daughters, just as we experience invasion of our homes by robbers, burglars and rapists; our founding fathers had their property taken by force without representation, just as we have our property forcibly taken by marauders.

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2. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Yet our founding fathers thought and spoke in terms of protecting not merely all citizens by a requirement of due process, but primarily those who are accused of crime. Yes, they were concerned about victims. But they conceived of the accused as the potential victim of government, thus to him went the guarantee of rights. But, as I shall indicate, the guarantees were only the bare minimum.

Take, for example, the right of privacy. In courts throughout the land, that somewhat elusive concept is being urged and generally accepted. It must be placed high on any agenda.

I find it significant that in many respects state constitutions protect individuals more expansively than does the United States Constitution. For example, although the High Court has on occasion found privacy to be among so-called penumbral rights, there is no specific guarantee contained in the federal Bill of Rights. Article I, section 1, of the California Constitution declares that among the inalienable rights are: "pursuing and obtaining safety, happiness, and privacy." That is typical of a number of other state constitutions.[3]

For a scenario on this subject, let me observe that a police officer or a public prosecutor may walk into a bank and, with no authority of process, demand to examine the bank records of a named individual or corporation. No constitutional violation, says the United States Supreme Court in *United States v. Miller*.[4] But some states have pointed out that one's cancelled checks, loan applications, and other banking transactions are a mini-biography, that one reasonably expects his bank records to be used only for internal bank processes and therefore an examination of them violates the state constitutional right of privacy, unless the records are obtained by a warrant or subpoena.[5] Does one reasonably expect privacy in his credit card records, or his unlisted telephone calls? Tune in later.

To most of us, learning and knowledge are our most prized possessions. Yet the United States Supreme Court has never recognized education to be a fundamental right. Indeed, in *San Antonio School Dist. v. Rodriguez*[6] the court in 1971 specifically held that education is not a fundamental right, and it has never retreated from that position. Just last year it reached a similar conclusion in *Papasan v. Allain*[7]. The court has come no closer than *Plyler v. Doe*[8] in which it

3. *See, e.g.*, ILL. CONST. art. I, § 6.

4. 425 U.S. 435, 440 (1976).

5. Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

6. 411 U.S. 1 (1973).

7. 106 S. Ct. 2932 (1987).

8. 457 U.S. 202 (1982).

applied a higher scrutiny standard to a statute that denied basic education to alien, undocumented school-age children, but even under that standard it reiterated that education is not a fundamental right under the U.S. Constitution.

Contrast that result with the growing number of states, since Massachussetts provided the first public school system in 1647, that have recognized the inherent value of public education. California, in its celebrated *Serrano v. Priest*[9] case openly broke away from the high court reticence and firmly declared that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest."[10]

Connecticut, Michigan, Wyoming, Arizona, Mississippi, Washington, Wisconsin and West Virginia have reached the same fundamental right conclusion.[11]

High on the constitutional agenda in the next few years will be *Miranda*,[12] and what, if anything, to do about it. I note the Supreme Court has taken over the *Patterson*[13] case from Illinois, but the issue there appears to be whether *Miranda* gives enough protection to a defendant, not too much.

Attorney General Meese has taken an extreme anti-*Miranda* position, rejecting the right of a suspect to terminate interrogation either by saying he wants to do so or that he desires to have the advice of a lawyer. Instead, the recent report of his office calls such persons uncooperative suspects and believes the police should be able to undertake persuasion to induce the suspect to change his mind and talk—translation: to confess.

There is a long list of doubters that this effort of the Attorney General will succeed. The overruling of precedent prevailing for two decades or more is a quiet, slow, patient process. It is usually accomplished by steps, often in a succession of cases. It is seldom done by press release.

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9. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

10. *Id.* at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618.

11. Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Milliken v. Green, 389 Mich.1, 203 N.W.2d 457 (1972); Washakie Co. School Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Clinton Municipal Separate School Dist. v. Byrd, 477 So.2d 237 (Miss. 1985); Seattle School District v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

12. Miranda v. Arizona, 384 U.S. 436 (1966).

13. Illinois v. Thomas, 116 Ill. 2d 290, 507 N.E.2d 843 (1987), *cert. granted sub nom.*, Patterson v. Illinois, 108 S. Ct. 227 (1987).

