

By Justice Stanley Mosk

The Two Rehnquists

In a recently discovered manuscript, Stanley Mosk offers some provocative observations about William Rehnquist the jurist

Among my father's papers to be deposited in the archives of the Library of the California Supreme Court, I found an unpublished paper he delivered at a symposium on September 17, 1998, at the University of Tulsa Law School, an institution he often visited because of his warm relationship with its dean, Morton Belsky. (See M. Belsky, ed., The Rehnquist Court: A Retrospective.) My father, widely regarded as a "liberal," was on good terms with Chief Justice Rehnquist—indeed, he had provided welcome support to the very conservative justice during his contentious confirmation proceeding to become chief justice. He did so because he liked Justice Rehnquist and admired his intellect. This paper was delivered before Gore v. Bush, 531 U.S. 98 (2000), a decision my father found regrettable. However, my father's respect and friendship would not have been diminished by even the most divergent views. Part of my father's success was due to his ability to like and be liked by those with whom he disagreed. There is a lesson there for all of us.—Justice Richard M. Mosk

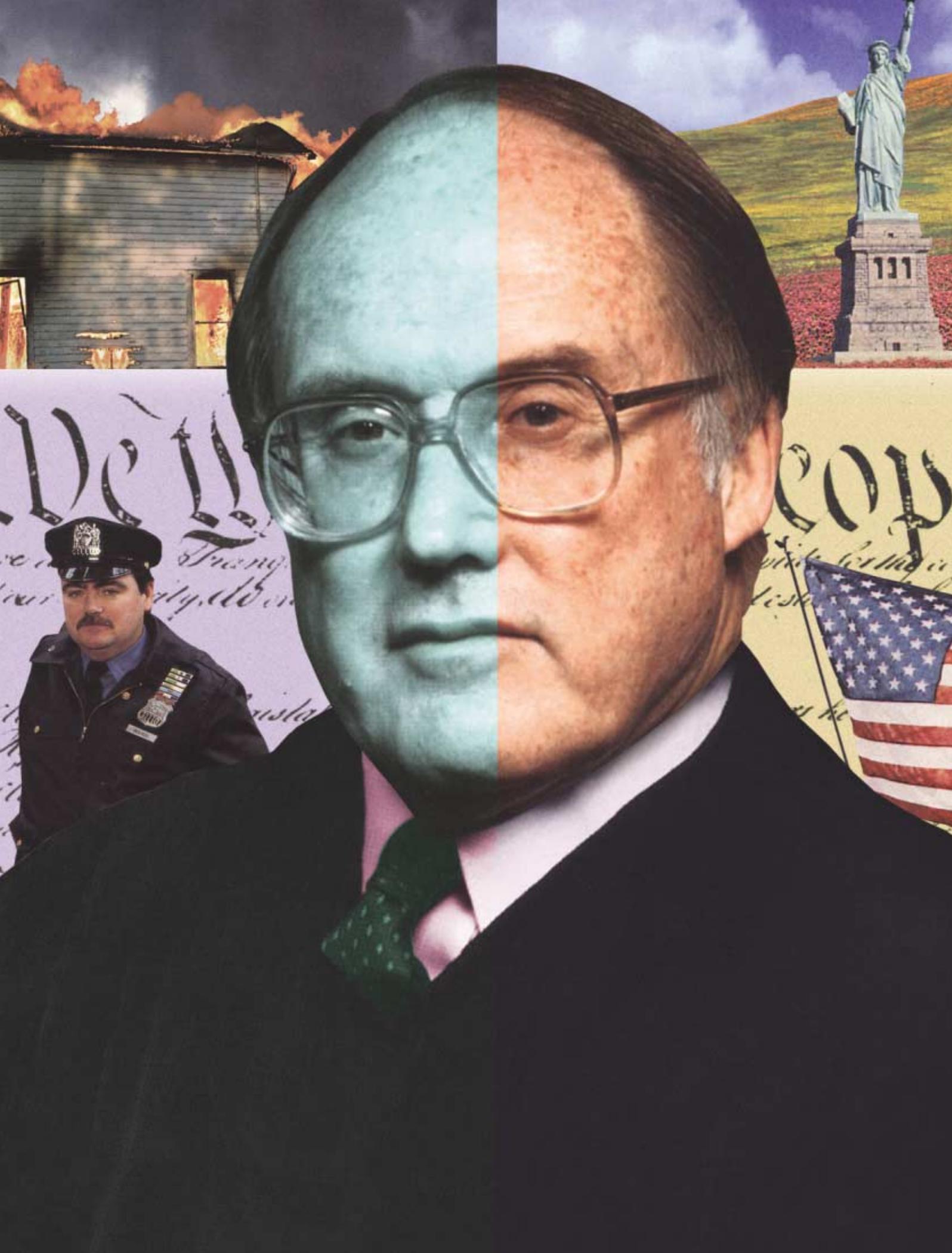
Chief Justice Rehnquist and I may come from different poles in the political spectrum, but let me begin by revealing the great respect I have for him as a person, as the leader of the Supreme Court, and as a devotee of relative consistency in the judicial process. Knowledge of precedent and the High Court's direction, whether deemed right or wrong, are of inestimable importance to those in the state trenches.

