New Frontiers: Individual Rights Under the California Constitution

By MARGARET C. CROSBY*

California residents have greater freedom than other Americans because the California Constitution has strong protection for individual rights and because the California courts have taken seriously the independent force of the state constitution. Californians should celebrate this liberty, which will become even more significant in the 1990s as the United States Supreme Court increasingly restricts individual rights. To maintain consistency in State constitutional doctrine, California courts will be called upon to reaffirm precedents that afford their residents more protection than the national norm. Moreover, California courts will be called upon to apply California constitutional provisions to novel and complex social phenomena that affect personal liberty. California courts have acted in a principled fashion in developing a body of State law that protects individual rights and is broader than federal law. State precedents reflect the unique language and history of California constitutional provisions and are responsive to the needs of this State and its people. Three areas of constitutional law illustrate these principles: freedom of expression, religious liberty, and privacy.

I. Freedom of Expression

A. Sources

The United States Constitution's First Amendment's guarantee of freedom of expression is drafted in tight, restrictive terms: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[1] In contrast, the parallel provision of the California Constitution includes an affirmative right of expression: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[2] This affirmative provision neither mirrors

* Attorney, American Civil Liberties Union Foundation of Northern California; J.D., Yale Law School, 1973.

1. U.S. CONST. amend. I.
2. CAL. CONST. art. I, § 2(a).

nor derives from the First Amendment. It is clearly broader than the Federal Free Speech Clause.[3]

B. Forums for Expression

1. *Private Property: Shopping Centers*

Any discussion of state constitutional protection for expression must start with *Robins v. Pruneyard Shopping Center*[4] because *Pruneyard* is so seminal an opinion in state constitutional construction. Before *Pruneyard,* from 1968 through 1976, the United States Supreme Court issued a series of conflicting opinions on whether citizens had the right to engage in expressive activity in privately owned shopping centers. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[5] the Court ruled that the First Amendment barred the use of state trespass laws against members of the public expressing their views in shopping centers. In *Lloyd Corp. v. Tanner,*[6] however, the Court restricted *Logan Valley* sharply, stressing the private status of the property. In *Hudgens v. NLRB*[7] the Court squarely overruled *Logan Valley.*

The plaintiffs in *Pruneyard,* students barred from petitioning in a San Jose, California, shopping mall, challenged their exclusion from the mall in court. They argued that because San Jose had no downtown business district, a situation largely due to the growth of shopping centers, they were entitled to petition in a shopping center because they lacked adequate alternative channels of communication, which were assumed to exist in *Lloyd.*[8] The California Supreme Court took a broader approach, ruling that article I, sections 2 and 3 of the California Constitution (guaranteeing liberty of speech and petition) required all shopping center owners to allow members of the public who wished to speak or petition the opportunity to do so.[9]

This state constitutional holding required the Court to confront the potential federal constitutional question: Did private property owners have federally guaranteed rights that would supersede the speakers' state constitutional rights to expression? In other words, was the language in *Lloyd* stressing private property directed at defining the limits of federal free speech by holding that the absence of state action made the First

3. *See* Pines v. Tomson, 160 Cal. App. 3d 370, 393-95, 206 Cal. Rptr. 866, 880-82 (1984).
4. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).
5. 391 U.S. 308 (1968).
6. 407 U.S. 551 (1972).
7. 424 U.S. 507, 518 (1976).
8. *Pruneyard*, 23 Cal. 3d at 907, 592 P. 2d at 345, 153 Cal. Rptr. at 858.
9. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860.

Amendment inapplicable, or did it establish fifth amendment property rights in the mall owners? The Court decided that *Lloyd* was primarily a first amendment case, allowing broader construction of the state constitution to limit the interest of shopping center owners in excluding members of the public.

When the case reached the United States Supreme Court, civil liberties advocates relied on a number of cases in which the Supreme Court had rejected civil liberties claims under a federal doctrine that property rights originate from such sources as state law, not the Federal Constitution.[10] These opinions became the basis for the argument protecting the California Supreme Court decision in *Pruneyard*: the State's highest court had defined property rights in compliance with the State's highest law. The Court agreed that the Federal Constitution was implicated only by confiscatory conduct or contravention of "any other constitutional provision."[11] In an opinion by Justice Rehnquist, the United States Supreme Court unanimously affirmed the California Supreme Court's *Pruneyard* decision.[12]

Pruneyard illustrates two significant aspects of state constitutional adjudication. First, it indicates that although overriding federal rights limit state courts' authority to confer independent state constitutional rights, state courts should take a hard look at federal precedents to see whether they articulate federally conferred rights that act as barriers to independent state constitutional adjudication.[13]

Second, *Pruneyard* demonstrates the ability of state constitutions to respond to local conditions. California is a state in which the shopping center has assumed enormous commercial significance, eclipsing the traditional "Main Street" as the area in which people congregate. If freedom of expression were to survive in California's modern commercial era, then State constitutional provisions protecting speech had to open privately owned malls as a forum for expression.

Pruneyard is a significant decision, both because it has sparked similar opinions in other states[14] and because it has revitalized grass-roots

10. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (no fourteenth amendment hearing requirement prior to nonrenewal of a non-tenured state teachers' contract).

11. *Pruneyard*, 447 U.S. at 81.

12. *Id.* at 75-76.

13. Before *Pruneyard*, many courts assumed that *Lloyd* was a fifth amendment decision that precluded more expansive state constitutional interpretation. *See* Diamond v. Bland II, 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974), *rev'g* Diamond v. Bland I, 3 Cal. 3d 653, 477 P.2d. 733, 91 Cal. Rptr. 501 (1970), *cert. denied*, 419 U.S. 885 (1974).

14. *See, e.g.*, Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d. 108 (1981); Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 445 N.E.2d. 590 (1983)

activism in California. The shopping center industry has launched a massive resistance to the decision, promulgating burdensome and restrictive rules for petitioning activity. That, in turn, has led to a second wave of shopping center litigation challenging the validity of the regulations.[15] The struggle over access to shopping centers will continue to occupy state courts in the years ahead.

2. *Public Forums*

In an analogous area, California constitutional law defines public forums for expression much more expansively than the federal doctrine. In this State, public property must be available for expressive purposes that are not inconsistent with the use to which the government has dedicated the property.[16] Thus, for example, if the traffic function of a prison parking lot is not impeded by the communicative activities of prisoners' families, the prison must permit this activity.[17]

California's public forum doctrine parallels federal constitutional law before 1980. In recent years, however, the United States Supreme Court has accorded the government the regulatory authority, comparable to the right of a private property owner, to dedicate property to nonexpressive uses.[18] Only traditional public forums (streets and parks) must remain open for all protected activity.[19] The government may create "limited public forums" such as university facilities for recognized student clubs,[20] but it may also reasonably limit access to those forums or close them altogether. In all areas the government has not dedicated to speech—"nonpublic forums"—the government may even engage in content-based discrimination. It may allow some speakers but not others, provided that it does not suppress a particular view on which speech is allowed ("viewpoint discrimination").[21]

(both protecting unobtrusive signature solicitation at shopping malls under their respective state constitutions).

