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The State Constitution: A More Than Adequate Nonfederal Ground

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To most lawyers "the constitution" means the Federal Constitution and, because commerce clause cases are not plentiful these days, more particularly the Bill of Rights. This is in part the consequence of the many decisions of the Warren Court applying to state and local governments nearly all the restraints of the Bill of Rights. As our rights and liberties became increasingly federalized, there was little need to consider what protections, if any, were secured by state constitutions.

It was not always so. At the time the California constitution of 1849 was adopted, it was understood that the Federal Bill of Rights was inapplicable to the states and functioned solely as a restraint upon the national government. The adoption of the fourteenth amendment by which various protections of the Bill of Rights were made applicable to state and local governments has been a phenomenon of this century,

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The author was co-counsel for Appellant Robert Page Anderson by appointment of the Supreme Court of California in People v. Anderson, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), cert. denied, 406 U.S. 958 (1972), a decision which is discussed in this Forward, as well as in a number of other cases challenging the constitutionality of capital punishment. The foregoing statement will, I trust, be understood as made solely in the spirit of full disclosure by one who might be thought to be, in the phrase of Mr. Justice Douglas, a "special pleader." Douglas, Law Reviews and Full Disclosure, 40 Wash. L. Rev. 227, 228 (1965). What credit for Anderson is due counsel must be allocated almost entirely to Professor Anthony G. Amsterdam who, when not illuminating the classrooms of Stanford Law School, has often as not been found in the past several years in courtrooms around the country tirelessly and brilliantly asserting the unconstitutionality of capital punishment. Yet I suspect that decisions such as Anderson result not as much from the cleverness or eloquence of counsel (which, in Professor Amsterdam's case, can be substantial) as from the independent intellectual and moral resources of the judges.

For most of the life of this nation the Federal Constitution offered no protection for the personal, religious, intellectual and political rights of its citizens in their relations with state and local government. In California those protections were provided by the Declaration of Rights—Article I of the California constitution—which contains provisions much like those of the Federal Bill of Rights.

Yet when, in February, 1972, the Supreme Court of California ruled in People v. Anderson that the imposition of the death penalty violated the proscription against "cruel or unusual punishments" of Article I, section 6 of the California constitution, many objected that the court improperly premised its decision on the state charter. The Attorney General of California was one of the more vociferous critics. In his view, the state court's assertion that Anderson relied solely upon Article I, section 6 of the California constitution was unworthy of belief; he advised the United States Supreme Court that it was "not bound to accept the California Supreme Court's self-serving characterization of its opinion as being premised upon" the California constitution. Moreover, he asserted, it constituted an "unseemly rush to judgment" for the court to have reached the state constitutional issue while the United States Supreme Court had the federal constitutional question before it.

2. See, e.g., Malloy v. Hogan, 378 U.S. 1, 4-6 (1964).
3. 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972).
4. 6 Cal. 3d at 633-34, 493 P.2d at 883-84, 100 Cal. Rptr. at 154-55.
5. Petition for Writ of Certiorari, State of California v. Robert Page Anderson, Oct. Term, 1971, No. 71-1248, cert. denied, 406 U.S. 958 (1972), at 13. The quotation here of the Attorney General's arguments does not imply agreement with their propriety. In fact, the Attorney General responded to the Anderson decision with an attack upon the court which in tone and timing strongly suggested political motivation. That assault was levelled not only in the media but in subsequent pleadings filed in the Anderson case. In his Petition for Rehearing, for example, the Attorney General stated:

   The Court's lack of respect for the constitutional doctrine of separation of powers and for the Court's own precedents can only be viewed by the public as indicative of a lack of judicial restraint and responsibility, thereby decreasing the already-declining respect of the public for our courts.

Petition for Rehearing, People v. Anderson, supra, at 25. This remarkable document was followed by a letter addressed directly to Mr. Justice McComb, the sole dissenter in Anderson, urging that in the event the court were to deny the Petition for Rehearing, he "consider incorporating [the] Petition into an opinion dissenting from such a denial." Letter from Attorney General Evelle J. Younger to Justice Marshall F. McComb, March 8, 1972. Justice McComb dissented, but without assisting the Attorney General in converting the California Reports into a political podium.