I also express admiration for the dignity with which Chief Justice Rehnquist directs the court and leads his colleagues. He obviously believes in the American judicial system and what it does for society.

I have personal appreciation for the chief justice as a result of a recent incident. I had been invited to a constitutional conference at the University of Hong Kong, precisely one month prior to the Chinese takeover.¹ It occurred to me that a message of encouragement from the head of the judiciary in the world's greatest democracy would be of some relevance. I was sur-

Justice Stanley Mosk was a justice of the California Supreme Court from 1964 to 2001. On June 10, 2002, the Los Angeles County Civil Courthouse was renamed the Stanley Mosk Courthouse in his memory.

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prised; all it took was a simple request. The chief justice responded with a thoughtful message to the judges gathered from throughout the world. It was sent to me and I had the opportunity to read it to the assembled delegates in Hong Kong.

That is rather typical of Chief Justice Rehnquist. He makes himself available to take any reasonable steps to further respect for the law and democratic institutions. In his message to the delegates at the constitutional conference in Hong Kong, Chief Justice Rehnquist expressed his views on the origin of the American structure.² Here is part of what he told the judges and academics assembled in Hong Kong:

[Constitutional transition] is a subject that not only is interesting from an historical perspective, but also is important from a contemporary point of view. Few periods of American history are as inherently exciting as the founding era. Living during a time of fundamental change and revolution, the framers of the new American Constitution had to examine critically many traditional assumptions and convictions as well as many new untested ideas and theories. Out of this ferment, two unique institutions were born: an independent executive branch of government that is not responsible to the legislative branch and an independent judiciary with the authority to declare laws passed by the legislative branch unconstitutional. The first of these unique institutions—and the notion that the chief executive officer should not be responsible to the legislature—has not been widely copied by other nations. The second, however, has fared very differently.

Since the end of World War II, many countries around the world that have undergone a period of constitutional transition have decided to empower an independent judiciary with the authority to interpret a written constitution. The reasons underlying why so many of these countries have made independent judiciaries a part of their future are a fascinating topic for study and discussion.

He concluded by urging that study and discussion by the Hong Kong participants. I can tell you that such analysis did occur. Of course, what the ultimate effect will be on the future Hong Kong remains unpredictable.

Let me now return to the more mundane aspects of the chief justiceship. I must be candid. I believe there is the good Rehnquist, one who recognizes states' rights and true federalism. And there is the bad Rehnquist, one

who takes a narrow view of individual rights in the criminal law setting. Let me elaborate on the good and the bad, or, to be more delicate, the plus and the minus. Or the yes and the no.

In a 1996 *Indiana Law Review* article, Laura Ray wrote of William Rehnquist's judicial philosophy:³

The hallmark of Rehnquist's opinions is their air of certainty, their conviction that the result he endorses is not only correct but inevitable. Other Justices have at times expressed publicly their private anguish at finding that their judicial principles compel a result at variance with their personal convictions: Justice Frankfurter voting to uphold the school board's right to compel the children's flag salute in *West Virginia State Board of Education v. Barnette*⁴ despite his membership in "the most vilified and persecuted minority in history," or Justice Kennedy voting to strike down as unconstitutional a state flag burning statute despite his keen sense that this case, like others before us from time to time, exacts its personal toll.⁵ Rehnquist's opinions are unmarked by such inner tensions....

