



4-1-1978

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Supreme Court of California

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Recommended Citation

Satnley Mosk, *Contemporary Federalism*, 9 PAC. L. J. 711 (1978).

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Address

Contemporary Federalism

STANLEY MOSK*

I am not certain I envy young men and women who are about to become lawyers these days. The reputation of the legal profession is at a low ebb. You can always tell who is unpopular by noting those who become the butt of attacks from demagogic politicians, and these days politicians find they can hit the jackpot on the applause meter when they publicly flail away at lawyers. Rebuttal from the State Bar falls on deaf ears. Indeed, on a Richter scale of one to ten, lawyers rate at about a two, approximately the same as Rumanian tennis players and Canadian hunters of baby seals, perhaps a notch or two above used car salesmen and the endless stream of Watergate defendants who tell all—or almost all—for a fee, to become known as the Crook of the Month Club.

As we look ahead to the third century of American law, we must hope that all of us working together—instead of sniping at one another—can restore the former luster of our great profession, when we can once again point to a John Marshall rather than a John Mitchell, to more Harlan Stones, Hugo Blacks, Benjamin Cardozos, Earl Warrens and William O. Douglasses. There must be some out there, but they remain undiscovered.

We completed a rather memorable bicentennial year in 1976. It produced

* Justice of the Supreme Court of California. This is an address given by Justice Mosk at the Lou Ashe Symposium at McGeorge School of Law on March 18, 1978. Much of the material contained in the address was adapted from a lecture he delivered at the New York University Bicentennial Conference on April 28, 1976, and published in *AMERICAN LAW: THE THIRD CENTURY* (1976) (edited by Professor Bernard Schwartz).

its share of trivia, such as red-white-and-blue cosmetics, flag-draped dog food and star-spangled bikinis. But it did encourage those of us who are history buffs to revel in refreshing our recollection of the halcyon early days of our republic. I found myself pondering such phenomena as a nation in 1770 of a mere 2,205,000 people producing a Washington, two Adamses, Jefferson, Franklin, Tom Paine, Patrick Henry, Hamilton, Madison, John Jay, John Marshall, all learned, literate, enlightened men of character and integrity. Then with our more than 200 million people today, as we compare our contemporary leadership at all levels—even the potential leadership as far as one can see on the horizon—we must ask plaintively with Archibald MacLeish: “Where has the grandeur gone?”

I find myself concerned, too, in this year of 1978, that we are only six years from 1984, the cataclysmic year about which the Englishman George Orwell long ago warned us in his classic book entitled, simply, *1984*.¹ As Orwell described the era toward which he saw us plunging, by six years from now the world will be made up of three monster slave states, powerful, ruthless, constantly at war. Overworked and undernourished, deprived of past and future, the average citizen will be a mindless robot, existing in a world in which love is forbidden by government decree, hatred is aroused despite one’s will, and two-way television makes privacy a punishable crime.

To reflect upon what the Watergate defendants had in mind for us, to learn what some government agencies have been doing for us and to us in the name of national security, to hear the former head of the CIA still insist we must give up some of our liberties to preserve other liberties, implying someone determines which shall be destroyed and which preserved—all suggest that Orwell’s *1984* may yet be our destiny.

Nevertheless I am an eternal optimist. There will be no inevitability of 1984, so long as we maintain intact our legal system composed of an independent judiciary. Our profession has its shortcomings, revealed primarily by the bar and the bench themselves. Despite carping critics, members of the legal profession give every indication of doing their utmost to discover and to eliminate the deficiencies in our system, that is, those burdens that are not inherent in a democratic way of life.

A year ago last October the Society of American Law Teachers, a prestigious national organization of academicians, released a 31-page summary of Burger Court opinions² which added up to a conclusion that there is a pattern of closing the federal courthouse to “minorities, women, victims of consumer fraud, poor people, victims of legislative malapportionment,

1. G. ORWELL, *1984* (1949).

2. Society of American Law Teachers, Statement of the Board of Governors, Oct. 10, 1976.

environmentalists, prisoners, mental patients, victims of governmental irregularities. . . .”³ The cases supporting that conclusion were roughly categorized in this manner:

1. Those procedurally curtailing access to the federal court actions traditionally in those courts—these include the cases on standing and class actions.

2. Those requiring great deference to state court proceedings—these include restrictions on federal court injunctions against state enforcement and forfeiture of the right to federal habeas corpus review of constitutional defects in state court convictions.