7. Furman v. Georgia, No. 69-5003; Jackson v. Georgia, No. 69-5030; Branch v. Texas, No. 69-5031; Aikens v. California, No. 68-5027. The U.S. Supreme Court dismissed the writ in Aikens as moot following the decision in Anderson, 406 U.S. 813 (1972), and subsequently proceeded to hold capital punishment, at least as presently administered through selective, discretionary procedures, federally unconstitutional. Fur-
Of course the criticism of *Anderson*—and of the Supreme Court's subsequent qualified invalidation of the death penalty in *Furman v. Georgia*—was also premised on broader grounds. The Attorney General told the California Supreme Court that its decision demonstrated that the judges were "oblivious to the nature of constitutional separation of powers." But rather than focus on these questionable attacks upon the court, I prefer to discuss the notion—implicit in the criticism of the California decision—that it was impermissible for the Supreme Court of California to have decided *Anderson* while *Furman* was pending, and beyond that court's power to invalidate capital punishment on state constitutional grounds alone. These are the more serious contentions, requiring appraisal here.

The issue is anything but academic. *Anderson* was based solely on independent state constitutional grounds; it was beyond the reviewing power of the United States Supreme Court—even had that court held in *Furman* that capital punishment did not violate the Federal Constitution. The principle that the United States Supreme Court will not review state court decisions based on adequate nonfederal grounds is a familiar and fundamental one. It rests, the Court has said, in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

This principle has been applied both when the state court has explicitly premised its decision on state law alone, without reference to

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10. The Chief Justice of the Supreme Court of California prepared a thoughtful address on the subject of judicial review, commenting specifically upon the *Anderson* case, in the third annual Roger J. Traynor Lecture at Boalt Hall. Wright, *The Role of the Judiciary From Marbury to Anderson*, 60 CALIF. L. REV. 1262 (1972).


the Federal Constitution (as in Anderson), and when the state ground is "independent" of federal principles, although the state court opinion discusses federal law.\[^{14}\]

The controversy over Anderson reflected dissatisfaction, not so much with these well-established principles,\[^{15}\] as with the California Supreme Court's practice, exemplified by Anderson, of resting important public law determinations on the California constitution. Much of the

14. E.g., Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965). When the Court cannot determine with reasonable assurance whether the state court decision rested independently on state law or, alternatively, viewed the state law issues as dependent upon interrelated, overriding or identically worded federal provisions, its practice is to vacate the judgment below and thereby permit the parties to obtain from the state court a determination of the precise basis of its judgment. E.g., Minnesota v. National Tea Co., 309 U.S. 551 (1940). See discussion of California v. Krivda, 409 U.S. 33 (per curiam) and Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965), note 17, infra.

15. But see Bice, Anderson and the Adequate State Ground, 45 So. CALIF. L. REV. 750 (1972). Professor Bice suggests that where a state court has (unlike the Anderson court) grounded its judgment on both federal and state law, the Court ought to review the federal question and, if it finds the lower court has decided it incorrectly, vacate for such further proceedings as the state court might wish to hold. His concern is that, absent such a procedure, the state court's dual-premised decision "will also have the effect of precluding effective political review... because amendment to the state constitution or laws cannot correct the federal defect and therefore cannot change the result of the state court's decision." Id. at 757. In other words, the Supreme Court ought to review the state court's resolution of the federal question—even though technically dictum—so that if legislators (or the people, through the initiative process) wish to change the state constitution or laws on which the decision also rests they will be able to proceed with the assurance that the federal constitution is not an obstacle to their objective. Two factors persuade me to disagree.

First, no matter how delicately phrased, the remand of a judgment—which by definition rests on an independent and adequate nonfederal ground [see note 12, supra]—in such circumstances would inevitably be abrasive. The state court would be placed in an exceedingly awkward position, for no reason related to the case at hand. The matter would have been remanded for further proceedings not inconsistent with the Supreme Court's resolution of the federal question; of course the state court will be compelled to adhere to its original judgment as to the state law question, but from a posture uniquely susceptible to political pressure and public misunderstanding.