One consequence of Rehnquist's [philosophy] is the predictability of his votes....Rehnquist scholars have attributed his consistency to a core of governing principles that are applied with regularity. In a seminal article that reviewed Rehnquist's first four terms on the Court, David Shapiro identified three such principles: resolution of conflicts between an individual and the government in favor of the government; resolution of conflicts between state and federal authority in favor of the state; and resolution of questions of federal jurisdiction against the exercise of that jurisdiction. Although subsequent scholars have defined these governing principles in slightly different ways, the point has been made with Rehnquistian regularity that the body of Rehnquist's opinions holds few surprises for the experienced reader of his work.⁶

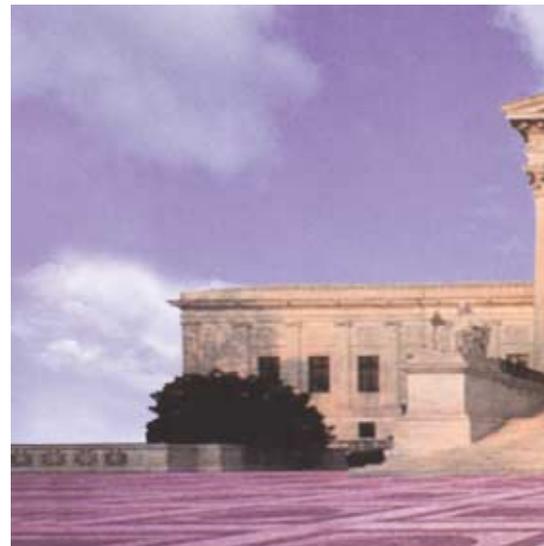
I agree with Laura Ray. But she does recognize that Justice Rehnquist's opinions do contain occasional surprises, and I am going to mention one of them today.

The Predictable Rehnquist

First, we have the predictable Rehnquist—the one who resolves conflicts between an individual and the government in favor of the government. A prime example is *Arizona v.*

Fulminante (1991).⁷ In *Fulminante*, Justice Rehnquist declared that appellate courts are to review for harmless error the improper presentation to the jury of a defendant's coerced and involuntary confession.

This decision has been deplored by legal scholars and editorial writers alike, and for good reason. Harvard Law Professor Charles Ogletree, Jr., said: "[T]he practical effect of *Fulminante* is that an accused is no longer constitutionally guaranteed a trial free from a coerced confession. After *Fulminante*, an accused may be convicted of a crime by a jury that has heard a coerced confession, as



long as an appellate court find[s] its admission harmless. This is an affront not only to the jury, but also to the notion of justice."⁸

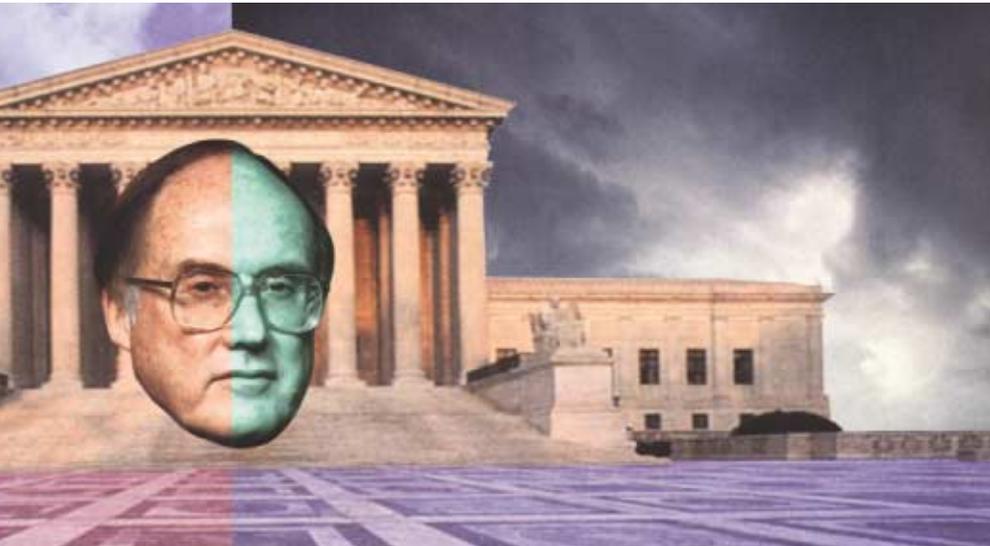
In an article in the *American Journal of Criminal Law*, Hedieh Naseri and Victor DeMarco collected some of these views on the *Fulminante* decision.⁹ They wrote:

La[u]rence Tribe finds it to be "very dismaying." Jeffrey Weiner of the National Association of Criminal Defense Lawyers labels it an "abomination." He argues that, notwithstanding that the standard of coercion may have been lowered, the Supreme Court is sending a negative message to all actors involved in the criminal justice system. To the police, the Supreme Court sends the message that it may, under the right circumstances, overlook a confession that has been coerced from a suspect. This may give the police "an incentive to pressure, threaten, or even beat a confession out of a prisoner."