3. Those denying the lower courts the power to fashion appropriate remedies for constitutional violations, including the grant of attorneys’ fees, as well as other decisions cutting back on a federal court’s power to redress or prevent harms by state officials.

That is a strong indictment and I shall not venture an opinion as to its accuracy. My bottom line is that for those who believe that to be the current trend, all is not lost—at least in such enlightened states as California.

For 173 of the 200 years of this republic a relentless tide of judicial authority has flowed from the states to the federal government. From John Marshall’s opinion in *Marbury v. Madison*⁴ in 1803 to very recent days, the highest courts in the several states were often reduced to the status of intermediate appellate tribunals, mere wayside stations on the route from trial courts to the Supreme Court. I do not for one moment suggest that this was entirely unnecessary or undesirable. Back in 1951 one learned commentator reviewed the somewhat dismal performance of state courts in enforcing provisions of their own constitutions and observed that “if our liberties are not protected in Des Moines the only hope is in Washington.”⁵

That observation turned out to be a prophecy. The Warren Court, from its inception in 1953, served as the midwife to a new design of constitutional law. The previous era had been characterized by a benign acceptance of racism, political rotten boroughs, disability of the poor, an Anthony Comstock approach to sexual matters, denial of universal suffrage, egregious imposition upon the rights of the criminally accused. Under Chief Justice Warren and his colleagues, the Court abandoned its apathetic approach to overt injustice in society and elected to employ the federal constitution to achieve a liberating and egalitarian impact in the areas of political opportunity, criminal justice, and racial equality.

As a result, the states were compelled to fall in line. Despite the furor

3. *Id.*

4. 5 U.S. (1 Cranch) 137 (1803).

5. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951).

over many of the decisions, notably in the areas of reapportionment⁶ and protection of the rights of criminal defendants,⁷ state courts swallowed their own prejudices, abandoned the dictates of stare decisis and obediently embarked upon the new course. Between *Mapp v. Ohio*⁸ in 1961 and *Benton v. Maryland*⁹ in 1969, the nation underwent what one commentator described as a "criminal procedure revolution."¹⁰

California's Supreme Court under Chief Justice Roger Traynor had anticipated the trend. California adopted the exclusionary rule¹¹ six years before the United States Supreme Court applied the *Wolf v. Colorado*¹² rule to the states in *Mapp v. Ohio*.¹³ Back in 1903 Iowa had anticipated *Weeks v. United States*¹⁴ by 11 years.¹⁵ But most states had been apathetic; they took their cue from the 1833 case of *Barron v. Baltimore*¹⁶ which declared: "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."¹⁷

Although there were a few state court evasions of the Warren Court reforms,¹⁸ ultimately the states adapted their criminal techniques to the High Court's requirements. Some results were labored, as, for example, applying the fourth amendment to a back-alley trash can,¹⁹ but in general a satisfactory accommodation was achieved. Police officers were taught how lawfully to enforce the law; trial judges became reconciled to admitting only legally obtained evidence.

Just as an era of peaceful coexistence seemed imminent, the post-Warren counterrevolution began. Few will gainsay the observation of Professor Wilkes that the current Supreme Court "is no longer a bold, innovative institution and has abandoned, for the moment at least, the role of keeper of the nation's conscience."²⁰ As indicated previously, I do not intend to venture a judgment on that course; perhaps it is wise and inevitable that we follow a period of hypertension with years of lowered expectations.

6. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

7. F. GRAHAM, *THE SELF-INFLICTED WOUND* (1970).

8. 367 U.S. 643 (1961).

9. 395 U.S. 784 (1969).

10. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 422 (1974).

11. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

12. 338 U.S. 25 (1949).

13. 367 U.S. 643, 655 (1961).

14. 232 U.S. 383 (1914).

15. *See State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903).

16. 32 U.S. (7 Pet.) 243 (1833).

17. *Id.* at 247.

18. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAND. L. REV. 260 (1972).

19. *People v. Krivda*, 5 Cal. 3d 357, 365, 486 P.2d 1262, 1267, 96 Cal. Rptr. 62, 67 (1971), *vacated and remanded per curiam*, 409 U.S. 33 (1972); 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973), *cert. denied*, 412 U.S. 919 (1973) (determined to have relied upon independent state ground).

20. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 421 (1974).

But what can reasonably be expected of state courts? Are they alternately to create and then to abandon doctrines of state authority as the tides on the Potomac ebb and flow?

