

Courts and the Culture Wars

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The California Supreme Court in the Culture Wars: A Case Study in Judicial Failure

Edward J. Erler

For several decades California has been a principal battleground in the culture wars. Hollywood obviously comes to mind. But less obviously—and more importantly—is the battle that has been raging between California courts and the people of California. Fifteen years ago, the Chief Justice of the California Supreme, Rose Bird, and two of her activist colleagues were turned out of office in a hotly contested judicial confirmation election. The issue was California's death penalty statute, which the Court's majority refused to implement, inventing a variety of implausible legal and constitutional excuses for its dilatoriness.¹

The California Supreme Court uses the doctrine of independent state grounds as one of the principal weapons in its activist arsenal. This doctrine allows state courts to interpret the same or similar language in state constitutions independently of the U.S. Supreme Court's interpretation of the federal Constitution. The one restriction is that the interpretation of the same or similar language cannot create lower standards of protection than is established by the federal Constitution, but it can create higher standards. Independent state ground is something of a misnomer because state courts are not entirely independent in the interpretation of state constitutions—rights can be interpreted only more expansively and state protections can never fall beneath the federal minimum. There can be little doubt that the doctrine of independent state grounds is a necessary and appropriate component of the American federal system; it is derived from the very nature of a system that delegates exclusive powers to the federal government and reserves powers to the states. Thus, with respect to the regulation of the health, welfare, and morals of the people in the states, state law, and state constitutions are final as long as there is no conflict with the federal Constitution.

Interest in independent state grounds on the part of judicial activists began in the 1970s when they began to believe that the Burger Court did not share the enthusiasm for judicial innovation that had been evidenced by the ideological liberalism of the Warren Court. The acknowledged leader in the revival of independent state grounds was the late Justice William Brennan. His advocacy even led him to disguise himself as a supporter of federalism: "Every believer in our concept of federalism, and I am a devout believer, must salute this development in our State courts."² What Brennan had in mind, of course, was not federalism or state constitutionalism, but the extension of the Warren Court "legal revolution" through the use of the "independent protective force of State law."³ The incorporation of the provisions of the Bill of Rights through the Fourteenth Amendment's due process clause created, Brennan noted, "a Federal floor of protection" that "allow[s] diversity only above and beyond this Federal constitutional floor."⁴ Whenever the U.S. Supreme Court refused to extend the federal floor into questionable areas, Justice Brennan was quick to advise states on how they might evade the Supreme Court's rulings. In a dissenting opinion in the 1975 case of *Michigan v. Mosely*, Brennan decried the majority's "erosion of Miranda standards as a matter of Federal constitutional law." Brennan concluded by inviting state courts to take up the constitutional cudgels that he thought had been abandoned by the Supreme Court: "Understandably, State courts and legislatures are, as matters of State law, increasingly according protections once provided as Federal rights but now increasingly depreciated by decisions of this Court."⁵

The California Supreme Court took up Brennan's call to expand the reach of ideological liberalism through state constitutionalism with a vengeance. Most of the Court's activism has been in the area of criminal procedures and the rights of criminal defendants. But the people of California have also been active in curtailing the Court's use of independent state grounds through the use of the constitutional amendment initiative. One initiative, passed in 1972, required the California Supreme Court to accept federal standards for cruel and unusual punishment in capital cases; another, the Victims' Bill of Rights, passed in 1980, mandated that the exclusion of evidence proceed on federal grounds rather than independent state grounds. Both of these initiatives were designed to curtail the Court's expansion of the rights of criminal defendants under the aegis of independent state grounds, and both of these restrictions on judicial authority were subsequently upheld by the California Supreme Court.

Emboldened by these successes, in 1990 the people of California passed another constitutional amendment initiative that contained extensive reforms of criminal procedures. The main purpose was to withdraw independent state ground powers from California courts in almost all areas touching upon the rights of criminal defendants, thus restoring federal standards to the

California Constitution. In the areas of search and seizure, the right to counsel and cruel and unusual punishment, the California Supreme Court had gone well beyond the requirements set by the United States Supreme Court. Inevitably, the issue came to a show down before the California Supreme Court. One curious feature of the California Constitution is that it allows amendments to proceed by initiative but revisions of the Constitution can be made only by constitutional revision commissions. Not surprisingly, the California Supreme Court declared the initiative unconstitutional because its curtailment of judicial power was, in the Court's opinion, so extensive as to amount to a revision of the Constitution rather than an amendment. As the Court noted in *Raven v. Deukmejian* in 1990, as a result of the initiative's restrictions "California courts in criminal cases would no longer have authority to interpret the state Constitution in a manner more protective of defendants' rights than extended by the federal Constitution, as construed by the U.S. Supreme Court." This, the Court noted, "would substantially alter the substance and integrity of the state constitution as a document of independent force and effect."