Fulminante may also lead police to view the coerced confession as a way to announce that they have "cleared" another crime, one of its most dangerous results thus being that the

police will de-emphasize the value of hard evidence. This potential raises the concern expressed by Charles Peterson, a one time New York City police official: "When you rely on oral statements or jailhouse confessions over a period of time, your investigative skills atrophy. You lose the other skills." Yale Kamisar suggests that *Fulminante* will encourage prosecutors to gamble by using coerced confessions to clinch good cases.

[Finally,] *Fulminante* saddles the trial courts with the added burden of



having to decide such issues as whether they can proceed with trial once a coerced confession has reared its head. *Fulminante* will similarly affect appellate courts. The new coerced confession standard will force the judges to "undertake complex, hot-sensitive assessments of often extended trial transcripts to determine how harmful the confession was." These difficulties make the warning of Steven Shapiro, associate legal director of the American Civil Liberties Union, all the more salient: "Even with a dozen eyewitnesses, you can never, never be sure that the presence of the coerced [confession] did not play a pivotal role in the conviction, [because] of its emotional impact." As a way out, appellate courts may "all too easily slide[] into a decision to affirm a conviction simply because the judges themselves think it was right on the facts."

Fulminante may cause courts and juries alike to disregard or minimize the importance of a confession's provenance. As Jana J. Green's student comment in the *Oklahoma City University Law Review* explained:¹⁰

Under early common law, a confession was admissible during trial without question. Surprisingly, even a confession obtained by torture was not excluded. In the middle of the eighteenth century, English trial judges began restricting the admissibility of confessions. The formal rule appears to have been first stated by Justice Nares in *The King v. Warickshall*,¹¹ which is an English decision from 1783: "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so question-

able a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it...."

Even the press joined the chorus. Calling *Fulminante* a "Supreme Court Retreat," the *Washington Post* said of the decision:

The exclusion of unconstitutionally obtained evidence by courts in this country has not only produced fairer trials but has influenced police behavior. Without an absolute bar on admissibility, there may very well be an increase in coercion....When a confession has been coerced, it is inherently suspect and its admission into evidence can never be considered harmless....The court has retreated from what was, until this week, a clear, effective and eminently fair policy unequivocally barring tainted evidence of this kind.¹²

In the same vein, the *New York Times* wrote that the *Fulminante* decision "would have astonished earlier Courts. Since 1897 in federal cases, and 1936 in state cases, the assumption has always been that forcing a suspect to incriminate himself, through physical abuse, threats or strong inducements, was such reprehensible conduct that the use

of its fruits would make a fair trial impossible. Retrials without the tainted evidence were automatic."¹³

Instead, the *New York Times* continued, "[P]olice, prosecutors and trial judges are now invited to search for rationales for obtaining and using them in the hope that judges will manage to find the trial fair anyway. That's harm enough, but the greater and more lasting harm is to the high court's reputation for delivering justice."

I suspect that my feelings about *Fulminante* are by now quite clear. In *People v. Cahill*,¹⁴ a 1993 case in which a majority of the California Supreme Court followed *Fulminante* under our state constitution, I dissented. I wrote, "It has been said that fundamental truth is the first casualty of war. Now a fundamental principle of justice has become a casualty of the synthetic war on crime." I adhere to that view.¹⁵

The popular view is that confessions are rarely extracted by third-degree methods in the modern era. Let us hope so. In a recent case, *People v. Jones*,¹⁶ in which I discussed the corpus delicti rule, I quoted a venerable treatise: "If confessions could prove a crime beyond doubt, no act which was ever punished criminally would be better established than witchcraft; and the judicial executions which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case."¹⁷

Despite *Fulminante*, there is a better side to Justice Rehnquist, and judging from the law reviews I have perused in preparing this talk, it seems to be somewhat overlooked.

The Surprising Rehnquist

An extremely difficult problem arises in the judicial system when two rather simple basic rights appear to collide and the judiciary must choose between them. Take a rather commonly occurring conflict: A group or an individual seeks to pass out leaflets or to obtain signatures on a petition at a commercial shopping center. The shopping center proprietor orders the solicitors to leave his property. His philosophy is, simply, "shut up and shop."