Consider as an example the requirement that counsel be present at lineups. This rule was adopted by the Supreme Court in 1967 in *United States v. Wade*²¹ and *Gilbert v. California*²² under the frequently articulated theory that adversary criminal proceedings begin not in the courtroom but at the police station.²³ Justice Brennan, writing for the Court in *Wade*, emphasized the importance of the presence of counsel at “critical confrontations” and firmly declared that “we scrutinize any pretrial confrontation of the accused.”²⁴ And in *Stovall v. Denno*²⁵ the Court added unequivocally that “counsel is required at all confrontations” for identification.²⁶

I candidly admit to misgivings about the role of an attorney at a lineup, and I so expressed them in a dissent in *People v. Williams*²⁷ in 1971. But in a series of cases²⁸ involving all types of lineups our state court obediently followed directions from above. Manifestly, it seemed to us, “any” pretrial confrontation and “all” confrontations for identification implied no limitation to merely post-indictment proceedings. But along came *Kirby v. Illinois*²⁹ in 1972, and mirabile dictu the High Court found it to be “firmly established” that the right to counsel attaches only at the time judicial proceedings have been initiated.³⁰ “Any” and “all” have been translated to mean “very few,” for post-indictment lineups are rarely held, and when they are, it is merely for the purpose of refreshing identifications previously made. Now the right to counsel “is afforded the defendant where he least needs it.”³¹

The right to privacy is another area of concern. In 1927 Justice Brandeis wrote that “[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man.”³²

Consider, in that context, the result of the Supreme Court refusal³³ in 1976 to review a three-judge decision in *Doe v. Commonwealth’s Attorney*,

21. 388 U.S. 218, 236-37 (1967).

22. 388 U.S. 263, 273 (1967).

23. See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

24. 388 U.S. 218, 227 (emphasis in original).

25. 388 U.S. 293 (1967) (emphasis added).

26. *Id.* at 298.

27. *People v. Williams*, 3 Cal. 3d 853, 858, 478 P.2d 942, 945, 92 Cal. Rptr. 6, 9 (1971) (Mosk, J., dissenting).

28. Beginning with *People v. Forler*, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

29. 406 U.S. 682 (1972).

30. *Id.* at 688.

31. N.R. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS 33 (1972).

32. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

33. 425 U.S. 901 (1976).

*City of Richmond*³⁴ denying the right of privacy to consenting homosexuals. Apparently upon warrant or probable cause law enforcement officers are permitted nocturnal sweeps into bedrooms in search of sexual scofflaws. Thus the only hope of preserving this seemingly clear right of privacy remains with the more benign states that, some by court action and some by legislative enactment, have curbed local zealots who suspect Sodom and Gomorrah behind every keyhole.

That leads to the murkey field of obscenity which Justice Douglas once termed a "hodgepodge" that has "no business being in the courts." Everyone can agree that the term obscenity refers generically to speech, writing, cinematography and stage performances which deal with sex in such a manner as to put such forms of expression beyond protection of the first amendment. But beyond definition our problems compound.

For years federal and state courts grappled with the *Roth* rule,³⁵ which, had it not suffered an untimely demise, would have been 22 years old this year. To some the problem was simple. The Wisconsin Supreme Court declared "obscenity is not so elusive a concept as to require expert testimony."³⁶ South Carolina agreed.³⁷ An Ohio judge adopted a simpler test: "That the material acts as an aphrodisiac can almost be determined physically . . . a judge or juror should be able to estimate that rather closely by the reaction he himself has to the material."³⁸ I can hear his jury instruction now: "Ladies and gentlemen of the jury: in the final analysis what is obscene is whatever turns you on."

Other courts were less self-confident; they required expert testimony on the concepts of prurient appeal,³⁹ customary limits of candor,⁴⁰ and the *Roth* tests in general,⁴¹ which one state referred to in terms of its "exquisite vagueness."⁴²

Just as the states, one way or another, were adjusting to *Roth*, in 1973 the rules of the game were changed in *Miller v. California*⁴³ and several companion cases. Whereas previously the High Court declared in *Roth* and reaffirmed in *Jacobellis v. Ohio*,⁴⁴ that "the constitutional status of an allegedly obscene work must be determined on the basis of a . . . national Constitution we are expounding,"⁴⁵ in the new *Miller* test courts are to

34. 403 F. Supp. 1199 (E.D. Va. 1975).

35. *Roth v. United States*, 354 U.S. 476 (1957).

36. *State v. Simpson*, 56 Wis. 2d 27, 38, 201 N.W.2d 558, 564 (1972).

37. *State v. Watkins*, 259 S.C. 185, 195-96, 191 S.E.2d 135, 140 (1972).