Second, Professor Bice's proposal seems to require the United States Supreme Court to render "advisory" opinions of the most hypothetical sort. The lower court's judgment will not be affected; nor will any immediate, present controversy be resolved. The justification offered is that someone might wish to introduce legislation or propose a constitutional amendment to change the underpinning of the state-law portion of the decision. But the Court, of course, will not rule as to the constitutionality of proposed but unenacted legislation. Here the controversy would be yet another step more hypothetical, for the legislation or state constitutional amendment which a determination of the federal question might affect would not even have been proposed. In this connection, it is significant that in recent years the California Supreme Court has refused to entertain pre-election challenges to initiative measures (even where the constitutionality of the challenged ballot measure was open to serious doubt). See, e.g., Lewis v. Jordan, Calif. Sup. Ct., Sac. No. 7549 (June 3, 1964), order reprinted in Clancy and Nemorovski, Some Legal Aspects of Proposition Fourteen, 16 Harv. L.J. 3 (1964); Levit v. Brown, Calif. Sup. Ct., Sac. No. 7950 (August 3, 1972).
criticism, although unrefined, rested on the notion that the court should have either awaited the United States Supreme Court's decision on the eighth amendment challenge or, at the least, that it should have decided only that federal question so that the United States Supreme Court could review the California judgment. At its core, the dispute centered on the emphasis placed on the state constitution in constitutional adjudication by the courts of California. How much independent significance should California courts give to the state charter?

Although People v. Anderson was based on the state constitution, it was no sport. The California Supreme Court has long regarded the Declaration of Rights of the California constitution as a charter of independent significance. In some cases the court has relied on both the California and United States constitutions. In others, however, the

16. The California Supreme Court has also decided cases on grounds of state policy or in exercise of its inherent supervisory powers which, like dispositions based upon the California constitution, provide an independent nonfederal ground and avoid the necessity of deciding a federal (and, for that matter, state) constitutional question. For example, in In re Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), the court avoided a constitutionally-founded challenge to California's failure to provide counsel for men under sentence of death at the post-automatic appeal stage by providing that condemned men might, as a matter of state policy, obtain counsel as a matter of right for purposes of instituting state and federal post-conviction proceedings. In People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972), the court adopted a similar state policy assuring the right to counsel at probation hearings, thus avoiding the question reserved in Morrissey v. Brewer, 408 U.S. 471 (1972). In People v. Caban, 44 Cal. 2d 434, 282 P.2d 905 (1955), the court adopted the exclusionary rule as to evidence seized in violation of the prohibition against unlawful searches and seizures although at that time the Federal Constitution had been held not to require such a rule. In In re Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968), the court declined, presumably as a matter of state policy, to hold in contempt a person who disobeyed an unlawful court order despite the United States Supreme Court's approval of such a result in Walker v. Birmingham, 388 U.S. 307 (1967). Cf. Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963) (school authorities have affirmative duty to alleviate racial imbalance; opinion unclear whether result compelled by Federal Constitution, state constitution, or state policy of nonconstitutional dimension).

17. See, e.g., Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (equal protection); People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (search and seizure); People v. Murphy, 8 Cal. 3d 349, 352 n.2, 503 P.2d 594, 596 n.2, 105 Cal. Rptr. 138, 140 n.2 (1972) (prohibition against ex post facto laws); People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972) (due process); People v. Barksdale, 8 Cal. 3d 320, 332, 503 P.2d 257, 266, 105 Cal. Rptr. 1, 10 (1972) (due process-void for vagueness rule); People v. Taylor, 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972) (unreasonable search and seizure); Curtis v. Board of Supervisors, 7 Cal. 3d 942, 951, 501 P.2d 537, 104 Cal. Rptr. 297 (1972) (equal protection; independent significance of California constitution explicitly noted); Raffaele v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (equal protection); McDermott v. Superior Court, 6 Cal. 3d 693, 493 P.2d 1161, 100 Cal. Rptr. 297 (1972) (prohibition against excessive bail); Hayes v. Superior Court, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971) (equal protection); Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971) (equal protection); Randone v. Appellate Dep't, 5 Cal. 3d
California constitution has been the sole basis for decision, sometimes without reference to the Federal Constitution or even without acknowledgment that a different result might follow if only the Federal Constitution were considered.\textsuperscript{18}