Whose rather basic right is to prevail: the individual's or the shopping center owner's? In *Diamond v. Bland*,¹⁸ a case before our court in 1974, we decided in favor of the petition circulator, so long as he did not interfere with normal business operations. The shopping center sought certiorari and it was denied. Thus we were confident that our conclusion was correct, even though two years earlier, in *Lloyd v. Tanner*,¹⁹ the U.S. Supreme Court had reached a conclusion contrary to ours in *Diamond v. Bland*.

The problem would not disappear. It arose

again in California in the case of *Pruneyard Shopping Center v. Robins*.²⁰ We again rather cold-bloodedly indicated we would not follow the Supreme Court's lead in *Lloyd v. Tanner* and would instead decide the matter under what we perceived to be state law. Certiorari was granted in *Pruneyard*, and I must tell you that we sensed doom to our California theory of states' rights. We were pleasantly surprised.

The basic question in *Pruneyard* was whether our state court could interpret the California Constitution as providing a right to exercise free speech on the premises of a private shopping mall. In his decision, Justice Rehnquist reaffirmed the principle that state high courts may interpret their own constitutions to confer greater individual freedoms than the federal constitution would permit. Citing the *Lloyd v. Tanner* case that involved an Oregon mall, he noted that the First Amendment did not create such a right. But he wrote:

Our reasoning in *Lloyd*, however, does 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. In *Lloyd*,... there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.²¹

It is interesting to note that subsequently, in 1989, the Oregon Supreme Court relied on the *Pruneyard* decision to hold that the Lloyd Center in Portland—the very shopping center at issue in *Lloyd v. Tanner*, which held there was no federal constitutional right to engage in free-speech activity—must permit signature-gathering for an initiative under two provisions of the Oregon Constitution, subject to reasonable time, place, and manner restrictions.²²

Similarly, the New Jersey Supreme Court relied significantly on the *Pruneyard* decision in deciding a free speech case under that state's constitution. The court wrote, "Defendant asserts that under the State Constitution he is afforded protection of his expressional rights even if it is not clear that the First Amendment would serve to grant that protection. The United States Supreme

Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. [Citing *Pruneyard*.] The view that state constitutions exist as a cognate source of individual freedoms and that state constitutional guarantees of these rights may indeed surpass the guarantees of the federal Constitution has received frequent judicial expression."²³

In reaching this decision, the New Jersey Supreme Court quoted an opinion I authored in 1975 for the California Supreme Court in *People v. Brisendine*.²⁴ In *Brisendine*, I wrote, "It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse."²⁵

Unfortunately, a recent opinion reveals that Justice Rehnquist does not defer to state court interpretations of their own constitutions as much as I would prefer. In a 1996 case, *Ohio v. Robinette*, he wrote that a deputy who stopped a driver for speeding but decided not to cite him could nevertheless ask to search the car for drugs. Drugs were found and the driver arrested. His opinion reaffirmed another 1996 case, written by Justice Scalia, that permits an officer, who sees only a traffic violation, to search for drugs, even if the traffic stop is a pretext for the search. (I don't know about Oklahoma, but in California that means about 95 percent of drivers are subject to search at any time!) Worse yet, he brushed aside the Ohio Supreme Court's opinion, which held that the Ohio Constitution forbade this practice.²⁶

It was left to Justice Ginsburg, in a concurrence, to make these two points. First, she noted:

Formerly, the Ohio Supreme Court was "reluctant to use the Ohio Constitution to extend greater protection to the rights and civil liberties of Ohio citizens" and had usually not taken advantage of opportunities to "us[e] the Ohio Constitution as an independent source of constitutional rights." Recently, however, the state high court declared: "The Ohio Constitution is a document of independent force.... As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."²⁷

One Ohio appellate court noted: "[H]undreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travels and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to 'practice' his drug interdiction technique." Against this background, the Ohio Supreme Court determined, and announced in *Robinette's* case, that the federal and state constitutional rights of Ohio citizens to be secure in their persons and property called for the protection of a clear-cut instruction to the State's police officers: An officer wishing to engage in consensual interrogation of a motorist at the conclusion of a traffic stop must first tell the motorist that he or she is free to go.²⁸

There are numerous commentators who are critical of Justice Rehnquist and his consistent support for states' rights when those rights conflict with federal limitations. In my view, however, that principle of his is a plus, not a minus. Take the matter of jury selection and the exercise of peremptory challenges to prospective jurors. I recall cases during my days as a trial judge in which there would be a black defendant, a white prosecutor, and white witnesses. The prosecutor would exercise peremptory challenges to any black called into the jury box. He would make certain that the black defendant would be tried by an all-white jury.