38. *City of Cincinnati v. Walton*, 167 Ohio St. 14, 23, 145 N.E.2d 407, 413 (1952).

39. *Ramirez v. State*, 430 P.2d 826, 828 (Okla. Crim. 1967).

40. *G.P. Putnam's Sons v. Calissi*, 86 N.J. Super. 82, 92, 205 A.2d 913, 920 (1964).

41. *Sanza v. Maryland State Bd. of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320 (1967); *Keuper v. Wilson*, 111 N.J. Super. 489, 493, 268 A.2d 753, 755 (1970).

42. *Commonwealth v. LaLonde*, 218 Pa. Super. 805, 812, 288 A.2d 782, 787 (1972).

43. 413 U.S. 15 (1973).

44. 378 U.S. 184 (1964).

45. *Id.* at 195 (emphasis added).

apply “contemporary *community* standards.”⁴⁶ Indeed, it was even more specific than that: prosecutions were to be limited to materials that depicted “patently offensive” sexual conduct “specifically defined by the applicable state law.”⁴⁷

The shift from *Roth* to *Miller* was momentous enough for the states to follow. But while *Miller* was still undergoing scrutiny, and some state courts were beginning to adjust, *Smith v. United States*⁴⁸ was decided last session. A federal conviction was upheld for using the mails to distribute obscene materials, all within the State of Iowa, even though at the time there were, due to a legislative hiatus, no criminal laws relating to obscenity on the books.⁴⁹ The majority stated, directly contrary to *Miller*, that the proper community standard was “not one that can be defined legislatively.”⁵⁰ A jury randomly selected, can peer into the soul of the community and determine standards more unerringly than democratically responsible state legislators.

There were other difficult obscenity cases this past term: *Marks v. United States*,⁵¹ *Splawn v. California*⁵² and *Ward v. Illinois*.⁵³ The inescapable conclusion is that the whole problem remains no less intractable than it was when *Roth* was announced 20 years ago. Obscenity seems to lend itself to ad hoc adjudications that make it impossible for state courts to adapt principles with any precision.

One other area of difficulty: trying to square the High Court decision in *Williams v. Florida*⁵⁴ approving a requirement to reveal alibi witnesses with the constitutional freedom from self-incrimination. There is some confusion in California because Justice Traynor improvidently referred to discovery as a two-way street in *Jones*.⁵⁵ But *Jones* must be read in the light of its facts: a defendant asking the court for an order and the court imposing a condition for the granting of the request.⁵⁶ Most state courts recognize a criminal defendant has a right to remain totally mute—he need not even speak to enter a plea; if he is silent, the court enters a not guilty plea on his behalf. Thus how can he be compelled to reveal his defense or his witnesses, and if he persists in remaining mute, how can sanctions be invoked?

In the final analysis, as the Supreme Court has careened from one end of the constitutional spectrum to the other,⁵⁷ state courts have two alternatives.

46. 413 U.S. at 24 (emphasis added).

47. *Id.* at 25.

48. 431 U.S. 291 (1977).

49. *Id.* at 295-96.

50. *Id.* at 302.

51. 430 U.S. 188 (1977).

52. 431 U.S. 595 (1977).

53. 431 U.S. 767 (1977).

54. 424 U.S. 507 (1976).

55. *Jones v. Superior Court*, 58 Cal. 2d 56, 59-60, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962).

56. *Id.* at 61-62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

57. L.W. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* 87 (1974).

They can shift gears and once again change directions, thus resuming the course upon which they were embarked in the pre-Warren era. Or they can retain existing individual rights by reliance upon the independent nonfederal grounds found in the several state constitutions. A growing number of states have adopted the latter course.

Indeed, on several occasions Justice Brennan cordially invited the states to do so, most recently in a *Harvard Law Review* article.⁵⁸ In his dissent in *Michigan v. Mosley*⁵⁹ he reminded us that each "state has power to impose higher standards governing police practices under state law than is required by the Federal Constitution,"⁶⁰ citing *Oregon v. Hass*,⁶¹ *Lego v. Twomey*,⁶² and *Cooper v. California*,⁶³ and he enumerated several state courts which have done so.⁶⁴ There are now at least 18 states which have used independent state constitutional grounds in a wide variety of subjects.⁶⁵ Our state has been a leader in this area.

California has a long record of reliance upon its own constitution.⁶⁶ Our bilingual charter, originally adopted in 1849, a year after the Treaty of Guadalupe Hidalgo, was clearly meant to be an independent source of individual rights. As presently constituted, the Bill of Rights in our state

58. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

59. 423 U.S. 96 (1975).