At the same time these constitutional issues were being fought out, another case was developing that would culminate in one of the most important battles in California's culture wars. That case would also use independent state grounds as its main constitutional weapon in the promotion of ideological liberalism. In 1987 the California legislature, then as now controlled by the Democratic Party, passed a parental consent law requiring that unemancipated minor girls obtain parental permission or, alternatively, permission from a court, before receiving an abortion. This popular bill, which was carefully crafted to meet guidelines articulated by the U.S. Supreme Court, was signed by Republican Governor George Deukmejian. The law was enjoined immediately upon its passage, and eventually made its way to the California Supreme Court in 1996. In *American Academy of Pediatrics v. Lungren*, the California Supreme Court upheld the law by a 4-3 margin, with the majority opinion authored by the lone Democratic appointee on the Court, Justice Stanley Mosk. Both the trial court and the court of appeal had declared the parental consent law unconstitutional as a violation of the right to autonomy privacy guaranteed by the California Constitution. Justice Mosk acknowledged that the "right to procreative choice" was protected by the California Constitution and that the right existed as a matter of independent state grounds. The California Constitution contains an explicit guarantee of the right to privacy, whereas under the federal Constitution the right to privacy is only an inference from the "penumbras, formed by emanations" of various provisions of the Bill of Rights (to use Justice Douglas' phraseology from the Court's opinion in *Griswold v. Connecticut*). Furthermore, as Justice Mosk pointed out, the California Supreme Court had articulated a right to abortion four years before the U.S. Supreme Court acknowledged the right

in *Roe v. Wade*. Both these factors argued in favor of the independent force of the right of procreative choice in the California Constitution.

Justice Mosk, however, refused to countenance the argument that minor girls possess autonomy privacy rights to the same extent as adults. "The grounds for distinguishing the rights of children from those of adults," Justice Mosk wrote, "are deeply rooted in our culture and society. They are based on normative assumptions about the family, including the mutual interests of children and their parents and the benefits to children of parental guidance and control." Indeed, restrictions on the autonomy of minors "are premised on a fundamental social tenet that children require protection against their own immaturity and vulnerability in making decisions that may have serious consequences for their health and well being." Furthermore, the parental consent law, Mosk argued, is justified as an aspect of the well-recognized right of parents "to direct his or her child's upbringing." Parental rights have long been recognized by both the California courts and the U.S. Supreme Court as a "compelling interest" before which the child's interest in privacy must yield. Under the California legislation the unemancipated minor girl is protected from arbitrary or capricious decisions of parents by the judicial bypass procedure where the minor girl can appeal to a court for permission. The court is bound by law to act in the interest of the child and if convinced that the minor's maturity is sufficient for informed consent can give permission for an abortion. The bypass procedure is required by U.S. Supreme Court decisions which have made it a necessary ingredient of the minor's right to privacy.

The trial court, in holding the legislation unconstitutional, had adduced from expert testimony that there was no evidence that "children over the age of thirteen or fourteen years lack the capacity for rational choice" or were in any way deficient in "the cognitive ability and maturity to make a fully-informed choice as to abortion." Justice Mosk rightly said that such evidence was, to say the least, "counterintuitive." It defies the universal experience of parents. As Mosk acerbically summed up the issue, the right of autonomy privacy for adults and minor girls cannot be coextensive because "the capacity to become pregnant and the capacity for exercising mature judgment concerning the wisdom of an abortion are not logically related."

The case produced three shrill dissents. Justice Joyce Kennard argued that "the best scientific evidence available" supported the notion that minor girls were fully competent to make informed choices. There was thus no ground for holding that the autonomy privacy rights of pregnant minors were any less extensive than that of adults. In fact, Kennard argued, the dilution of autonomy privacy rights for minor girls "may have an adverse psychological effect" since "the ability to make an autonomous decision about abortion is an important predictor of a minor's satisfaction with her decision." Autonomy privacy rights are matters of "profound importance" and "so fundamental and 'life-shaping,'"

Kennard asserted, "that age limits are not constitutionally acceptable as a means of conclusively determining that an adolescent below the prescribed age is not yet ready to assume sole responsibility for those decisions. The decision to continue or terminate a pregnancy is one such decision." Unemancipated minor girls, beginning at age thirteen or fourteen, therefore have a "reasonable expectation of privacy in the making of this decision."