\begin{itemize}

The parallel citation of federal and state constitutional provisions has, on occasion, led to uncertainty as to whether the decision rests independently on the California constitutional provision (even if the Supreme Court were to disagree as to the interpretation of the federal provision). In Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965), the United States Supreme Court vacated and remanded a judgment of the California Supreme Court which had invalidated state legislation with an opinion citing the equal protection provisions of the state and federal constitutions. The Court stated that it was "unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground." \textit{Id.} at 196-97. \textit{Compare} Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965). The Court took the same action on review of the California Supreme Court decision holding a warrantless search unconstitutional [California v. Krivda, 409 U.S. 33 (1972)] and on review of a decision invalidating the suspension of a driver's license without a hearing. Department of Motor Vehicles v. Rios, 35 L. Ed. 2d 398 (1973) (per curiam). In each instance, the California Supreme Court determined, on remand, that its prior decision had been based upon both federal and state constitutional provisions, with the latter independent of the former. Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965); People v. Krivda, 8 Cal. 3d 323, 504 P.2d 457, 105 Cal. Rptr. (1973) (per curiam). Procedural tangles of this sort are aided by the sometimes casual treatment the state law provisions are given by the California Supreme Court. For example, in its landmark decision on school financing, the court discussed the federal provisions and, in a footnote, added the observation that Article I, sections 11 and 21 of the California constitution are "substantially the equivalent of the equal protection clause." Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971). Recent efforts have been more careful. \textit{E.g.}, People v. Triggs 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (search and seizure).

\textit{E.g.}, In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (cruel or unusual punishment); Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (just compensation); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (cruel or unusual punishment); People v.
For example, in *Cardenas v. Superior Court*, the California Supreme Court acknowledged that the United States Supreme Court had held that a mistrial, granted on the trial court's own motion without the defendant's consent but for his benefit, does not constitute a violation of the double jeopardy clause of the fifth amendment. It concluded, nonetheless, that such a mistrial does violate Article I, section 13 of the California constitution. After *Benton v. Maryland* made the fifth amendment protection against double jeopardy applicable to state criminal prosecutions, the California Attorney General urged the court to reconsider *Cardenas*. The court declined, observing:

*Benton* requires only that the states accord their citizens at least as much protection against double jeopardy as is provided under the Fifth Amendment of the United States Constitution; it does not forbid a state from according a greater degree of such protection.

Similarly, in *People v. Henderson*, the California Supreme Court held that the state constitution bars imposition of a harsher sentence following retrial of a defendant who has successfully appealed a criminal conviction. That rule was applied in *People v. Hood* notwithstanding an intervening decision of the United States Supreme Court allowing, in certain circumstances, the imposition of a harsher penalty following retrial. And although the United States Supreme Court has not yet extended its right-to-counsel rulings to state misdemeanor prosecutions, the California Supreme Court has found the state constitution...
requires appointed counsel in such cases.\textsuperscript{26}

The court's willingness to read the state constitution independently of the Federal Bill of Rights has not been widely emulated by its counterparts in other states.\textsuperscript{27} In many state courts, judges often treat state and federal constitutions as if they were interchangeable; some even rely upon a principle of construction that requires them to treat decisions interpreting the Federal Constitution as dispositive when considering counterpart provisions of their state charters.\textsuperscript{28} Thus California's commitment to the continuing development of a significant body of state constitutional law is uncommon. In fact, as the decisions of the United States Supreme Court begin to reflect the philosophies of its newest members, it is likely that California constitutional law principles will increasingly differ from federal principles. The criticisms of Anderson, then, must be viewed in a larger context. Is it proper for the courts of California to read language of the California constitution that mirrors provisions of the Bill of Rights as more protective\textsuperscript{29} of civil rights and liberties than the federal charter? In interpreting the state constitution, what significance, if any, should a state court attach to a decision of the United States Supreme Court rejecting the identical claim as a matter of federal constitutional law?