60. *Id.* at 120 (Brennan, J., dissenting).

61. 420 U.S. 714, 719 (1975).

62. 404 U.S. 477, 489 (1972).

63. 386 U.S. 58, 62 (1967).

64. 423 U.S. at 121 (Brennan, J., dissenting).

65. *Williams v. Florida*, 399 U.S. 781 (1970); *Scott v. State*, 519 P.2d 774 (Alaska 1974); *Grossman v. State*, 457 P.2d 226 (Alaska 1976); *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); *People v. Lonswire*, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *Reynolds v. Superior Court*, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971); *Carley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971); *State v. Kaluna*, 55 Hawaii 361, 520 P.2d 51 (1974); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971); *Haas v. South Bend Comm. Sch. Corp.*, 259 Ind. 515, 289 N.E.2d 495 (1972); *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974); *People v. Beavers*, 383 Mich. 554, 227 N.W.2d 511 (1975), *cert. denied*, 423 U.S. 878 (1975); *People v. White*, 390 Mich. 245, 212 N.W.2d 222 (1973); *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973); *State v. Granberry*, 491 S.W.2d 528 (Mo. 1973); *Baker v. State*, 88 Nev. 369, 498 P.2d 1310 (1972); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973); *John v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *Chandler v. State*, 501 P.2d 512 (Okla. 1972); *State v. Brown*, 262 Ore. 442, 497 P.2d 1191 (1972); *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975); *Commonwealth v. Campana*, 455 Pa. 622, 314 A.2d 854 (1974), *cert. denied*, 417 U.S. 969 (1974); *State ex rel. Payne v. Walden*, 156 W. Va. 60, 190 S.E.2d 770 (1972); *McConville v. State Farm Auto. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1972); *Wilkes*, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421, 450 (1974).

66. In 1955 California adopted the exclusionary rule, six years before the United States Supreme Court applied *Wolf v. Colorado*, 338 U.S. 25 (1948), to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Supreme Court of California adopted the position deliberately in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955), when Chief Justice Roger Traynor wrote the provisions of the constitution "contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught." *Id.* at 449, 282 P.2d at 914. In taking that step, Justice Traynor declared that

[i]n developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them.

Id. at 450, 282 P.2d at 915.

constitution⁶⁷ contains more specific individual guarantees than those enumerated in the federal constitution's first ten, plus the fourteenth, amendments. Indeed our charter specifically declares: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."⁶⁸

In virtually every area of constitutional law there are California cases resting squarely upon our own constitution.⁶⁹ Two law review commentators have gone so far as to suggest that the "California Supreme Court may be likened, in these years of equal-protection gloom on the national scene, to those monks who kept classical learning alive so that it might be rediscovered in the Renaissance."⁷⁰

At least two relevant questions arise regarding this recycled federalism. Is it historically tenable? Is it permitted by the Supreme Court? I respond affirmatively to both queries.

A reading of the Federalist Papers clearly reveals an intent by the Founding Fathers to leave the states as a repository of individual rights. Hamilton and Madison so declared over and over. Madison put it this way:

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.⁷¹

67. CAL. CONST. art I, §§1-28.

68. CAL. CONST. art I, §24.

69. For a compilation, see Falk, *The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 277-79 nn.17 & 18 (1973). For a most flattering analysis of "California's example" see the extensive list of state bill of rights cases discussed in 8 HARV. C.R.-C.L. L. REV. 324-26 (1973); Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1269-72 (1972).

70. Horowitz & Karst, *The California Supreme Court and State Action Under the Fourteenth Amendment: The Leader Beclouds the Issue*, 21 U.C.L.A. L. REV. 1421, 1421 (1974).

71. THE FEDERALIST No. 45 (Madison). See also THE FEDERALIST No. 14 (Madison), No. 23 (Hamilton), No. 32 (Hamilton), No. 38 (Madison), No. 43 (Madison), No. 82 (Hamilton), and No. 83 (Hamilton). The following excerpt from No. 17 (Hamilton) is particularly significant on the role of the state judiciary:

There is one transcendent advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not infrequently, dangerous rivals to the power of the Union.

It is urged that most state constitutions derive universally in inspiration and often in text from provisions of the federal constitution. This is said to be particularly so with the reference to bills of individual rights.