Justice Kennard found Justice Mosk's assertion that such scientific evidence was counterintuitive rather troubling. After all, counterintuitive though it may be, it was the best available. Both Mosk and Kennard had excluded the propriety of making moral arguments because decisions about the morality or moral implications of abortion were beyond the capacity of the Court. Rather, it was a matter of statutory and constitutional construction. But whereas Justice Mosk was willing to recognize the "deeply rooted social norms" that distinguished between the privacy and liberty interests of children and adults, Kennard found those norms to be incompatible with the latest science. In the presence of science—however tentative or counterintuitive its conclusions may be—social norms, no matter how long standing or deeply rooted, must yield.

Justice Ronald George wrote the most radical dissent. His main concern was equal protection. His argument was that there was a fundamental violation of equal protection because the law discriminated between minor girls who chose not to abort and those who did. Parental permission was required only of those who elected abortion. The California Constitution's equal protection component, George argued, requires "the government, when it legislates in the intimate and sensitive realm of reproductive choice, to act evenhandedly with regard to this right of choice." But the legislature placed a greater burden on "a pregnant minor's access to medical care in the event she chooses to terminate her pregnancy than if she chooses not to terminate her pregnancy." The U.S. Supreme Court in its 1980 decision in *Harris v. McRae* had held that the Fourteenth Amendment's requirement of equal protection did not prevent the federal government from making a legislative judgment preferring childbirth over abortion. But George argued that the California's autonomy privacy rights did not depend on the federal Constitution but had independent force. The California Supreme Court had decided previously that such disparate and unequal treatment was forbidden by the California Constitution which imposes an obligation of "governmental neutrality" with respect to childbirth and abortion. The government thus has no constitutionally cognizable interest in choosing life over death when confronted by a claim of autonomy privacy.

Shortly after the decision in *American Academy of Pediatrics v. Lungren* was handed down, two members of the majority retired, including Chief Justice Malcolm Lucas. The Republican governor, Pete Wilson, nominated two

replacements, Ming Chin and Janice Brown, and elevated Justice George to the Chief Justiceship. Almost immediately, the newly constituted court voted, in a rare procedure, to rehear the case. Less than a year and a half after the first decision the Court finally handed down its revised opinion striking down the parental consent law—without a single line of explanation or acknowledgement of the reversal. Indeed, there was only the barest hint that there had even been a previous decision. The only discernible difference was the ideological predilections of the newly minted majority. But is it possible that a change in the ideological predilections of the Court requires a change in constitutional doctrine? And, if so, is this consistent with constitutional government and the rule of law? The California Supreme Court has almost given new meaning to the cynical quip that the Constitution is merely what the judges say it is. If that is the case, then constitutions have no force as organic or fundamental law.

In the new decision, bearing the same name as the old one, Justice Mosk's majority opinion became a dissent, and Justice Kennard's dissent became a concurring opinion, and Justice George's dissent became the opinion of the Court. The most important feature of the Chief Justice's opinion for the purpose of drawing the battle lines in the culture war was his elucidation of autonomy privacy as the realm of moral autonomy. Autonomy privacy is the sphere in which individuals make decisions unencumbered by outside influences. This is the realm of privacy that the California Supreme Court says is a fundamental right that can be invaded only on the basis of the most compelling necessity. Within the sphere of autonomy privacy decisions can be made in accordance with a morality that is also autonomous. It is abundantly clear, however, that when the privacy provisions were added to the California Constitution in 1972 there was no thought that radical moral autonomy would be the core of the right to privacy. Indeed, the ballot pamphlets and other election materials indicate that the protection of informational privacy—the protection of personal information and records—was the principal thrust of the constitutional amendment. There was no mention or hint of anything like autonomy privacy; this was added by judicial construction. There was also no indication that the intent of the constitutional amendment was to protect the right to privacy to a greater degree than afforded under the federal Constitution—in fact, the legislative debate proceeded almost exclusively in terms of federal case law.

Chief Justice George spoke of autonomy privacy as the individual's right "to retain personal control over . . . fundamental autonomy interests." And perhaps the most fundamental autonomy privacy interest, according to the Chief Justice, is the right to choose whether or not to procreate. "The right of choice," the Chief Justice noted, "may implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence, and the beginning of human life."