In short, I believe, to paraphrase Mark Twain, the death of *Miranda* is greatly exaggerated. But assume I am wrong. After all, reversals of former precedent are not unprecedented. Remember *Lochner v. New York*,[14] *Pace v. Alabama*,[15] *Plessy v. Ferguson*,[16] *Minersville v. Gobitis*,[17] *Swain v. Alabama*,[18] and others.

Bear in mind that when *Miranda* was announced, many of the states were reluctant to accept it. Some were dragged kicking and screaming into conformity. But conform they did. The question will be, if *Miranda* expires, will the states revert to their pre-*Miranda* policy of anything-goes-at-the station house, or will they choose to insist upon some form of *Miranda*-type warning under state constitutional authority?

I am convinced that unless the High Court should rule a *Miranda* warning is absolutely forbidden—which seems utterly inconceivable—many, if not most, states will adhere to the state rules which they adopted to conform to *Miranda*. It has taken two decades, but law enforcement officers in the states have become reconciled to giving appropriate warnings to suspects. And trial judges understand they must reject statements obtained from defendants who were not warned. Many of the state decisions have been based on state constitutions.

For example, in *Harris v. New York*[19] the Supreme Court permitted statements obtained in violation of *Miranda* to be used for impeachment purposes. A number of states have held that if a statement offends *Miranda*, it is useless for all purposes. Here is a forthright declaration of state independence in *People v. Disbrow*:[20]

> We therefore hold that the privilege against self-incrimination of article I, section 15, of the California Constitution precludes use by the prosecution of any extrajudicial statement by the defendant, whether inculpatory or exculpatory, either as affirmative evidence or for purposes of impeachment, obtained during custodial interrogation in violation of the standards declared in *Miranda* and its California progeny. Accordingly, we . . . declare that *Harris* is not persuasive authority in any state prosecution in California.[21]

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14. 198 U.S. 45 (1905).
15. 521 F.2d 812 (5th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976).
16. 163 U.S. 537 (1896).
17. 310 U.S. 586 (1940).
18. 380 U.S. 202 (1965).
19. 401 U.S. 222 (1971).
20. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).
21. *Id.* at 113, 545 P.2d at 280, 127 Cal. Rptr. at 368.

To the same effect is *State v. Santiago*,[22] a Hawaiian case, and *Butler v. State*,[23] a Texas case. Note this quotation from *Butler*:

> *Harris*, of course, in no way obligates [state courts] to overturn prior decisions as a matter of state criminal procedure. . . . Therefore, we cannot agree with the [prosecution's] contention despite the natural temptation to rush to accept the *Harris* rationale. The beauty is only skin deep.[24]

Another hole was dug in the exclusionary rule by the United States Supreme Court in 1984. In *United States v. Leon*[25] the Court announced the "good faith" exception to the exclusionary rule: suppression of evidence from the prosecution's case-in-chief is, as a matter of federal law, appropriate only if the officers were dishonest in preparing their affidavit for a search warrant.

The good faith doctrine was expanded to include reasonableness in *Maryland v. Garrison*.[26] There the Baltimore police actually invaded the wrong apartment, but in a 6-3 vote, Justice Stevens held for the court that the validity of the search depended on whether the officers' failure was "objectively understandable and reasonable."[27]

Several state courts, on state constitutional grounds, have declined to follow *Leon* and probably will do so as to *Garrison*. All the cases to date involved searches conducted pursuant to a warrant later determined to be invalid. Let me enumerate a few.

In *State v. Novembrino*,[28] the court, in a lengthy opinion, refused to follow *Leon* because: (1) its long run effect will be to undermine the integrity of the warrant process by diminishing the quality of evidence presented in search warrant application; (2) it "will ultimately reduce respect for and compliance with the probable-cause standard"; (3) it is inconsistent with the state constitution as interpreted; (4) there was no evidence that the criminal justice system was impaired by the requirement of probable cause; and (5) there is no satisfactory alternative to the exclusionary rule.[29]

The New York court in *People v. Bigelow*[30] declined to follow *Leon* because it: (1) frustrates the exclusionary rule's purposes; (2)

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22. 53 Hawaii 254, 492 P.2d 657 (1971).
23. 493 S.W.2d 190 (Tex. Crim. App. 1973).
24. *Id.* at 198.
25. 468 U.S. 897 (1984).
26. 107 S. Ct. 1013 (1987).
27. *Id.* at 1019.
28. 105 N.J. 95, 519 A.2d 820 (1987).
29. *Id.* at , 519 A.2d at 854-56.
30. 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).