15. *See* H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (1987), *cert. denied*, 108 S. Ct. 1248 (1988).

16. University of California Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory, 154 Cal. App. 3d 1157, 201 Cal. Rptr. 837 (1984).

17. Prisoners Union v. Department of Corrections, 135 Cal. App. 3d 930, 185 Cal. Rptr. 634 (1982).

18. Perry Education Ass'n v. Perry Local Eduactors' Ass'n, 460 U.S. 37 (1983).

19. *Id.* at 45.

20. Widmar v. Vincent, 454 U.S. 263 (1981).

21. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985) (respondents exclusion from charity drive is viewpoint-neutral and therefore constitutionally permissible).

California's more expansive definition of public forums illustrates an important aspect of state constitutional law: its role in promoting consistency in constitutional doctrine. Even though state precedents may derive from federal precedents, state constitutional law should not expand and contract automatically with shifts in opinions from the United States Supreme Court. The essence of an independent body of state law is that it is not controlled by the judiciary in Washington, D.C., 3000 miles away. In coming years, California's public forum law will be a focal point of concern for lawyers supportive of independent state constitutional interpretation. California courts should not follow the United States Supreme Court in narrowing access to public property for expressive purposes, but should adhere to consistent state constitutional doctrine.

C. Subsidized Speech

Another area of current concern regarding freedom of expression involves restrictions placed by the government on speech subsidized with public funds. The United States Supreme Court increasingly has adopted a deferential attitude toward evaluating governmental conditions on public benefits.[22] If the Court characterizes such restrictions as a "penalty" for protected conduct, the Court will employ strict scrutiny, imposing a heavy burden of justification from the government.[23] But if the Court views the challenged restriction as simply a "failure to fund," it allows the state far more latitude.[24] In recent years, such restrictions have increasingly been characterized as "failures to fund." For example, the Court upheld federal legislation that denied a worker and his family food stamps though the worker's financial status satisfied neutral eligibility criteria—lack of sufficient income—because his financial problems resulted from participation in a labor dispute and subsequent strike.[25] It is

22. In Maher v. Roe, 432 U.S. 464 (1977), the Supreme Court added a new gloss to the federal doctrine of unconstitutional conditions. It required, for close judicial scrutiny, either that the government erect a new hurdle to the exercise of constitutional rights or that a benefit recipient lose other, related benefits upon the exercise of constitutional rights. If these elements are not present, the Court will evaluate the constitutionality of benefit restrictions under the substantial interest test.

23. *Id.* at 474 n.8; *see also* Harris v. McRae, 448 U.S. 297 (1980). The Court distinguished earlier federal precedents on unconstitutional conditions as "penalty" cases. These include Shapiro v. Thompson, 394 U.S. 618 (1969), and Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). *Id.* at 317 n.9.

24. *See Harris*, 448 U.S. at 316-18.

25. Lyng v. International Union, UAW, 485 U.S. 360 (1988) (challenging the Omnibus Budget Reconciliation Act of 1981, 7 U.S.C. § 2015(d)(3) (1988)).

not intuitively obvious that this was a failure to fund rather than a penalty for expression.

During the 1988 Term the Court declined to determine the constitutionality of a Missouri law forbidding family planning counselors from advising their clients of the option of abortion when the counseling is subsidized with public funds.[26] The Court declined to decide this issue holding that it was moot. Because similar restrictions exist in federal regulations,[27] the Court is expected to resolve the important question of subsidized speech in the future.

California courts have developed an extensive body of law on the doctrine of unconstitutional conditions, which holds that if a condition of receiving a public benefit is the waiver of a fundamental right, the government must justify the restriction by a stringent three-part test that is functionally identical to strict scrutiny.[28] This is true even where the challenged restriction could be characterized as a "failure to fund" speech rather than a penalty on speech. For example, in *Danskin v. San Diego Unified School District*,[29] the California Supreme Court held that refusal to allow "subversive" speech in public auditoriums was unconstitutional despite the government's claim that it simply did not wish to support "subversive" views with public funds. The doctrine has been invoked in many free speech cases dealing with the right of public employees to engage in political expression,[30] to refuse to sign loyalty oaths,[31] and to gain access to public housing despite being considered "subversive elements."[32] Under the California Constitution, restrictions

---

26. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3053 (1989).

27. These are currently being litigated in federal courts. *See, e.g.*, Planned Parenthood Fed'n of America v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction), *appeal filed*, No. 88-2251 (10th Cir.); Massachusets v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), *aff'd*, No. 88-1279 (1st Cir. May 8, 1989), *vacated and withdrawn, reh'g en banc granted*, No. 88-1279 (1st Cir. Aug 9, 1989); New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988).

28. Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

> [A] governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.

Id. at 501-02, 421 P.2d at 411, 55 Cal. Rptr. at 403.

29. 28 Cal. 2d 536, 171 P.2d 885 (1946).

30. *Bagley*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401; Fort v. Civil Serv. Comm., 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

31. Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

32. Housing Auth. v. Cordova, 130 Cal. App. 2d Supp. 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956).

on publicly funded speech are subjected to close judicial scrutiny.[33] The government is not totally forbidden from imposing conditions on the exercise of constitutional rights in benefit programs, but it bears a heavy burden of justifying such restrictions.[34]

The unconstitutional conditions doctrine is important in the modern welfare state where the government has massive control over public resources. To allow the state to use that authority to manipulate the ways in which citizens exercise fundamental rights is to allow a significant incursion into freedom. While the United States Supreme Court has been increasingly willing to give the federal government great latitude in "buying up" fundamental rights by strategic restrictions on public benefits, the California Constitution will serve as a bulwark against similar restrictions unless they serve a compelling public need.

D. Summary of Freedom of Expression

The California Constitution's free speech doctrine offers more protection than its federal counterpart for less affluent speakers who most need access to shopping centers, public property, and public benefits. In an era in which public opinion is often shaped by techniques such as television advertising, marketing focus groups, and mass computer mailings—communications technology that is priced far beyond the reach of many Americans—it is important that people have alternative means of expressing their views on important topics. Often, the people who most need access to low-cost forums for speech are those with views that dissent from the opinions held by those who can afford modern mass communications—the political majority, corporate executives, and the government. Constitutional principles that preserve forums where people congregate and limit the government's power to manipulate subsidized expression are important because they maintain a society in which different voices can be heard. In the coming years, protection for these voices will come from the state, not the federal, constitution.