The California Supreme Court has not, at least in recent years, discussed these questions at any length.\textsuperscript{30} Perhaps the court thinks too

\textsuperscript{26} Compare Blake v. Municipal Court, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1st Dist. 1966).
\textsuperscript{27} In re Johnson, 62 Cal. 2d 325, 398 P.2d 420. 42 Cal. Rptr. 228 (1965).
\textsuperscript{28} Countryman, \textit{Why a State Bill of Rights?}, 45 \textit{WASH. L. REV.} 454 (1970); Mazor, \textit{Notes on a Bill of Rights in a State Constitution}, 1966 \textit{UTAH L. REV.} 326 (1966); Paulsen, \textit{State Constitutions, State Courts and First Amendment Freedoms}, 4 \textit{VAND. L. REV.} 620 (1951); Linde, Book Review (to be published in \textit{ORE. L. REV.} 1973). This caution on the part of most state courts in finding scant independent protection of civil liberties in their state charters has not been matched in the field of economic regulation; the reign of substantive due process, generally thought to be largely at an end in the federal domain [see, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963)], continues to have vitality in many state courts—on the authority, of course, of their respective state constitutions. See Paulsen, \textit{The Persistence of Substantive Due Process in the States}, 34 \textit{MINN. L. REV.} 91 (1950); Note, \textit{Counterrevolution in State Constitutional Law}, 15 \textit{STAN. L. REV.} 309 (1963).
\textsuperscript{28} Mazor, \textit{Notes on a Bill of Rights in a State Constitution}, supra note 27, at 334.
\textsuperscript{29} It goes without saying, of course, that any reading of a state constitution which affords less protection to individual rights and liberties than is required by the Federal Constitution cannot affect the outcome; the question here is not whether state constitutions can be read more restrictively than the federal (they can, but the supremacy clause requires enforcement of at least what the Federal Constitution demands) but whether they can and should be read more broadly.
\textsuperscript{30} Its terse statement in Curry v. Superior Court quoted in the text at note 21, \textit{supra} might have been the introduction to a discussion of that nature, but the court did not see fit to elaborate. Chief Justice Wright, the author of the \textit{Anderson} opinion, re-
obvious for explanation the principle that the state constitution is an independent document binding upon it. Perhaps, too, the court should not stoop to answer the intemperate, and perhaps politically inspired, criticisms of *Anderson.*\(^{31}\) But respectable and serious expressions of concern are beginning to appear. Thus Professor Bice recently wrote:

A more difficult question of propriety is posed when a state court attempts to preclude Supreme Court review because it fears that the Supreme Court will give the federal constitutional provision a narrower, more restricted interpretation.\(^{32}\)

Although Professor Bice does not provide it,\(^{33}\) the answer to the question he poses seems clear: there is not the slightest impropriety when the highest court of a state\(^{34}\) invalidates state legislation or state
administrative action as violative of the state constitution. That remains true even where the state constitutional provision is similar or identical to the Federal Constitution, where the Federal Constitution's meaning is uncertain, or where the state court suspects or knows to a certainty that the United States Supreme Court would reject an analogous federal constitutional claim. Moreover, state courts ought to regard decisions of the United States Supreme Court interpreting like provisions of the Federal Constitution as binding only to the extent the Court's reasoning is intellectually persuasive. These unequivocal assertions warrant elaboration.