It may be noted, however, with equal relevance that our Founding Fathers obtained their inspiration and texts for the first ten amendments from the predecessors of the states, the colonies and their declaration of rights. The Virginia Declaration of Rights set the example for eight of the 12 states which framed new constitutions during the Revolutionary period,⁷² and it was the Pennsylvania Declaration of Rights of 1776 that, with regard to freedom of speech and press, was the direct precursor of perhaps the most significant guarantee of the Federal Bill of Rights.⁷³ Delaware's Declaration of Rights, 1776, inspired federal provisions against quartering of soldiers and *ex post facto* laws;⁷⁴ Maryland that same year prohibited bills of attainder,⁷⁵ and North Carolina's Declaration, 1776, "contains a compendium of most of the fundamental rights which had come to be recognized by American Constitution-makers."⁷⁶

As to contemporary authority, the Supreme Court has consistently held that states may impose higher standards than those required by the United States Constitution.⁷⁷ Justice Harlan in particular was a consistent advocate of decentralizing criminal justice, urging that state criminal procedure should be uninhibited by federal restraints as long as there is adherence to fundamental standards of fairness.⁷⁸ Chief Justice Burger has expressed a similar viewpoint.⁷⁹

The most recent encouragement for this new attitude toward and by state courts can be traced to *Younger v. Harris*,⁸⁰ argued in 1969, reargued twice in 1970 and decided in early 1971. The opinion by Justice Black declared, "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts."⁸¹ The underlying reason for federal courts to abstain from interfering with state prosecution is

the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States

72. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 256 (1971).

73. *Id.* at 262.

74. *Id.* at 276.

75. *Id.* at 279.

76. *Id.* at 286.

77. See *Oregon v. Hass*, 420 U.S. 714, 719 n.4 (1975); *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Sibron v. New York*, 392 U.S. 40, 60-61 (1968); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 491-92 (1965).

78. *Griffin v. California*, 380 U.S. 609, 616 (1965) (Harlan, J., concurring); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Harlan, J., dissenting); *Cicenia v. Lagay*, 357 U.S. 504, 509 (1958).

79. *California v. Green*, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring).

80. 401 U.S. 37 (1971). See also *Carey v. Sugar*, 425 U.S. 73 (1976).

81. 401 U.S. at 43.

and their institutions are left free to perform their separate functions in their separate ways.⁸²

This, said Justice Black, is the essence of federalism, to the ideal of which we must remain loyal.⁸³

To avoid any misunderstanding, let me emphasize I am not advocating the right of state courts to differ with the United States Supreme Court on federal constitutional interpretations. Obviously if state courts unduly restrict individual rights under the federal constitution, the Supreme Court will take appropriate action.⁸⁴ And when state courts have presumed to extend individual rights under the United States Constitution more broadly than has the High Court, state decisions have also been reversed.⁸⁵ What I am stating is that the American constitutional scheme neither requires nor necessarily prefers that state judges conform their interpretation of state constitutions to the United States Supreme Court's interpretation of the federal constitution.

The use of state constitutions is no sport designed to thwart federal review, although that is a salutary by-product. Invoking state rather than federal authority benefits defendants who find themselves unable to avail themselves of individual rights in the federal system. It also benefits prosecutors in the hastening of the finality of court decisions, and thus the avoidance of interminable appeals through the federal system after exhaustion of state courts.

It seems to me the rational course is for the highest courts of a *state* to evaluate *state* legislation, *state* administrative action, or the conviction of a defendant in a *state* prosecution, pursuant to the provisions of the *state* constitution. If the result is fragmentation of a national consciousness, it is justified in furtherance of an expanded liberty.

Why do we have two sets of constitutions—federal and state—in this one nation? Perhaps an answer can be found in this mythical quotation from Alice in Wonderland:

Alice skooched up her forehead and ventured quietly, "If he writes the same thing, why does he do it twice?" "Because," said the White Rabbit, "he may write the same thing, but it's read differently."⁸⁶

The United States has learned much in the past 200 years. But federal institutions still do not have all the solutions. Encouraging the 50 states to experiment, to retain their historic individuality, to seek innovative responses to problems of protecting individual liberty, may ultimately produce more of the answers in the century ahead.

82. *Id.* at 44.

83. *Id.*

84. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Dickey v. Florida*, 398 U.S. 30 (1970).

85. *See, e.g.,* *Michigan v. Payne*, 412 U.S. 47 (1973); *California v. Byers*, 402 U.S. 424 (1971); *California v. Green*, 399 U.S. 149 (1970).

86. This delightful creation can be found in the fine new publication of the young members of the American Bar Association, 2 A.B.A. BARRISTER 49.