33. The California test for determining the constitutionality of a condition attached to receipt of public benefits evaluates whether the condition relates to the purpose of the legislation that confers the benefit; whether the utility of imposing the condition manifestly outweighs any resulting impairment of constitutional rights; and whether the state has established the unavailability of less offensive alternatives and demonstrated that the conditions are drawn with narrow specificity. *Bagley*, 65 Cal. 2d at 505-07, 421 P.2d at 414-15, 55 Cal. Rptr. at 406-07.

34. "[W]e acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitiutional rights. In doing so, however, government bears a heavy burden of demonstrating the practical necessity for the limitation." *Id.* at 505, 421 P.2d at 414, 55 Cal. Rptr. at 406 (footnote omitted).

II. Freedom of Religion

A. Sources

The California Constitution, like many state constitutions, contains provisions protecting religious liberty and guaranteeing separation of church and state in language far more detailed and comprehensive than the Federal Constitution's First Amendment.

Article I, section 4 of the California Constitution prohibits the State from making any law "respecting an establishment of religion" and guarantees that religion may be practiced "without discrimination or preference."[35]

California voters added the establishment clause by initiative in 1974.[36] Although its language mirrors the Federal First Amendment,[37] and State courts consult standards developed under the federal precedents in construing it,[38] its scope is broader than the Federal Establishment Clause. Article I, section 4 is a document of independent vitality, consistent with its passage in the same election (1974) in which the voters enacted article I, section 24, declaring that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[39]

California's free exercise clause, stating, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed,"[40] is clearly more expansive than its federal counterpart, for it not only prohibits governmental interference with the exercise of religion, but also governmental display of preference to any faith. This clause was part of the original 1849 Constitution, although it was strengthened in 1879 by changing the original language providing that free exercise is "allowed" to "guaranteed."[41] This section is "broader than the federal guarantee because preference is forbidden, even when there is no discrimination."[42]

---

35. CAL. CONST. art. I, § 4.

36. *Id.*

37. U.S. CONST. amend. I states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

38. Mandel v. Hodges, 54 Cal.App.3d 596, 616, 127 Cal. Rptr. 244, 253 (1976); Feminist Women's Health Center, Inc. v. Philibosian, 157 Cal. App. 3d 1076, 1086, 203 Cal. Rptr. 918, 922-23 (1984), *cert. denied*, 470 U.S. 1052 (1985).

39. CAL. CONST. art. I, § 24.

40. CAL. CONST. art. I, § 4.

41. DEBATES AND PROCEEDINGS, CAL. CONST. CONVENTION 1878-1879, at 1171, *cited in* Fox v. City of Los Angeles, 22 Cal. 3d 792, 799-800 n.2, 587 P.2d 663, 667 n.2, 150 Cal. Rptr. 867, 871 n.2 (1978) (Bird, C.J. concurring).

42. Philibosian, 157 Cal. App. 3d at 1092, 203 Cal. Rptr. at 926 (1984) (citing Fox v. City of Los Angeles, 22 Cal. 3d 792, 796, 587 P.2d 663, 665, 150 Cal. Rptr. 867, 869 (1978)), *cert. denied*, 470 U.S. 1052 (1985).

The California Constitution thus requires strict government neutrality among faiths.[43]

Article IX, section 8 of the California Constitution prohibits public school officials from permitting the instruction of "any sectarian or denominational doctrine [to] be taught . . . directly or indirectly, in any of the common schools of this State [or in the public school system]."[44] In addition, article IX, section 8 forbids public subsidy to any nonpublic school.[45] This clause, added to the California Constitution in 1879, firmly committed this State's school system to religious neutrality decades before the United States Supreme Court declared prayer in schools unconstitutional.[46]

Article XVI, section 5 prohibits all government entities from "grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose."[47] This provision, added to the State constitution in 1879, "does not mirror or derive from any part of the federal Constitution."[48] The California Supreme Court stated, "The section thus forbids more than appropriation or payment of public funds to support sectarian institutions."[49] Also prohibited is aid "in the form of prestige and intangible power."[50] Because of its expansive language, this clause most clearly reflects California's commitment to the principle of separation of church and state. As Attorney General, Justice Stanley Mosk described a constitutional prohibition on the use of public funds for any religious or sectarian purposes as "the definitive statement of the principle of government impartiality in the field of religion."[51]

These detailed and comprehensive provisions will serve as a bulwark as the United States Supreme Court dilutes protection afforded by the Federal First Amendment, a process that has already commenced. In the coming years, the California Constitution will be the primary source of protection for religious freedom in many areas, thus returning the State constitution to the role that it was designed to play. This trend will

43. *See* 25 Op. Cal. Att'y Gen. 309, 313 (1955).

44. CAL. CONST. art. IX, § 8.

45. *See* California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

46. *See* People *ex rel.* Beckwith v. Board of Educ., 55 Cal. 331 (1880); J. SWETT, PUBLIC EDUCATION IN CALIFORNIA (1969).

47. CAL. CONST. art. XVI, § 5.

48. Fox v. City of Los Angeles, 22 Cal. 3d 792, 801, 587 P.2d 663, 668, 150 Cal. Rptr. 867, 872 (1978) (Bird, C.J., concurring).

49. California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 605 n.12, 526 P.2d 513, 521 n.12, 116 Cal. Rptr. 361, 369 n.12 (1974).

50. *Fox*, 22 Cal. 3d at 802, 587 P.2d at 669, 150 Cal. Rptr. at 873 (Bird, C.J., concurring).

51. 37 Op. Cal. Att'y Gen. 105, 107 (1961).

be most striking in two areas: public subsidies to religion and symbolic alliance between church and state.