The controversy over the *Anderson* decision provides a useful starting point, for the court's critics seemed particularly outraged at the significance attached to the relatively slight difference in wording between the federal prohibition against “cruel and unusual punishments” and the state proscription of “cruel or unusual punishments.” But the court concluded in *Anderson* that “the delegates to the constitutional convention of 1849 . . . were aware of the significance of the disjunctive form and that its use was purposeful.” The *Anderson* critics assumed that the United States Supreme Court would find capital punishment to be constitutional under the eighth amendment prohibition against “cruel and unusual punishments” and the difference of a single word would not have justified the difference in result. But that view rested upon an implicit assumption which is entirely false: that if California and federal constitutional provisions had been identical in wording, an identical result would necessarily follow from their application. If one accepts that premise, it is not difficult to understand the consternation which *Anderson* generates.

But the premise is incorrect. It is certainly no novel perception that different men may employ identical language yet intend vastly different meanings and consequences. Some state constitutions preceded the Federal Bill of Rights; most were drafted thereafter. The courts of appeal—desirable in a state where the jurisdiction of the highest court is discretionary and in practice limited to a small percentage of the appellate caseload—is certainly open to serious question. As a practical matter, in all but a small number of cases the court of appeal is the court of last resort. For a court of appeal to let a presumption as to its proper function govern the disposition in a case not clearly controlled by precedents of the California Supreme Court is to allow (unless, of course, the importance of the case warrants review in the discretion of the supreme court) a factor unrelated to the merits to affect the outcome. But all of this is another subject; for present purposes, my focus is on the California Supreme Court's exercise of its function as the final arbiter of the California constitution's meaning.


I admit to being less than an impartial observer in this matter, having urged the very distinction between the conjunctive and disjunctive forms upon the court.
California constitution, for example, was first adopted in 1849; a substantial revision occurred in 1879; and revisions have taken place since that date. The authors of the Declaration of Rights were not the authors of the Federal Bill of Rights; and while they doubtless were familiar with the federal provisions, they placed heavy reliance on the constitutions of other states—principally Iowa and New York. Their life experiences, their sense of the evils against which an enumeration of liberties must guard, their understanding of the historical antecedents for the language chosen—all surely differed in no small measure from those of the framers of the Federal Bill of Rights.

But even had the framers of the state constitution intended to adopt for California a declaration of rights embodying the very same generalized principles as are in the Bill of Rights, they knew those principles would be applied in a concrete, case-by-case fashion by the state judiciary. Even if there were no disagreement as to the overall purpose of any given constitutional provision, such as a prohibition against harsh punishments, the state constitutional framers must have realized that reasonable men could differ over its precise application. Nothing in the history of the California constitution or in the structure of American federalism commands that California judges yield to the reasoning of federal judges in interpreting similarly worded constitutional provisions.

State judges, however, need not ignore the reasoning of the United States Supreme Court in opinions rejecting a comparable federal constitutional claim. For a state court interpreting a state constitution, opinions of the United States Supreme Court are like opinions of sister state courts or lower federal courts. While neither binding in a constitutional sense nor precedential in a jurisprudential one, they are entitled to whatever weight their reasoning and intellectual persuasiveness warrant. One would expect a state court to deal carefully with a Supreme Court opinion and to explain forthrightly why it found itself constrained to reason differently. But such a difference in rea-

37. Id. at 18-20.
39. The principle is no less true when state court judges conclude that the state constitution does not protect a claimed right or privilege but the United States Supreme Court finds the claim well-founded as a matter of federal law. While the supremacy clause requires the state to respect the rights and privileges the Supreme Court finds grounded in the Federal Constitution, nothing requires the state judiciary to re-interpret the state constitution in a conforming manner.
soning should be no more alarming than the differences which impel one judge to dissent from another’s opinion, one court to disagree with another, or the judges of any court to disagree with a precedent established by their predecessors.