Many will recognize this statement as a paraphrase from Justice O'Connor's 1992 opinion in *Planned Parenthood v. Casey* in which she spoke of "choices central to personal dignity and autonomy." In what has become known to constitutional scholars as the "mystery clause," Justice O'Connor noted that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." But can such liberty, based on radical moral autonomy, serve as the foundation of constitutional morality?

This precise question was raised by Justice Janice Brown in her penetrating dissent. Privacy autonomy for children, Justice Brown argued, conflicts with the long-standing right of parents to direct the upbringing of their children, a right recognized as "fundamental" in both the U.S. and California Constitutions. If the privacy rights of children are recognized to be coextensive with those of their parents, then no possible reconciliation of these competing rights is possible. Justice Brown, I believe, addressed the core of the issue when she remarked that the decision to accord autonomy privacy rights to minor children puts the Court in the position that allows it "to dismiss all societal values, and to become the final arbiters of traditional morality in a context in which their view of wisdom cannot be challenged." And with perhaps more irony than she intended or knew, Justice Brown noted that "[t]his case is an excellent example of the folly of courts in the role of philosopher kings. Here, the trial court 'found' there is no difference in the decisionmaking capacities of minors and adults. . . . There is only one problem. The 'finding' is contrary to what every adult in the country knows from experience. . . . Certainly, in matters of normative judgment, no court should be in the position to supplant a society's collective understanding, distilled through experience and express in legislative enactments, on the basis of evidence presented in a single case." It is the legislature, she concluded, that is charged with the principal task of expressing the collective experience and wisdom of society, not courts. Courts, of course, have an important check on the expression of legislative will; legislative will must conform to the constitution and be consistent with the protection of minority rights. But it is not for the court to substitute its will for that of the legislature. After all, courts exercise judgment, and should never find themselves in the position of exercising will. This is a basic tenet of the doctrine of separation of powers which is essential to constitutionalism and the rule of law.

We are left with this stark anomaly: a minor girl—perhaps as young as ten—has an unfettered right to an abortion as long as she can convince a for-profit abortion provider that she is mature enough to give informed consent. At the same time, however, California law forbids the same minor from getting a permanent tattoo without parental consent—or from using a tanning salon without permission, or body-piercing, or a drivers' license. Presumably

these activities do not fall within the zone of autonomy privacy because—unlike procreational choice—they do not provoke questions about the mystery of being or the complexity of the universe.

Both the U.S. Supreme Court and the California Supreme Court have said that personal autonomy and autonomy privacy are somehow the core of constitutional liberty. Is this possible? Can autonomy ever be the source of liberty rightly understood as moral choice? Whatever else morality might mean, it certainly means making choices. But it means making choices with a view as to how those choices will affect others, whether family members or fellow citizens. Morality is by definition “other-regarding.” Confronting the mystery of the universe or the mystery of life as an autonomous human being is simply to do so idiosyncratically. Any idiosyncratic answers will be unintelligible and uncommunicable. Under these circumstances it is impossible to distinguish between the greatest wisdom and the greatest folly. But are there any standards for morality? Isn’t morality a matter of individual choice? We have been told often enough that morality is simply a matter of values and that there are no rational grounds to prefer one value to another. There are no standards to judge morality or value judgments, we are told, because value judgements do not rest on reason—value judgments are individual and idiosyncratic. All value judgments are therefore equal and equally deserving of respect. There is no better or worse—only differences.

Occasionally we are provoked to wonder whether these assumptions are adequate. We are still outraged by events such as the recent spate of school shootings. We are at a loss to explain or understand such outrages. But should we be? Teachers have taught their students that there is no such thing as morality, or at least no morality that has an objective ground or basis. We should clarify our values, we should make sure that the values to which we have committed ourselves are truly the ones we want, but there is no ground or standard by which we can say that any morality is right or wrong. Since there is no right or wrong morality, tolerance becomes the highest value. In a world where all values are equal and equally valuable, no judgment is possible; only tolerance of all values remains.

But teachers have also said that we should exercise our values in a way that does not harm others. Harming others is never good because it shows a lack of tolerance. And when students reply: is “not harming others” a morality, the teachers are forced to respond that it is not. Why then should this be a restriction on our autonomy, the students demand? If there is no morality how can you make an exception? And if this exception is only your personal autonomy choice, how does it apply to us? The students thus are more thoughtful and less timid than their teachers who, although they say there is no morality, act as if there were. Students want to be consistent: if there are no grounds for morality, then the prohibition against harming others cannot be valid. Students who act more consistently than their teachers cannot un-

derstand why their courage and honesty is not praised by their teachers who are prevented by their dishonesty and lack of courage from expressing their full moral autonomy. The teachers, of course, inconsistently believe that in a universe of moral relativism there can still be a moral absolute—respect for the moral autonomy of others. But the teachers don't see that there is no ground but their own idiosyncratic preferences for this moral injunction. The students thus understand their teachers better than they understand themselves. The teachers sow the seeds of nihilism but profess surprise and moral outrage when it bears fruit.