As the trial judge, I was appalled by that practice. But I could do nothing about it because the U.S. Supreme Court held in *Swain v. Alabama*²⁹ that there could be no limitations whatsoever on the exercise of peremptory challenges. When I came to the state supreme court I had the opportunity, with the help of my colleagues, to produce *People v. Wheeler*,³⁰ in which we held that despite *Swain*, we would not permit peremptory challenges to be exercised for a racially discriminatory purpose. We outlined the procedure for trial courts to follow when it appears that race is the only factor causing challenges to be exercised.

Eight years later the Supreme Court followed our lead in *Batson v. Kentucky*.³¹ I can tell you that we felt understandable pride in reaching a rational conclusion on a subject some years prior to the High Court adopting a comparable rule. That, I suggest, is the value of states' rights and their ability to grant to their citizens more, or different, rights than are required under federal law. However, I would probably part company with those who have expressed occasional approval of

states' ability to provide their citizens with fewer than federal rights.

State Constitutionalism

I must concede that state constitutionalism is a relatively new phenomenon. It grew in scope in the 1970s as the U.S. Supreme Court retreated somewhat from the Warren-era protection of individual rights.

The role of state constitutionalism is neither simple nor fully recognized. When Justice Souter was on the Supreme Court of New Hampshire, he wrote:

It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a *mere row of shadow*; if we place too little, we will render State practice *incoherent*. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.³²

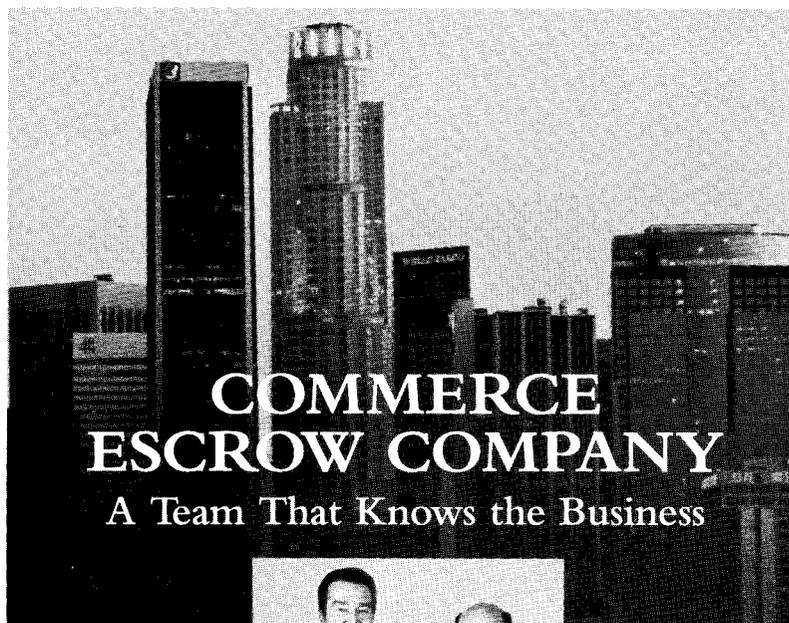
Injection of religion into the public schools often provokes such a federal-state conflict. Our court had that very problem in *Sands v. Morongo Unified School District*,³³ a case involving prayers at a high school graduation ceremony. The result was five separate opinions, all agreeing that religion has no proper place in public schools. But we could not decide definitively whether that represents a strictly federal issue or a state constitutional problem. Needless to add, I opted for the latter.

Chief Judge Judith Kaye of the New York Court of Appeals has been a staunch defender of state constitutionalism. In *People v. Scott*,³⁴ she clearly expressed her belief in the right, indeed the duty, of state justices to rely on their state constitution. She wrote:

Time and again in recent years, the Supreme Court as well as its individual Justices have reminded State courts not merely of their right but also of their responsibility to interpret their own Constitutions, and where in the State courts' view those provisions afford greater safeguards than the Supreme Court would find, to make plain the State decisional ground so as to avoid unnecessary Supreme Court review. The Supreme Court is not insulted when we do so.