Recognition that the American constitutional system neither requires nor prefers that state judges conform their interpretation of state constitutions to the United States Supreme Court’s interpretation of the federal charter is especially vital in light of the changing philosophy of the Supreme Court. After a consistent pattern of decisions making applicable to state and local governments provisions of the Federal Bill of Rights, a process of re-examination has commenced. The late Mr. Justice Harlan, for example, expressed the view that the Fourteenth amendment does not require that the strong prohibitions against censorship of expression imposed by the first amendment on the federal government in dealing with sexual matters apply with equal rigor to state and local governments.40 That view now appears to have at least two additional adherents in Chief Justice Burger and Mr. Justice Blackmun.41 Another shift is exemplified by Justice Powell’s conclusion that, although the sixth amendment commands a unanimous verdict for conviction in a criminal case, the states may convict without unanimity because “not . . . all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into . . . the Fourteenth Amendment.”42

It may well be that these recent views narrowing the sweep of the fourteenth amendment will not command a majority of the Court. But a single Justice who subscribes to them can have a critical effect on decisions which determine the meaning of constitutional provisions controlling state and local action. The unanimous jury decision which prompted an expression of Justice Powell’s view provides a vivid illustration. There four members of the Court thought the sixth amendment requires unanimous juries to convict; four members disagreed and voted to overrule a long line of cases requiring unanimity.43 Justice Powell’s conclusion that the sixth amendment requires unanimity but that the fourteenth permits the states to convict with something less


was dispositive: his approach, not joined in by any other member of the Court, becomes (for the moment, at least) the law of the land. In such circumstances, state judges must look to their own state constitutional provisions for guidance, without feeling obligated to follow the reasoning of the Supreme Court.

Indeed, Justice Powell's belief that reading the fourteenth amendment as incorporating "jot-for-jot and case-for-case" every element of the Sixth Amendment . . . derogates principles of federalism that are basic to our system"\(^{44}\) and "deprives the States to freedom to experiment with adjudicatory processes different from the federal model"\(^{45}\) surely contemplates the exercise of a high degree of responsibility on the state and local levels. State judges who insist that state government conduct itself in accordance with the specifications of the state constitution are an essential component of the kind of federalism Justice Powell envisions.

In a distinct but equally fundamental sense, the practice of looking first to the state constitution as a basis for disposing of a claim of right or privilege accords with our traditions of federalism. Professor Linde has persuasively argued that the state courts must reach and resolve claims in state constitutional terms before proceeding to a consideration of the federal question; only if the state constitution does not offer the protection sought does it become appropriate to consider the case in federal constitutional terms:

Whether [the fourteenth amendment] has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in a case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment.

The point is obvious when a conclusion such as "Regulation X denies defendant's rights under the fourteenth amendment and the corresponding sections of [the state constitution]" is broken down into its component parts. When a judgment holds with the defendant that the regulation is invalid under the state constitution, it cannot move on to a second proposition invalidating the state's action under the federal Constitution. By the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the four-

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45. Id.
teenth amendment, not denied it. While a defendant may have both a state and a federal constitutional claim to present, legally these are not cumulative but alternative . . . 46

Disposition of claims by reference first to the state constitution is consistent with the familiar principle that controversies ought to be resolved at the lowest possible level. Just as courts traditionally avoid, by statutory construction and like techniques, the necessity of invalidating legislation on constitutional grounds, 47 disposition upon state constitutional grounds 47 avoids unnecessary federal constitutional adjudication. As a consequence, the result may be altered by constitutional amendment at the state level (unless, of course, the Federal Constitution is subsequently held to have the same meaning) without the necessity of a federal constitutional amendment.

In the pages which follow, the work of the California Supreme Court in 1972 will be discussed and dissected. As will happen when scholars with a fair amount of time and a fresh perspective closely scrutinize the decisions of busy courts, flaws in reasoning will be detected, unanswered countervailing arguments will be identified, disregarded considerations will be discussed. But the review of the court's 1972 decisions also discloses the deep commitment of California's highest court—a commitment all too often not matched by its brethren in other states—to deal with the hard questions which are presented to it and to resolve them in a fashion which is faithful to the profoundly important values enshrined in the fundamental laws of the land. That commitment has required that serious attention be paid to the Declaration of Rights of the California constitution. More than twenty years ago, Professor Paulsen's review of the performance of state courts in enforcing the provisions of their respective state constitutions persuaded him to observe that "if our liberties are not protected in Des Moines the only hope is in Washington." 48 We are fortunate that the perspective from California requires that observation to be inverted.