B. Public Subsidies to Religion

The clear mandates of article IX, section 8 and article XVI, section 5 caused the California Supreme Court to depart from federal precedent in striking down a loan program of public school textbooks to parents of children attending parochial schools.[52] The California Supreme Court rejected both the reasoning and result of a United States Supreme Court precedent, upholding a functionally identical program to that struck down in *California Teachers Association v. Riles* under the Federal Establishment Clause.[53] *Riles* illustrates the significance of a textual difference in state constitutional adjudication, which, in California, has mandated a different, and more stringent, judicial role in evaluating public grants to religious institutions. The United States Supreme Court distinguished establishment clause precedents invalidating aid to parochial schools from the textbook loan program by adopting wholesale the argument that the arrangement benefitted the children rather than the parochial schools.[54] The California Supreme Court, in contrast, not only rejected the "child benefit" theory as proving too much (since any aid to parochial schools ultimately inures to the benefit of the pupils), but also took a much harder look at the reality of the program, piercing the fiction that the parents requested the books and concluding that the entire program was administered by and for the benefit of the religious schools.[55]

The strong State constitutional limitation on public support of religion undoubtedly will become extremely important in coming years as the United States Supreme Court allows greater public financial aid to religion. The California Supreme Court's hard look at the reality of the program struck down in *Riles* contrasts sharply with the extremely deferential, if not myopic, approach recently taken by the United States Supreme Court in *Bowen v. Kendrick*,[56] upholding federal grants to religious organizations to combat teen pregnancy. The plaintiffs in *Kendrick* challenged provisions of the Adolescent Family Life Act (popularly known as the "Chastity Act") under which grants were made to nonprofit organizations, including religiously affiliated groups, to prevent

52. California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

53. Board of Educ. v. Allen, 392 U.S. 236 (1968).

54. *Id.*

55. *Riles*, 29 Cal. 3d at 810, 632 P.2d at 962, 176 Cal. Rptr. at 309.

56. 108 S. Ct. 2562 (1988).

teenage pregnancy;[57] the Act specifically required that grantees encourage abstinence and not encourage abortion.[58] The subjects of counseling—sexuality, pregnancy, contraception, and abortion—are obviously sensitive, for many religions have developed extensive doctrine on these topics. Indeed, a focal point of disagreement among religions is their beliefs regarding sexuality and childbirth, and attempts to inculcate those views and see them embodied in the secular law. The evidence in *Kendrick* established, and the district court found, that religious grantees had misused grants to counsel religious doctrine.[59] Nevertheless, the Supreme Court upheld the program.[60] In contrast to the *Riles* court's hard look at the reality of whether the public program financially benefitted the religious mission of parochial institutions, the United States Supreme Court dismissed the evidence that sectarian doctrine had been promoted with public funds as showing incidental abuse, rather than a systemic violation of the Establishment Clause's proscription on public aid to religion.[61]

Kendrick represents a shift in establishment clause doctrine and heralds the future for challenges to aid to sectarian institutions. The Court has adopted a casual attitude toward direct subsidies to religious organizations and made it far more difficult to prove a systemic constitutional violation sufficient to justify an injunction against public aid to religion. In contrast, the California Constitution plainly and unequivocally bars tax support for religious institutions. This will mandate much closer judicial scrutiny of social programs (such as aid to the homeless), in which the government seeks the aid of religious organizations, to ensure that the religious mission of the organization is not being subsidized.

C. Symbolic Alliance Between Church and State

Challenges to a symbolic alliance between church and state arise most often in the context of religious symbols placed on public land. The United States Supreme Court started a process of relaxing federal doctrine in this area in *Lynch v. Donnelly*.[62] *Lynch* upheld the inclusion of a Nativity scene in a municipal seasonal display that also included secular Christmas symbols such as reindeer and Christmas trees.[63] The Court upheld the placement of the crèche on the theory that it was secularized

57. *Id.* at 2566-68.
58. *Id.* at 2566-67.
59. *Id.* at 2573.
60. *Id.* at 2581.
61. *Id.* at 2573.
62. 465 U.S. 668 (1984).
63. *Id.* at 687.

by its surrounding context.[64] This led to a wave of fact-intensive federal litigation on religious displays, in which some federal courts counted the number of plastic animals in the surrounding display, leading to the "Two Plastic Reindeer" rule and the "St. Nicholas, Too" test.[65]

The Court revisited the issue in *County of Allegheny v. American Civil Liberties Union*,[66] ruling on a Nativity scene and menorah display in government buildings. The government in *Allegheny* argued that surely *Lynch* was not a mandate for federal judges to count reindeer and that the "context" that secularized the display must mean the Christmas season.[67] The Court ostensibly reaffirmed the *Lynch* standard, however, looking to the surrounding display to ascertain whether an observer would consider the inclusion of a religious symbol within the particular physical setting as communicating governmental endorsement of religious beliefs.[68] The Court majority adopted the approach suggested by the concurring opinion of Justice O'Connor in *Lynch*, which focused on whether the challenged object " 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' "[69]

The stronger State constitutional protection against symbolic alliance between church and state is illustrated by *Fox v. City of Los Angeles*,[70] which barred the illumination of windows on the Los Angeles City Hall in the form of a cross at Easter and Christmas. The display violated the article I, section 4 prohibition against governmental "preference" of a religious doctrine and the article XVI, section 5 prohibition against state "aid" to religion, interpreted as barring the government from lending its prestige or endorsement, as well as financial assistance, to religion.[71] Nothing in *Fox* suggests that the addition of secular seasonal objects would have rendered the cross illumination permissible.[72] The focus of the state constitutional tests is on the governmental action in "prefer-

---

64. *Id.* at 680-81.

65. American Civil Liberties Union v. County of Allegheny, 842 F.2d 655, 668-69 (3d Cir. 1988) (Weis, J., dissenting), *aff'd in part and rev'd in part*, 109 S. Ct. 3086 (1989).

66. 109 S. Ct. 3086 (1989).

67. Brief for Petitioner at 14-19, *Allegheny*, 109 S. Ct. 3086 (1989); *see also Allegheny*, 109 S. Ct. at 3101-05.

68. 109 S. Ct. at 3103-05.

69. *Id.* at 3118 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

70. 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978).

71. *Id.* at 800-03, 587 P.2d at 667-69, 150 Cal. Rptr. at 871-73 (Bird, C.J., concurring).

72. In a true public forum, the government's neutral, equal approval of the placement of all other religious and secular symbols might satisfy the preference criterion of article 1, § 4. *See id.* at 796-97, 587 P.2d at 665-66, 150 Cal. Rptr. at 869-70.

ring" and "aiding" religion by displaying its symbols publicly. An elaborate contextual analysis is unnecessary. The constitutional test is simpler: if the object is religious, the government should not use its resources to display it.[73] The explicit language of the California Constitution's clauses on religion mandate a different result from the Federal Establishment Clause.