places a premium on the illegal police action; and (3) provides a positive incentive for "others to engage in similar lawless acts."[31]

The Michigan court in *People v. Sundling*[32] rejected *Leon* because: (1) the magistrate's decision would, as a practical matter, be insulated from appellate review; (2) the exception would result in increased illegal police activity; and (3) the Court's claim that the exclusionary rule is not working is not supported—indeed, is contradicted—by the evidence.[33]

In *Stringer v. State*,[34] a Mississippi case, Justice Robertson declared that (1) the exclusionary rule is necessary so that it is "assur[ed] that issuing magistrates take seriously their responsibilit[y]" to ensure that people are free of unconstitutional searches; (2) if the exclusionary rule "ain't broke, why fix it?"; and (3) that there is "neither a need for change nor a reasonably effective and available alternative".[35] In addition, Justice Robertson suggested that *Leon* undermines the integrity of the judicial process.[36]

The Wisconsin court in *State v. Grawein*[37] refused to employ *Leon* because the state constitution and prior Wisconsin Supreme Court decisions interpreting it hold that the receipt into evidence of the fruits of an invalid search warrant violates the defendant's state constitutional rights.[38]

It would appear that if state courts can find other ways of rejecting *Leon* and retaining the rule of excluding illegally obtained evidence, they will do so.

Another significant federal-state conflict arises over the use of a defendant's pretrial silence. All jurisdictions agree that, as held in *Griffin v. California*,[39] the silence of a defendant, under a claim of privilege against self-incrimination, may not be admitted in the prosecution's case-in-chief. But there is some divergence as to the use of such silence for impeachment purposes.

Jenkins v. Anderson[40] approved the prosecutor's use for impeachment purposes of a defendant's failure to surrender for two weeks,

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31. *Id.* at 424, 488 N.E.2d at 458, 497 N.Y.S.2d at 637.
32. 153 Mich. App. 277, 395 N.W.2d 308 (1986).
33. *Id.* at 292, 395 N.W.2d at 314.
34. Stringer v. State, 491 So.2d 837 (Miss. 1986) (Robertson, J., concurring).
35. *Id.* at 849-51.
36. *Id.* at 850.
37. 123 Wis. 2d 428, 367 N.W.2d 816 (1985).
38. *Id.*
39. 380 U.S. 609 (1965).
40. 447 U.S. 231, 235-38 (1980).

when he claimed on the stand that the killing was in self-defense. Most state cases agree, on a theory that the silence must amount to an invocation of Fifth Amendment rights in order to be excluded.

After arrest, however, the dichotomy depends on whether *Miranda* warnings have been given. If so, *Doyle v. Ohio*[41] controls. Obviously it would be unconscionable to penalize a defendant for remaining silent after he has been told by the authorities that he has a right to refuse to talk.

However, if *Miranda* warnings have not been given, the U.S. Supreme Court held in *Fletcher v. Weir*[42] that a defendant's constitutional rights are not violated by permitting him to be cross-examined about his pre-*Miranda* silence. The court reasoned that because there were no affirmative assurances as a result of the failure to give a *Miranda* warning, no fundamental unfairness would arise from allowing the defendant's silence to be used for impeachment purposes.

Courts in Washington, Connecticut, Alaska, New Jersey, Pennsylvania, Texas and California reach a contrary conclusion.[43] The latter relied entirely on the state Constitution.[44]

Several of the foregoing state cases feared that to allow the defendant's silence to be used for any purpose would invite the police to dispense with *Miranda* warnings. They also expressed concern that silence used for impeachment would likely be used by the jury in determination of guilt.

A conflict is inevitable between national and state standards in the field of obscenity. Under the U.S. Supreme Court rubric from *Miller v. California*,[45] material is obscene if (1) it depicts sexual conduct in a patently offensive manner, (2) the average person, applying contemporary state standards, would find that it, taken as a whole, appeals to a prurient interest in sex, and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.[46]

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41. 426 U.S. 610, 616-20 (1976).

42. 455 U.S. 603 (1982).

