I. The New Judicial Federalism

1. Justice Brennan quoted from *People v. Disbrow*, 545 P. 2d 272, 280 (Cal. 1976): “We pause...to reaffirm the independent nature of the California Constitution and our own responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.” *See also*, 90 HARV. L. REV. at 500, *citing People v. Brisindine*, 531 P. 2d 1099 (Cal. 1975).


C. The broad outlines and features of the New Judicial Federalism are outlined in a wide range of legal literature. For example:


II. Federalism: States as Laboratories of Innovation.

A. Justice Brandeis made the reference to states as “laboratories” in 1932. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting, discussing “social experiments... in the insulated chambers afforded by the several States”).


E. Not only did the Westward Movement carry innovations toward the West coast, but after the frontier was settled, in the words of Frederick Jackson Turner, the Eastern states felt the “stir in the air raised by the Western winds of Jacksonian democracy.” FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 1982 (1920). The same can be said now of the New Judicial Federalism.
III. The California Supreme Court.


B. California was an early leader in the New Judicial Federalism. Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice 68, 118-30 (1989);


IV. The New Judicial Federalism in California.

A. In 1972 the California Supreme Court declared the death penalty unconstitutional under the state constitutional ban on cruel or unusual punishment. People v. Anderson, 493 P. 2d 880, 899 (Cal. 1972).

1. This approach underscored the importance of textual distinctions between the state and federal constitutions. Analysis of textual distinctions is one of the central features of the New Judicial Federalism.

2. Justice William O. Douglas was quick to notice the developments in California:

[t]he California Supreme Court decided that the state’s death penalty violated the California constitution’s prohibition against “cruel or unusual punishment.” Douglas’s chambers got advance notice of the decision, and within three days, Douglas had distributed a per curiam draft dismissing the one hundred California cases that were awaiting the Court’s ruling.


3. This case illustrated the newer, “rights protective” application of the adequate and independent state ground doctrine.


(2) Earlier California cases had been vacated and remanded, without reaching the federal constitutional issue, where the state court opinion was unclear as to whether it was based on federal or state constitutional law. *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 196-97 (1965); *California v. Krivda*, 409 U.S. 33, 35 (1972).


(1) “If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached....if the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”


(2) “These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen’s assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and “overprotected” the citizen.

Such cases should not be of inherent concern to this Court.”

(3) The Impact of *Michigan v. Long*.


(b) In *Arizona v. Evans*, 514 U.S. 1, 24 (1995), Justice Ginsburg dissented and joined Justice Stevens’ criticism of the *Michigan v. Long* approach:

> The Long presumption, as I see it, impedes the States’ ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona’s Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion.


B. In 1972 the California voters approved an amendment “overruling” *People v. Anderson*. CAL. CONST. art. I, § 27. JOSEPH R. GRODIN, CALVIN R. MASSEY, AND RICHARD B. CUNNINGHAM, THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 60-61 (1993). This amendment overruling a state constitutional rights decision was the first to take political, rather than legal, issue with the New Judicial Federalism. It led to a number of other such amendments. Robert F. Williams, *Third Stage, supra*, at 216-17.

*Raven v. Deukmejian*, 801 P. 2d 1077 (Cal. 1990) blocked the wholesale overruling of New Judicial Federalism cases by initiative, holding this was a “revision” of the state constitution, not a permitted “amendment.”


D. In 1974 the California constitution was amended to add article I § 24: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” GRODIN, *at al, supra*, at 59.
1. The next year the California Supreme Court observed: “Of course this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing law.” *People v. Brisendine*, 531 P. 2d 1099, 1114 (Cal. 1975). *See also People v. Norman*, 538 P. 2d 237, 245 n. 10 (Cal. 1975); Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 312 (1977).

2. A 1978 attempt in Florida to adopt a similar constitutional provision failed with the rejection of the entire package of proposals by the 1977-1978 Constitution Revision Commission. Patricia Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 610, 612 (1978) (“The purpose of this beguilingly simple proposal was to breathe new life into the declaration of rights of the Florida Constitution. It was to remind the bench and the bar that federal constitutional rights are only minimum guarantees. They do not exhaust the possibilities for human freedom.”).


   “We are especially aided in this endeavor by the California Supreme Court’s recent decision in *People v. Wheeler*..., which has broken much of the ground for us.

   *Id.*, at 510 n. 12.

2. United States Supreme Court continued to defer to experiments in laboratories of the states.


   b. Justice Marshall dissented:

   For the third time this year, this Court has refused to review a case in which an all-white jury has sentenced a Negro defendant to death after the prosecution used peremptory challenges to remove all Negroes from the jury....

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   I write today to address those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions, but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and
procedural solutions to the problem....

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-311 (1932). As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis’ concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court’s abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.

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Contrary to my colleagues’ assumptions, these two recent decisions by the California and Massachusetts high courts have not inspired other State Supreme Courts to deviate from the rule of *Swain* and experiment with new remedies for peremptory challenge misuse. *Id.*, at 867, 869-70 (Marshall, J., dissenting).


F. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), *affirming* 592 P. 2d 341 (Cal. 1979), upheld by a 9-0 vote the California Supreme Court’s decision to
recognize free speech and assembly rights in privately-owned shopping malls. Justice Rehnquist noted that the federal constitution did not “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.” *Id.*, at 81. For this proposition, Justice Rehnquist cited another California case, *Cooper v. California*, 386 U.S. 58, 62 (1967).

Although expressing a truism, Justice Rehnquist’s statement for the majority placed the United States Supreme Court’s imprimatur on the New Judicial Federalism.

G. Political and Academic Backlash Against the New Judicial Federalism.


“The growing use of the doctrine of independent grounds, combined with a minimum of judicial restraint, threatens irreparable harm to our system of government. It emasculates the people’s right to govern through the legislative process, and substitutes for legislation the judicial decree process. This process destroys the people’s sense of certainty in relying on the decisions of the nation’s highest court.” *Id.*, at 1009-1010.


Attacks on state supreme court justices based on their decisions have occurred in other states since then. Williams, *Third Stage*, supra at 217.