Even when the federal and state texts are identical—as with the Establishment Clauses of the First Amendment and article I, section 4—the California Constitution is more protective. One of the analytic elements of the Federal Establishment Clause is whether a challenged state-church program fosters " 'excessive government entanglement with religion,' "[74] or divisiveness along religious lines.[75] In *Lynch* and *Kendrick* the United States Supreme Court limited this aspect of the establishment clause doctrine to direct aid to pervasively sectarian institutions.[76] Thus, in cases dealing with placement of religious symbols or government support for anti-abortion religious doctrine, the Court dismissed any resulting controversy as legally irrelevant. In California, in contrast, political divisiveness is an element to be considered in evaluating whether the line between church and state has become too close. Thus, a district attorney's symbolic support for anti-abortion views by turning fetal tissue over to a religious group for a burial ceremony was found to violate the California Constitution, in part because of the divisiveness along religious lines of the abortion controversy.[77]

The California courts' insistence on considering whether State action fosters religious divisiveness illustrates an important function of a state constitution, namely, its responsiveness to local conditions. As California courts have recognized, this State has perhaps the most diverse and pluralistic population of any state in the country, with a great

73. A court of appeal upheld the placement of a particular menorah, the Katowitz Menorah, with singular historical significance, in Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (1989). Central to the court's conclusion was its finding that the Katowitz Menorah, "with its unique historical background, was much more a museum piece than a symbol of religious worship." *Id.* at 580, 254 Cal. Rptr. at 922. To the extent that the court ruled that religious symbols are permissible in government buildings, the decision would appear to be incorrect under California law.

74. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Commission, 397 U.S. 664, 674 (1970)).

75. *Id.* at 622.

76. Lynch v. Donnelly, 465 U.S. 668, 684 (1984); Bowen v. Kendrick, 108 S. Ct. 2562, 2577-78 (1988).

77. Feminist Women's Health Center, Inc. v. Philibosian, 157 Cal. App. 3d 1076, 1091, 203 Cal. Rptr. 918, 926 (1984), *cert. denied*, 470 U.S. 1052 (1985).

number of religious minorities.[78] The concern for minimizing fragmentation along religious lines reflects the demographic characteristics of California. The courts' special sensitivity to the plight of religious minorities—preventing the government from ostracizing them by endorsing a majority faith—fulfills an important stabilizing function in so diverse a population. From the first 1849 Constitution, the bar against governmental "preference" for sectarian beliefs established an official policy of government neutrality to prevent divisiveness.[79] Throughout California's history the need for religious tolerance has been an important theme in case law. In contrast, an emerging theme in some federal cases is the perceived need to allow public acknowledgement of our religious heritage—by which judges mean the Judeo-Christian heritage—and the benefits of accepting a public "civil religion."[80] In California, courts have recognized that residents do not share a common religious heritage; thus, California's constitutional heritage shows tolerance for divergent beliefs.[81]

Although the California Constitution undoubtedly will assume greater significance in limiting governmental endorsement of religion as establishment clause doctrine retreats, there is one significant limitation on the power of California courts to enforce the State constitution. Because religious speech is, of course, protected speech, some measure of federal constitutional protection for it will override State constitutional provisions on church and state. Federal courts have already conferred federal constitutional protection for worship or religious symbols in public forums under the Free Speech and Equal Protection Clauses of the United States Constitution.[82] The issue likely will be confined to a public forum context.

78. *See* Bennett v. Livermore Unified School Dist., 193 Cal. App. 3d 1012, 238 Cal. Rptr. 819 (1987).

79. CAL. CONST. art. I, § 4.

80. *See, e.g.*, Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987) (ceremonial invocation and benediction at public school commencement not precluded by First Amendment); *cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (Nebraska Legislature's opening of each session with a prayer by state-paid chaplain not precluded by First Amendment).

81. "[O]ur own state Constitution is committed to the principle of separation of church and state. The mutually reinforcing constitutional provisions have helped make this state one in which persons of different religious beliefs might live together in mutual tolerance and respect." Fox v. City of Los Angeles, 22 Cal. 3d 792, 803, 587 P.2d 663, 669, 150 Cal. Rptr. 867, 873 (1978) (Bird, C.J., concurring).

82. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (university must make facilities available for religious clubs); McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 83 (1985) (city park allowing secular symbols must allow religious symbols).

D. Summary of Freedom of Religion

The significance of state constitutional doctrine on religious liberty undoubtedly will be great in the coming years. The clear signals from the United States Supreme Court indicate a retreat in establishment clause doctrine in the name of religious accommodation. Strict separation of church and state will become the duty of state courts under state constitutions.

III. Privacy

A. Concept

Privacy encompasses a broad and diverse area. Constitutional privacy has two separate aspects: informational privacy and autonomy. Informational privacy includes control of personal information, limits on data compilation, and access to personal information in the control of third parties. Autonomy includes freedom to make intimate choices and the right to control invasion of the body.

B. Sources

In contrast to the implicit penumbral right of privacy in the United States Constitution, California's article I, section 1 explicitly guarantees privacy as a fundamental right.[83] Enacted by voters in 1972, the privacy initiative was, according to the ballot pamphlet argument supporting its passage, enacted to safeguard both informational privacy and automony.[84] The ballot pamphlet addressed the accelerating encroachment on individual privacy resulting from powerful data collection technology, the need for protection for families, homes, and thoughts; and expansion of existing privacy decisions.[85]

C. Informational Privacy

While very little federal constitutional protection exists for personal information,[86] California has led the nation in creating a body of State constitutional law that prevents "cradle-to-grave" profiles. Article I, section 1 has been invoked in numerous cases involving employment records,[87] health records,[88] financial records,[89] and scholastic records.[90] It is also regularly invoked in litigation when discovery threatens to in-

83. CAL. CONST. art. I, § 1.

84. 1972 VOTERS' HANDBOOK, Proposition 11.

85. *Id.*

86. Whalen v. Roe, 429 U.S. 589 (1977).

87. Payton v. City of Santa Clara, 132 Cal. App. 3d 152, 182 Cal. Rptr. 17 (1982); City and County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 178 Cal. Rptr. 435

trude into intimate spheres such as sexual history.[91] Reported cases regularly include informational privacy decisions under article I, section 1 in advance sheet reports. These suggest that there are many more unpublished decisions dealing with informational privacy claims.

The question for the future of the informational aspect of article I, section 1 is its scope. We live in an informational age; can courts really demand a compelling interest for every request for personal data by business and government? At least one court of appeal decision suggested in dictum that courts should apply a lower threshold for justifying informational requests unless other fundamental rights are implicated.[92] This approach seems to be incorrect since the ballot pamphlet argument is explicit in requiring a compelling interest as the standard for justifying invasion of informational privacy.[93] Moreover, the *Cutter* approach would make article I, section 1 superfluous if the compelling interest standard were triggered only by a burden on another fundamental right because the burden on a separate fundamental right alone would require a compelling interest.

That society *has* developed such powerful communications technology shows that the framers of article I, section 1 were visionaries; if the privacy provision slows and limits compilation of data banks, it is performing its function. Requests for judicial oversight on demands for in-

(1981); Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981); Arcelona v. Municipal Court, 113 Cal. App. 3d 523, 169 Cal. Rptr. 877 (1980).