43. Connecticut: State v. Leecan, 198 Conn. 517, 504 A.2d 480 (1986) (relying on principles of evidence rather than on the Connecticut Constitution); Texas: Sanchez v. State, 707 S.W.2d 575 (Tex. Crim. App. 1986); Washington: State v. Davis, 38 Wash. App. 600, 686 P.2d 1143 (1984); Alaska: Nelson v. State, 691 P.2d 1056 (Alaska Ct. App. 1984); Pennsylvania: Commonwealth v. Turner, 499 Pa. 579, 454 A.2d 537 (1982); New Jersey: State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1976).

44. People v. Jacobs, 158 Cal. App. 3d 740, 751, 204 Cal. Rptr. 849, 857 (Cal. App. 2d Dist. 1984).

45. 413 U.S. 15 (1973).

46. *Id.* at 23-25.

Recently in the case of *State v. Henry*[47] a proprietor of an adult bookstore was convicted after his entire inventory was seized in a police raid. The Oregon Supreme Court declared that its state Constitution was written by "rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others."[48] Oregon's pioneers intended to protect freedom of expression "on any subject whatever," including the subject of sex. In rejecting the *Miller* rule, the court declared "[i]n this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.'"[49]

There is no better example of how the states can be laboratories for development of the law than the fate of *Swain v. Alabama*.[50] In that case the majority of the United States Supreme Court held that there could be no limitations whatever on the exercise of peremptory challenges.

A modest concession was made if a defendant could demonstrate a long pattern of discriminatory use of the challenges.

This, of course, was an utter impossibility. How could a defendant, while jury selection was underway, demonstrate that the prosecutor had employed discriminatory tactics in x-number of previous cases in which, of course, this defendant was not involved and in which the racial characteristics of previous jurors was not recorded?

California specifically rejected *Swain* in a case entitled *People v. Wheeler*.[51] The state court held that there could be a limitation on peremptory challenges if they were employed for a discriminatory purpose. The method of ascertaining the systematic exclusion of a cognizable group was described in detail, and if a prima facie case of discrimination was evident, the trial judge could call on the prosecutor to explain each of his challenges. If he flunked that test, the entire jury panel was to be excused and a new panel brought in to start the proceedings over. Massachusetts adopted much the same procedure[52] and a number of other states have acted similarly.

Lo and behold, last year in *Batson v. Kentucky*[53] the United States Supreme Court admitted that *Swain* is not workable, and

47. 302 Ore. 510, 732 P.2d 9 (1987).
48. *Id.* at 523, 732 P.2d at 16.
49. *Id.* at 525, 732 P.2d at 18.
50. 380 U.S. 202 (1965).
51. 22 Cal. 3d 258, 583 P.2d 748 (1978).
52. Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979).
53. 476 U.S. 79 (1986).

finally conceded that the use of peremptory challenges for racially discriminatory purposes must not be condoned. This suggests the old adage: wisdom too often never comes, so one ought not to reject it merely because it comes late. It also demonstrates how state courts can have a significant effect on the pattern of the law, even federal-made law.

Motor vehicles present a particular problem as courts at every level grapple with the boundaries of permissible searches.

If a person is stopped by a police officer for a simple traffic violation, the motorist may find himself subjected to a full body search and his vehicle searched. No constitutional violation, says the United States Supreme Court in *United States v. Robinson*[54] and *Gustafson v. Florida*.[55] But Hawaii[56] and other states have found such police conduct offensive to state constitutional provisions unless the officer has articulable reasons to suspect illegal conduct other than the minor traffic infraction.

I must add that most courts have difficulty in ascertaining the limits, if any, of automobile searches in light of more recent federal opinions. If a vehicle is stopped on mere suspicion, may the car be searched without a warrant? The glove compartment? The trunk? A closed container in the trunk? And if the vehicle is a van with a bed, kitchen, closet, curtained windows, etc., does it have the qualities of an automobile because it is mobile, or is it entitled to the protections of a home because one lives in it? These are areas in which the states are likely to reach independent and varying conclusions.

The right of police to inventory the contents of an impounded motor vehicle results in another conflict between United States Supreme Court and state court decisions. In *South Dakota v. Opperman*[57] the High Court held inventory searches of automobiles to be consistent with the Fourth Amendment. And in the recent case of *Colorado v. Bertine*[58] the court justified the inventory as a means to protect the police and garage attendants from subsequent false claims of theft.

