LABORATORY OF LEGAL INNOVATION: THE CALIFORNIA ROOTS OF THE NEW JUDICIAL FEDERALISM IN STATE CONSTITUTIONAL LAW

Robert F. Williams*

California State Bar Annual Meeting, Monterey
California Supreme Court Historical Society Panel
October 7, 2006

I. The New Judicial Federalism

A. "Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution." Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003). *See also* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U.L. REV. xiii (1996).

B. Justice William J. Brennan, Jr., relied first on a California decision in his famous Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498-99 (1977).

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).
2. Justice Brennan's article was referred to as the "Magna Charta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).
3. Justice Brennan's article is among the most often cited law reviews. Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge who Believes in States' Rights*, 20 J. MARSHALL L. REV. 1, 2 n. 3 (1986).
4. Justice Brennan updated his views in 1986, initially relying once again on a California case. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) *citing Robins v. Pruneyard*, 592 P. 2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

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

---

*Distinguished Professor of Law, Rutgers University School of Law, Camden. Associate Director, Center for State Constitutional Studies, www-camlaw.rutgers.edu/statecon.

1. *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).
2. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).
3. Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U.L. REV. 421 (1996).
4. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).
5. Robert F. Williams, *Third Stage*, supra; *Looking Back*, supra.

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").

B. Recently, scholars have expressed some skepticism regarding the validity of the "laboratories" metaphor. James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996); G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, 31 PUBLIUS: THE JOURNAL OF FEDERALISM 37 (Winter 2001).

C. Political scientists refer to the adoption of successful measures tested in the "laboratories" of other states as "diffusion of innovation." *See* Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973); Symposium, *Policy Diffusion in a Federal System*, PUBLIUS, Fall 1985 (Robert L. Savage ed.); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

D. There is also a specialized literature on diffusion of *judicial* innovations among the states. *See* James N. G. Cauthen, *Judicial Innovation under State Constitutions: and Internal Determinants Investigation*, 21 AM. REV. POL. 19 (spring, 2000); James P. Wenzel, Shaun Bowler and David J. Lanone, *Legislating from the State Bench: A Comparative Analysis of Judicial Activism*, 25 AM. POL. Q. 363 (1997); James M. Lutz, *Regional Leaders in the Diffusion of Tort Innovations Among American States*, 27 PUBLIUS: THE JOURNAL OF FEDERALISM 39 (1997); Bradley C. Canon and Lawrence Baum, *Patterns of Adoptions of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975 (1981).

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.

A. The Court had an early record of concern with state constitutional rights. *See* Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HAST. CONST. L. Q. 141 (2004).

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);

C. By 1986, the California Supreme Court was referred to as "the nation's leading court" in the New Judicial Federalism. Ronald K.L. Collins, Peter J. Galie and John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HAST. CONST. L. Q. 599, 603 (1986).

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.

BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHEREN: INSIDE THE SUPREME COURT 212 (1979).

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

a. Older, "rights depriving" approach. *See, e.g., Williams v. State*, 88 S.E. 2d 376 (Ga. 1955), *cert. den.* 350 U.S. 950 (1956) (federal review denied, even for obvious federal constitutional violation of racial discrimination in state jury selection, where failure to raise pre-trial objection deemed an adequate and independent state ground). *See* STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT 198 (1970) and Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

b. Newer, "rights protecting" approach.

(1) Review denied in the Supreme Court in *People v. Anderson*, 406 U.S. 958 (1972).

(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).

c. *People v. Anderson* stimulated academic interest in, and development of the adequate and independent state ground doctrine as a "rights protective" doctrine. *See, e.g.*, Scott H. Bice, Anderson *and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Donald R. Wright, *The Role of the Judiciary: From* Marbury *to* Anderson, 60 CAL. L. REV. 1262 (1972); Edward L. Barrett, Jr., Comment, Anderson *and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972).

d. In 1983 the United States Supreme Court resolved the procedural approach to the adequate and independent state ground doctrine in *Michigan v. Long*, 463 U.S. 1032 (1983).

(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."

463 U.S. 1032, 1041 (1983).

(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."

463 U.S. 1032, 1067-68 (1983) (Stevens, J., dissenting).

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

(a) A survey of over 500 decisions, from all 50 states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfield, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988). For a similar conclusion many years later, *see* Mathew G Simon, Note, *Revisiting* Michigan v. Long *After Twenty Years*, 66 ALB. L. REV. 969, 970 (2003).

(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.

e. Justice O'Conner explained her *Michigan v. Long* approach in Justice Sandra Day O'Conner, *Our Judicial Federalism*, 35 CASE WEST. RES. L. REV. 1, 5-9 (1984).

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."

C. In 1971 the California Supreme Court initiated the state constitutional school finance litigation revolution. *Serrano v. Priest*, 487 P. 2d 1241 (Cal. 1971) (*Serrano* I); *Serrano v. Priest*, 557 P. 2d 929 (Cal. 1977) (Serrano II). Kenneth L. Karst, Serrano v. Priest: *A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 743-48 (1972).

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.").
3. Rhode Island copied California's provision in 1986. R.I. CONST. art. I, § 24.

E. In 1978 the California Supreme Court banned the use of racially-motivated peremptory challenges. *People v. Wheeler*, 583 P. 2d 748 (Cal. 1978).

1. *Wheeler* was followed the next year in Massachusetts. *Commonwealth v. Soares*, 387 N.E. 2d 499 (Mass. 1979).

> "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.
   a. *Guillard v. Mississippi*, 464 U.S. 867 (1983).
   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....
>
> ****
>
> 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.
>
> ****
>
> Even though *Swain v. Alabama* has been roundly and regularly criticized by commentators, see sources cited in *McCray v. New York, supra*, at 964-965, n. 1 (MARSHALL, J., dissenting), in the 18 years since *Swain* was decided only two State Supreme Courts have interpreted their State Constitutions to provide criminal defendants greater protection against discriminatory use of peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).
>
> 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).

3. In 1986 the United States Supreme Court finally banned racially-motivated peremptory challenges, *Batson v. Kentucky*, 476 U.S. 79 (1986).

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.

1. Robert F. Williams, *Third Stage, supra*, at 215-19.

2. George Deukmejian and Clifford K. Thompson, Jr., *All Sail and No Anchor – Judicial Review Under the California Constitution*, 6 HAST. CONST. L.Q. 975 (1979).

> "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.

H. In 1986 three California Supreme Court Justices were defeated by the electorate, largely based on criticism of expansive state constitutional rulings, including death penalty cases. *See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). *See also* JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 162-86 (1989).

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