88. Planned Parenthood Affiliates v. Van de Kamp, 181 Cal. App. 3d 245, 226 Cal. Rptr. 361 (1986); Wood v. Superior Court, 166 Cal. App. 3d 1138, 212 Cal. Rptr. 811 (1985); Jones v. Superior Court, 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981); Gunn v. Employment Dev. Dept., 94 Cal. App. 3d 658, 156 Cal. Rptr. 584 (1979); Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979).

89. Valley Bank v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975); GT, Inc. v. Superior Court, 151 Cal. App. 3d 748, 198 Cal. Rptr. 892 (1984); Allen v. Superior Court, 151 Cal. App. 3d 447, 198 Cal. Rptr. 737 (1984); Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982); Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82 (1981).

90. Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

91. *See, e.g.*, Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987) (both protecting privacy of plaintiff's sexual history); Boler v. Superior Court, 201 Cal. App. 3d 467, 247 Cal. Rptr. 185 (1987); Rider v. Superior Court, 199 Cal. App. 3d 278, 244 Cal. Rptr. 770 (1988); Binder v. Superior Court, 196 Cal. App. 3d 893, 242 Cal. Rptr. 231 (1987); Morales v. Superior Court, 99 Cal. App. 3d 283, 160 Cal. Rptr. 194 (1979); Fults v. Superior Court, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).

92. Cutter v. Brownbridge, 183 Cal. App. 3d 836, 844 n.7, 228 Cal. Rptr. 545, 550 n.7 (1986).

93. The ballot pamphlet argument states, "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments. This right should be abridged only when there is a compelling public need." 1972 VOTERS' HANDBOOK, Argument in favor of Proposition 11, at 27.

formation are manageable if article I, section 1 is interpreted to protect intimate or confidential personal data, not simply any records.

D. Autonomy

The United States Supreme Court has protected a cluster of choices relating to family (child rearing, contraception, marriage) under the implicit federal constitutional right to privacy.[94] Any suggestion that the Court might expand the federal privacy right to protect nonconforming lifestyle choices was firmly dispelled by the Court's decision in *Bowers v. Hardwick*,[95] upholding Georgia's sodomy law. The majority and dissenting opinions in *Hardwick* illustrate two different approaches to adjudicating constitutional privacy claims. The dissenting approach more closely mirrors the approach adopted under article I, section 1.

The majority decision in *Hardwick* looked to the federal privacy precedents to evaluate the kinds of choices protected by the Constitution and, noting that they all related to the family, concluded that federal precedents had "no connection" to homosexual activity.[96] The majority also considered historical and contemporary attitudes toward homosexual activity to buttress its conclusion that the Constitution did not protect it.[97]

The *Hardwick* dissent focused not on "a right to engage in homosexual activity" but rather the government's interest in criminalizing consensual adult activity in the privacy of the home.[98] The dissent asked what constituted the basis for the state's punishing this intimate choice.[99] Because the dissent could discern no substantial interest, and concluded that the criminal law simply reflected the fact that the choice upset the moral views of the political majority, the dissent felt that it was impermissible.[100]

The *Hardwick* majority expressly recognized the right of state courts to take a more expansive approach under state constitutions.[101] The majority also voiced an institutional concern about the role of the Court in construing an implicit right: at what point is the Court impos-

94. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (penumbral right to privacy protects married couples' choices regarding contraception).

95. 478 U.S. 186 (1986).

96. *Id.* at 190-91.

97. *Id.* at 192-94.

98. *Id.* at 199 (Blackmun, J., dissenting).

99. *Id.* at 208 (Blackmun, J., dissenting).

100. *Id.* at 208-13 (Blackmun, J., dissenting).

101. *Id.* at 190.

ing its own "choice of values"?[102] The dissent, in contrast, expressed more concern about limits on the political majority, and was not troubled by its role in defining the limits of public life and the protection of a private sphere in which all intimate choices would be protected unless they threatened important public policies.[103]

Article I, section 1 of the California Constitution as interpreted by State courts embodies the approach of the *Hardwick* dissenters. Californians have a public life and a private life, with a zone of protection for intimate choices that do not jeopardize paramount governmental interests. Thus, the California Constitution's privacy clause combats majoritarian efforts to impose societal conformity.

1. Associational Privacy: The Alternate Family

A striking example of the different state and federal approaches to privacy is in the area of family zoning. One visible consequence of societal change in America is the choice of many people to live in households that do not conform to the model of the traditional family. Some communities have used their zoning authority to restrict the living arrangements of their residents.[104] These laws have been challenged on state and federal privacy grounds as infringing the right of association with roots in the privacy concept.[105]

The United States Supreme Court rejected the claims that the federal right of privacy protects the choice to live with persons unconnected by marriage, biology, or legal ties in *Village of Belle Terre v. Boraas*.[106] The ordinance challenged in *Belle Terre*, designed in part to zone out fraternity houses and other student collective houses from the nearby university at Stony Brook, limited single family dwellings to "families" related by blood, marriage, or adoption, and servants.[107] Having refused to recognize any constitutional right in the living arrangements of per-

102. *Id.* at 191.

103. *Id.* at 203-08 (Blackmun, J., dissenting).

104. Restrictive zoning laws have been enacted in Stony Brook, New York; East Cleveland, Ohio; Santa Barbara, California; Borough of Glassboro, New Jersey; White Plains, New York; North Hempstead, New York; Coral Springs, Florida; Brewer, Maine; and Washington Township, Ohio. For cases discussing the validity of the ordinances, see *infra* notes 106-118 and accompanying text.

105. *See also* State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979); Molino v. Mayor of Glassboro, 116 N.J. Super. 193, 281 A.2d 401 (1971); Group Home of Port Washington v. Board of Zoning and Appeals, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1974) (all striking down restrictive laws under state constitutional provisions). *Contra* Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); Carroll v. Washington Township Zoning Comm'n, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980).

106. 416 U.S. 1 (1974).

107. *Id.* at 2-3.

sons unconnected by the statutorily defined ties, the Court upheld the zoning law under a deferential standard of reasonableness.[108] The law permissibly promoted "family values, youth values, and the blessings of quiet seclusion and clean air."[109]

The Court in *Moore v. City of East Cleveland*[110] made clear three years later that a community could not delve into the biological family and zone out extended families. The East Cleveland ordinance was struck down because it restricted "family" to the nuclear family and would have had the effect of separating a grandchild, with parents unable to care for him, from his grandmother.[111] The Court emphasized the aspect of *Belle Terre* that upheld the promotion of family values and concluded that the extended family, with its venerable roots in American history, could not be divided by zoning boards.[112] The decision relied on substantive due process, a concept philosophically aligned with privacy in that it places limits on the power of government to interfere with intimate choices.