How did we come to this? Did the courts, *sua sponte*, foist this new morality—this autonomy privacy—upon an unsuspecting public under the guise of protecting rights and liberties? I fear greater forces were at work: the forces of modern philosophy that sought to undermine both reason and revelation as sources of morality. Some today—especially conservatives—say that the decline in morality was made inevitable by the nation's founding principles, because those principles were an expression of the modern thought that inevitably leads to moral relativism or—worse—nihilism. Once you have premised your politics on the principle that “all men are created equal,” we are told, it is only a matter of time before the demand for equality in all things sweeps all before it. What once was a respectable principle of distributive justice based on equal opportunity has insensibly become a demand for equality of result. What was once moral freedom has inevitably become permissive egalitarianism. In short, when a nation is founded on the principle of equal rights, individual moral autonomy then will be the inevitable result. The emphasis on rights came at the expense of obligations—so we are told. We used to derive our obligations from traditional morality, which, in turn, was inspired by traditional religion. Both of these were undermined by the triumph of permissive egalitarianism. Thus, we are told by some observers, there is a straight line between the Declaration of Independence and the California Supreme Court's decision in *American Academy of Pediatrics v. Lungren*.

Is this explanation plausible? I think not. The Founders of America operated within a well-articulated moral universe informed by the “laws of nature and nature's God.” That is, the principles that were to animate the political and moral life of the nation were to be drawn from the principles of human nature—principles that were confirmed by biblical teachings. The moral universe as understood by the Founders was not mysterious, but comprehended an articulated whole. In saying that “all men are created equal, [and] that they are endowed with by their Creator with certain unalienable Rights,” the Declaration refers to both a Creator and a creation. Creation, of course, necessarily implies an intelligible universe, an ordered whole. While the whole may always remain elusive, since God works in mysterious ways, man can discover as much of God's plan as is vouchsafed to man's reason. This

was the argument given by the Reverend Samuel West in 1776 in a sermon entitled "On the Right to Rebel against Governors"; it was an argument repeated almost *ad infinitum* by colonial ministers. "A revelation," Reverend West said, "pretending to be from God, that contradicts any part of natural law, ought immediately to be rejected as an imposture; for the Deity cannot make a law contrary to the law of nature without acting contrary to himself, —a thing in the strictest sense impossible, for that which implies contradiction is not an object of the divine power. Reason is the voice of God . . . [and] whatever right reason requires as necessary to be done is as much the will and law of God as though it were enjoined us by an immediate revelation from heaven, or commanded in the sacred Scriptures."⁶ I believe that both the argument of the Reverend West and the argument of the Declaration of Independence agree with St. Thomas Aquinas' account of the relation of the natural law to eternal law. According to Aquinas, the natural law is the rational creature's participation in the eternal law, and the eternal law is the law by which God governs the universe. Man participates in the eternal law to the extent that the law is rational, and the results of man's reasoning might properly be called the natural law. The distinction between God, man, and the lower orders of being provided the source and ground of morality in the American Founding. Men do not have the perfect wisdom of God, nor are they simply the creatures of instinct as are the lower animals. This means that the rule of law—which attempts to ameliorate the imperfections of man's reason—is the proper order for man's social constitution. And the rule of law, properly so-called, is derived from the consent of those who are subject to the law. If the rule of law means anything, it means that those who are subject to the law must participate in the making of the law and those who make the law must be subject to the laws they make. This is the dictate of natural human equality and the principles of human nature. Those who argue that the "pursuit of happiness" in the Declaration has no limit because the pursuit of happiness inevitably will become pursuit of idiosyncratic autonomy privacy understand rights apart from the natural law. Jefferson spoke of the Declaration as an expression of "the American mind." The American mind was a collective unity—it could not be idiosyncratic. "Public happiness," not the idiosyncratic happiness that might emanate from the sphere of autonomy privacy was the object of the Declaration's moral injunctions that there are no rights without concomitant obligations.