Colorado, however, reached a different conclusion[59] as has California.[60] Since property could conceivably disappear prior to or during the inventory process, both states believed a simpler solution would

54. 414 U.S. 218 (1973).
55. 414 U.S. 260 (1973).
56. Hawaii v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).
57. 428 U.S. 364 (1976).
58. 107 S. Ct. 738 (1987).
59. People v. Bertine, 706 P.2d 411 (Colo. 1985).
60. People v. Mozzetti, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971).

be to merely lock and seal the automobile in a secure parking facility. The *Mozzetti* case was particularly egregious: the woman was not a criminal suspect, she had been in an automobile accident and had been taken to the hospital. It is difficult to justify the police searching her car trunk and examining a closed suitcase on the back seat, all on an inventory theory.

My favorite federal-state dichotomy is in the history of a not uncommon factual situation: a small, orderly group of citizens undertakes to pass out leaflets, or to solicit signatures on petitions, in a privately owned shopping center. The shopping center owners seek to prohibit that activity.

Obviously there is a built-in tension between two constitutional guarantees. On the one hand the citizens assert their right of freedom of speech, and the right to petition their government for a redress of grievances. On the other hand, the shopping center owner asserts his right to control his private property and to exclude all non-business related activity. In that conflict which right is to prevail?

In 1970, the Supreme Court of California held in *Diamond v. Bland*[61] that unless there is obstruction or undue interference with normal business operations, the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly free speech and petitioning activities on the premises of shopping centers open to the public. This, of course, is subject to reasonable time, place and manner restrictions.

On four occasions the shopping center owner sought certiorari and rehearing from denial of cert., and in each instance he was rebuffed by the High Court, with no votes noted to grant.[62] We had every reason to believe *Bland* was acceptable law.

Two years later, however, the Supreme Court took over an almost identical case from Oregon, and in *Lloyd v. Tanner*[63] held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center.

Back to the California Supreme Court came the *Diamond v. Bland* owners and asked to be relieved from the previous orders. A 4-3 majority of our court agreed we were bound by *Lloyd v. Tanner*.[64]

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61. Diamond v. Bland, 3 Cal. 3d 653, 477 P.2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 402 U.S. 988, *reh'g denied*, 404 U.S. 874 (1971), *reh'g denied*, 405 U.S. 981, *reh'g denied*, 409 U.S. 897 (1972).

62. *Id.*

63. 407 U.S. 551 (1972).

64. Diamond v. Bland, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

At this point I shifted gears. In our original opinion we had relied on the First Amendment to the United States Constitution, and to such cases as *Marsh v. Alabama*[65] and *Amalgamated Food Employees Union Local 590 v. Logan Plaza*.[66]

The second time around I urged the same result under "unmistakable independent non-federal grounds upon which our earlier opinion could have been based."[67] But for the moment a majority of our court retained consistency with federal law.

I said "for the moment," for five years later in 1979, a new majority of our court decided in *Robins v. Pruneyard*[68] that the free speech provisions of the California Constitution offer "greater protection than the First Amendment now seems to provide."[69]

The United States Supreme Court granted certiorari in *Robins v. Pruneyard*,[70] and I must confess we sensed doom to our theory of state constitutionalism. But, to our delight, the Supreme Court agreed with us, 9-0.[71] Justice Rehnquist wrote the opinion that declared the reasoning in *Lloyd v. Tanner* "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution . . . ."[72]

No doubt there is a growing interest in true federalism. There was a time when states' rights were associated with Orval Faubus and George Wallace barring the entrance of Blacks to public schools. We are long past that confrontational period.

Today states' rights are associated with increased, not lessened, individual guarantees. There is every indication, particularly since *Pruneyard*, that the Rehnquist court will defer to the states when they rely on state constitutional provisions. Thus I urge you to constantly look to your state Constitution, to its history and to its provisions.

Don't let anyone tell you that state Constitutions are merely redundant, even when their text is similar to that contained in the federal Constitution. Bear in mind that state charters did not get their inspiration from the United States Constitution. It was the converse: the framers of the federal charter adapted almost all of the Bill of Rights from the charters of the original states.

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65. 326 U.S. 501 (1946).
66. 391 U.S. 308 (1968).
67. *See supra* note 60.
68. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).
69. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 861.
70. 447 U.S. 74 (1980).
71. *Id.*
72. *Id.* at 81.

At the top of any agenda is a review of James Madison's words in The Federalist (No. XLV):

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State.[73]

Sound policy 200 years ago. Sound policy today.

73. THE FEDERALIST No. 45, at 292-93 (J. Madison) (Mentor ed. 1961).