California's article I, section 1 is not limited to the *Belle Terre/Moore* biological family framework, but also protects unconventional living arrangements. The California Supreme Court ruled that article I, section 1 encompassed the right to live in an alternate family.[113] A zoning ordinance that defined family members who may reside together was thus ruled invalid when challenged by a group of unrelated adults with emotional ties to one another.[114] The court stated, "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."[115]

The state and federal approaches differ. Under the California Constitution, the government is limited to the *public* sphere—the actual land use problems connected to numbers—not the private issue of relationships among the occupants. In contrast, the federal right protects only choices connected to the family.

For example, the California Supreme Court ruled that the article I, section 1 protection of choices relating to living companions applies even when the government subsidizes the shelter, thus limiting its authority to

108. *Id.* at 8.
109. *Id.* at 9.
110. 431 U.S. 494 (1977).
111. *Id.* at 498-99.
112. *Id.* at 504-05.
113. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 134, 610 P.2d 436, 442, 164 Cal. Rptr. 539, 545 (1980).
114. *Id.* at 127, 134, 610 P.2d at 437-38, 442, 164 Cal. Rptr. at 540-41, 545.
115. *Id.* at 133, 610 P.2d at 441, 164 Cal. Rptr. at 544 (emphasis deleted).

standardize welfare recipients' living arrangements without a compelling justification.[116] The diversity and pervasiveness of land use controls leads to numerous questions about the scope of the state privacy right and the degree to which it renders certain restrictions unconstitutional. The California Supreme Court upheld a statutory provision allowing private mobile-home parks the right to exclude children.[117] Exercise of this statutory right injures some biological families. The court distinguished between a law codifying common-law property rights and a law under which the government itself limits living arrangements in a whole community or area.[118]

2. *Sexuality*

Although California courts have never been called upon to decide the validity of laws restricting consensual adult noncommercial sexual conduct, there is little doubt that the sodomy statute upheld in *Hardwick* would violate article I, section 1. The courts' protection of information about sexual partners[119] undoubtedly extends to limiting the power of the state to criminalize private consensual adult conduct.

3. *Reproductive Rights*

California has a pioneering history in the area of reproductive freedom. Four years before the United States Supreme Court ruled that the federal right to privacy encompassed a woman's decision to terminate a pregnancy by abortion,[120] the California Supreme Court recognized that the State constitution protected the fundamental rights to life and choice implicated in the abortion decision.[121] The Court reaffirmed this in 1972, striking down restrictive eligibility criteria in California's Therapeutic Abortion Act.[122]

After passage of the privacy initiative in 1972, the California Supreme Court ruled that article I, section 1 forbade the government's

116. Robbins v. Superior Court, 38 Cal. 3d 199, 695 P.2d 695, 211 Cal. Rptr. 398 (1985) (enjoining Sacramento program that compelled welfare recipients to accept "in-kind" care in regimented shelter).

117. Schmidt v. Superior Court, 48 Cal. 3d 370, 769 P.2d 932, 256 Cal. Rptr. 750 (1989).

118. *Id.* at 388-89, 769 P.2d at 943-44, 256 Cal. Rptr. at 761-62.

119. Vinson v. Superior Court, 43 Cal. 3d 833, 740 P.2d 404, 239 Cal. Rptr. 292 (1987); Fults v. Superior Court, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979).

120. Roe v. Wade, 410 U.S. 113 (1973).

121. People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

122. People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

elimination of abortion from the Medi-Cal system.[123] The Court held that the privacy clause imposed a duty of neutrality on the government, which was violated by the government's subsidy of childbirth and refusal to fund abortions.[124] The decision invoked the strong California doctrine of unconstitutional conditions and also squarely held that the state privacy provision protects the intimate and fundamental decision whether to bear a child.[125] The California Supreme Court grounded its decision entirely on the State constitution; the United States Supreme Court had ruled nine months earlier that the implicit federal provision did not bar the government from eliminating abortion from a publicly financed program of medical assistance.[126]

California's independent constitutional protection for abortion undoubtedly will be an important area of State privacy litigation in the 1990s. The abortion funding controversy continues because the California Legislature has never followed *Myers*. The annual budget acts have contained restrictions on abortion every year since 1979,[127] and successive court challenges have been brought to enforce the duty recognized in *Myers*. California appellate courts have followed the decision.[128] The California Supreme Court has denied successive petitions in which the government has asked the court to reverse *Myers* and follow the analysis of the federal *Harris v. McRae* decision.

The California Legislature also enacted restrictions on minors' access to abortion in 1987, requiring teenagers to obtain parental consent or a court order prior to obtaining an abortion.[129] The San Francisco Superior Court has enjoined that law under article I, section 1. In the appeal from the injunction, the state and amici curiae supporting its position argued that the State constitution should not be interpreted differently from the United States Constitution in the context of third-party consent for minors' abortions. The court of appeal rejected that claim in an opinion that forcefully reaffirms the independence and expansive

123. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

124. *Id.* at 284-85, 625 P.2d at 798-99, 172 Cal. Rptr. at 885-86.

125. *Id.* at 262-63, 625 P.2d at 784-85, 172 Cal. Rptr. at 871-72; *see also* Conservatorship of Valerie N., 40 Cal. 3d 143, 161, 163, 707 P.2d 760, 771, 773, 219 Cal. Rptr. 387, 398, 400 (1985).

126. Harris v. McRae, 448 U.S. 297 (1980).

127. *See, e.g.*, Committee to Defend Reproductive Rights v. Cory, 132 Cal. App. 3d 852, 854, 183 Cal. Rptr. 475, 476 (1982) (restrictions in the 1981 Budget Act).

128. *Id.* at 854, 183 Cal. Rptr. at 476-77; Committee to Defend Reproductive Rights v. Rank, 151 Cal. App. 3d 83, 198 Cal. Rptr. 630 (1984).

129. CAL. CIVIL CODE § 34.5 (West 1989); CAL. HEALTH & SAFETY CODE § 25958 (West 1987).

scope of California's right to privacy in affirming the preliminary injunction.[130]

Enormous interest in the future of abortion has been sparked by the United States Supreme Court's decision in *Webster v. Reproductive Health Services*,[131] in which both the State of Missouri and the Solicitor General asked the Court to reconsider *Roe v. Wade*.[132] Although the Court declined to reverse *Roe*, the *Webster* opinion revealed that *Roe* no longer commands a majority of the Supreme Court. Five Justices have announced their views that *Roe* should be modified or overturned.[133] Because the Court will hear three cases challenging state laws restricting abortion in the next Term,[134] substantial change in the analytic structure of the federal constitutional right to abortion may occur before the end of the decade.