It may be objected that the Declaration didn't spell out its moral basis. But the American mind—as Jefferson recognized—was virtually unanimous on the question of political morality; its sources were drawn from both reason and revelation, natural law and the Bible. The idea that the protection of individual rights was in tension with the existence of the common good—or with the moral obligations that derive from the common good—was never expressed by the Founders. None of the Founders viewed rights as idiosyn-

cratic preferences divorced from duty or moral obligations. The idiosyncratic view of rights was the product of the late nineteenth century school of thought that we know as progressivism. The explicit goal of progressivism was to free the Constitution from its moorings in the Founding, most particularly from the static doctrines of the Declaration of Independence and its reliance on the permanent truths of the "laws of nature and nature's God." The notion of permanent truths and the laws of nature, the progressives argued, had been exposed as hopelessly outmoded by the progress of science, which had refuted the possibility of nature or natural right. The moral and political universe was not informed by the laws of nature as understood by the Founders, but the laws of evolution. Government is a living thing, the progressives declared; it is Darwinian in nature, and in the Darwinian universe there is no fixed moral horizon—there is only evolution and progressive change or adaptation. Progressivism itself was only one strain of modernity, but it shared with the other strains the depreciation of both reason and revelation as sources of moral and political authority. Progressivism was phenomenally successful in its debunking of the Founding and its reformist zeal appealed wholly to the passions. It sought to liberate the passions from the constraints of morality, whereas the Founders appealed to the "reason . . . of the public"⁷ as the foundation of moral and political order. The appeal to reason, of course, will always be more difficult than the appeal to passion, especially when the appeal to passion has itself assumed a kind of moral authority as it has in the concept of moral autonomy.

The Declaration speaks of the people both in their moral capacity ("the good People") and their political capacity ("one people"). Indeed, Americans are "one people" by virtue of the fact that they are "the good people." The revival of the principles of the Declaration will, I believe, go hand in hand with the restoration of religion in both public and private life. Both the Declaration and mainstream religions have suffered under the onslaught of the forces of historicism and positivism. These forces of modernity have succeeded in undermining both reason and revelation as supports for moral and political life. The kind of value relativism promoted by notions of autonomy and privacy has eroded the principles of the Declaration of Independence no less than "liberation theology" has weakened America's mainstream religions. Autonomy and privacy is the antithesis of both reason and revelation. But the triumph of autonomy and privacy is the triumph of modern philosophy, not the activist judiciary. It would be a mistake to think that the activist judiciary can be curbed by increasing the power of legislatures. The Framers envisioned a legitimate role—indeed an activist role—for the judiciary in the protection against majority faction. That is, the judiciary was to stand as a bulwark against those occasions when the majority attempted to extend its reach beyond constitutional limits. The role of the judiciary was to protect the organic law—the Constitution—against assaults by temporary majorities. But the

organic law cannot be understood apart from the principles that animate it; and those principles were articulated in the natural right and natural law principles of the Declaration of Independence. It is the revival of those principles that must animate any reform, not any structural or institutional reform of the Constitution. Such reforms would be incomplete—and perhaps dangerous—without a thoroughgoing understanding of the principles of the Founding, the principles that must be the starting point for any moral and political revival in our time. Jefferson wrote in the Bill for Establishing Religious Freedom, that “truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument, and debate.” But today truth has been disarmed of her natural weapons by the pervasive assumption that there is no such thing as truth—there are only values and there can be no rational knowledge of values. Morality thus has no ground in reason. This unexamined assumption—which itself has taken on the character of a moral absolute—holds that all truth is relative, merely the product of autonomy privacy. Free argument and debate on matters of value and morality is irrelevant, because reason and debate can never be productive of truth. This is the principal weapon that ideological liberalism uses in the culture war today. That war will be lost unless we succeed in disarming the advocates of moral autonomy of their principal weapon.

NOTES

1. See Edward J. Eler and Ernest O. Vincent, “*The California Supreme Court and the Death Penalty*,” *Benchmark* 2 (1986):143–53.
2. William J. Brennan, “*State Constitutions and the Protection of Individual Rights*,” *Harvard Law Review* 90 (1977):489, 502.
3. Brennan, *State Constitutions and the Protection of Individual Rights*, 491.
4. William J. Brennan, “The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights,” *New York University Law Review* 61 (1986):535, 550.
5. *Michigan v. Mosley*, 423 U.S. 96, 120, 121 (1975) (Brennan, J., dissenting).
6. Charles Hyneman and Donald S. Lutz, eds., *American Political Writings During the Founding Era, 1760–1805* (Indianapolis: Liberty Fund, 1983), vol. 1, 416.
7. Hamilton, Madison, Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961).