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The president recognized the role of the states in our federalist system of government. In the Executive Order of Federalism,³⁵ issued on May 14, 1998, (for whatever value an executive order has) President Clinton proclaimed, among other specific provisions, the following:

(d) The people of [the] States are at liberty, subjected only to the limitations in the Constitution itself or in Federal law, to define the moral, political, and legal character of their lives.

(e) Our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own

conditions, needs, and desires. States and local governments are often uniquely situated to discern the sentiments of the people and to govern accordingly.

(f) Effective public policy is often achieved when there is competition among the several states in the fashioning of different approaches to public policy issues. The search for enlightened public policy is often furthered when individual States and local governments are free to experiment with a variety of approaches to public issues. Uniform, national approaches to pub-

lic policy problems can inhibit the creation of effective solutions to those problems.

Finally, I note that in cases too numerous to enumerate here, Justice Rehnquist has opted for judicial restraint. As a general proposition that concept appears desirable. Whether that is always desirable or is subject to criticism depends upon one's personal, or perhaps political, point of view and one's interpretation of judicial restraint. Time, history, and future events may give us appropriate answers. I hope so. ■



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¹ Justice Stanley Mosk, Speech at the Constitutional Transitional Hong Kong 1997: Global Perspectives Conference (May 29 to Jun. 1, 1997).

² *Id.*

³ Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535 (1996).

⁴ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

⁵ *Texas v. Johnson*, 491 U.S. 387, 420-21 (1989).

⁶ *Ray*, *supra* note 3, at 568-69.

⁷ *Arizona v. Fulminante*, 499 U.S. 219 (1991).

⁸ Charles Ogletree Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HAR. L. REV. 152, 175 (1991).

⁹ Hedieh Nasheri & Victor J. DeMarco, *1994 True Confessions? A Critique of Arizona v. Fulminante*, 21 AM. J. CRIM. L. 273, 283 (1994).

¹⁰ Jana J. Green, Comment, *Arizona v. Fulminante: The Harmful Extension of the Harmless Error Doctrine*, 17 OKLA. CITY U. L. REV. 755 (1992).

¹¹ *King v. Warickshall*, 168 Eng. Rep. 234 (K.B. 1783).

¹² *A Supreme Court Retreat*, WASH. POST, Mar. 29, 1991, at A20.

¹³ *The Supreme Court's Harmful Error*, N.Y. TIMES, Mar. 29, 1991, at A22.

¹⁴ *People v. Cahill*, 5 Cal. 4th 478 (1991).

¹⁵ *Id.* at 511.

¹⁶ *People v. Jones*, 17 Cal. 4th 279 (1998).

¹⁷ *Id.* at 324 (quoting *Cooley*, CONSTITUTIONAL LIMITATIONS 653-54).

¹⁸ *Diamond v. Bland*, 11 Cal. 3d 331 (1974).

¹⁹ *Lloyd v. Tanner*, 407 U.S. 551 (1972).

²⁰ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

²¹ *Id.* at 75.

²² *Lloyd Corp., Ltd. v. Whiffen*, 315 Or. 500, 849 P. 2d 446 (1989), *overruled by Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 11 P. 3d 228 (2000).

²³ *State v. Schmid*, 84 N.J. 535, 423 A. 2d 615 (1980).

²⁴ *People v. Brisendine*, 13 Cal. 3d 528 (1975).

²⁵ *Id.* at 550.

²⁶ *Ohio v. Robinette*, 519 U.S. 33 (1996).

²⁷ *Id.* at 43.

²⁸ *Id.* at 40-41.

²⁹ *Swain v. Alabama*, 380 U.S. 202 (1965).

³⁰ *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P. 2d 748 (1978).

³¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

³² *State v. Bradberry*, 129 N.H. 68, 82-83, 522 A. 2d 1380, 1389 (1986) (Souter, J., concurring) (regarding a defendant's argument on state constitutional grounds).

³³ *Sands v. Morongo Unified Sch. Dist.*, 53 Cal. 3d 863, 281 Cal. Rptr. 34, 809 P. 2d 809 (1991).

³⁴ *People v. Scott*, 79 N.Y. 2d 474, 505, 593 N.E. 2d 1328, 1347 (1992) (concurring opinion).

³⁵ Executive Order on Federalism, Exec. Order No. 13083, 63 Fed. Reg. 27,651 (1998).