Because the Court may relax or eliminate the *Roe* standards, California's state constitutional protection for reproductive privacy has assumed great importance as the abortion battle shifts back to the states. Article I, section 1 clearly prohibits criminal abortion legislation in California, assuming, of course, that the United States Supreme Court does not confer federal constitutional protection on the fetus. The state privacy clause undoubtedly will be the subject of litigation involving not only the right to abortion but other reproductive rights issues that have emerged with the combination of new medical technology and an active political movement to promote fetal interests. Future cases may deal with intervention during pregnancy in the interest of protecting fetuses. These cases may consider the following issues: Caesarean births over the

130. American Academy of Pediatrics v. Van de Kamp, 214 Cal. App. 3d 831 (1989).

131. 109 S. Ct. 3040 (1989).

132. 410 U.S. 113 (1973).

133. Justices White and Kennedy joined Chief Justice Rehnquist's plurality opinion, which criticized and called for elimination of *Roe*'s trimester framework under which the state's interest in fetal survival becomes compelling only at the point of fetal viability. *Webster*, 109 S. Ct. at 3055-57. Justice Scalia explicitly urged the Court to overrule *Roe*. *Id.* at 3064-67. Justice O'Connor wrote a concurring opinion that repeated her view that abortion regulations should be subject to strict scrutiny only when they "unduly burden" the right to seek an abortion. *Id.* at 3063. She "continue[d] to consider problematic" *Roe*'s trimester framework. *Id.*; *see also* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

134. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 3240 (1989) (Minnesota statute requiring notification to both parents or court authorization for minor's abortion); Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *juris. noted sub. nom* Ohio v. Akron Center for Reproductive Health, 109 S. Ct. 3239 (1989) (challenge to Ohio law requiring parental notification or court order for minor's abortion); Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 109 S. Ct. 3239 (challenge to Illinois law regulating licensing of first-trimester abortion clinics).

woman's objection, coerced fetal surgery, confinement of substance-abusing pregnant women, and restrictions on work in potentially hazardous environments.

The possibility of a country without *Roe*'s national constitutional protection for the abortion choice illustrates some aspects of state constitutional adjudication in the real world of politics. The specter of a nation with divergent rights to abortion, dependent on different state constitutional texts and interpretations, is disturbing to people on both sides of the abortion debate. In many contexts, unique state constitutional rights are considered a beneficial incident of federalism. Advocates of the right-to-choose abortion believe, however, that such a profound and intimate right should not depend on an accident of geography, while advocates of fetal life want uniform national protection for fetal existence.

The fervor of the political battle surrounding abortion raises the possibility of efforts to amend the State constitution to eliminate the privacy clause's protection for abortion. Other states already have experienced divisive battles around state initiative measures involving abortion.[135] One aspect of state constitutional adjudication that is different from federal constitutional interpretation is the ease with which the voters may reject it by initiative. The voters' right to amend the State constitution by a simple majority keeps the State charter responsive to the contemporary needs of California society, although allowing electoral changes to the State constitution undermines the special role of a constitution in protecting the minority by placing fundamental values beyond the reach of the majority. Whether one believes the initiative process to be a healthy remedy in a democracy or politically abused process, a future in which abortion rights are the province of the state judiciary, with limited federal constitutional protection, invites efforts to bring the issue to the electorate.

135. Three electoral battles on abortion occurred in 1988. Arkansas voters passed a constitutional amendment banning funding and declaring protection for life as state policy, Colorado voters rejected an attempt to repeal a 1984 initiative barring abortion funding, and Michigan voters rejected a referendum to restore funding for abortions. In 1986 there were five abortion related electoral battles. Oregon voters rejected an initiative to prohibit abortion funding. Massachusetts voters rejected a constitutional amendment to overturn independent state constitutional protection for the right to choose abortion. Rhode Island and Connecticut voters rejected a call for a constitutional convention on abortion. Arkansas voters rejected similar measures. In California, three separate initiatives to amend the California Constitution to overturn *Myers* have never qualified for the ballot.

E. Bodily Integrity

1. Rights of the Critically Ill

In the area of bodily integrity, California courts have been called upon in the 1980s to determine whether article I, section 1 protects an individual's refusal to accept life-sustaining treatment. Historically, the right to refuse medication was raised in a first amendment context when members of some religious groups had religiously based objections to certain forms of medical care.[136] With the development of sophisticated life-sustaining treatments, the question has focused more on privacy as patients and families of patients wish to refuse certain heroic treatments for personal, not religious, reasons. The United States Supreme Court has not yet addressed the privacy issue under the federal law, but has accepted a case that raises these issues.[137]

Without dissent, California courts have decided, in the contexts presented, that Californians have a fundamental right to refuse treatment, even if the consequence of that decision is death.[138] The courts have invoked article I, section 1, as well as the common-law informed consent concept, to approve the cessation of treatment in the following contexts.

First, family members have the right to discontinue food and water for a patient in a persistently vegetative state.[139] The courts concluded that the right of choice under article I, section 1 survived a patient's incompetence.

Second, a healthy although seriously disabled woman had the right to disconnect her forced feeding tube although death would probably ensue.[140] The court made it clear that the right to refuse treatment under article I, section 1 was "absolute" in the sense that it was not subject to medical override by disapproving physicians.[141]

Finally, a competent older man whose illness was serious but not terminal had a right to disconnect a ventilator although this would cause

136. *See, e.g.,* Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980); Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971); Montgomery v. Board of Retirement, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973).

137. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *cert. granted sub nom.* Cruzan v. Director, Missouri Dep't of Health, 109 S. Ct. 3240 (1989).

138. *See infra* notes 139-142 and accompanying text.

139. Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, *cert. denied,* 109 S. Ct. 399 (1988); Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

140. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).

141. "If there is ever a time when we ought to be able to get the 'government off our backs' it is when we face death—either by choice or otherwise." *Id.* at 1148, 225 Cal. Rptr. at 308 (Compton, J., concurring).

respiratory failure and death.[142] The court ruled that the patient's right overrode the religious beliefs of the staff of the private, religiously affiliated hospital in which he was a patient.

The right to refuse medical care raises profound questions that a society with increasingly sophisticated medical technology will confront in many different forms. The California cases have not answered all of the questions that will arise, despite their strong holdings about the scope of the State privacy right. In all of the decided cases, although the language of the opinions spoke strongly about self-determination, the courts plainly felt that the patients (or their surrogates) were making reasonable decisions in view of the quality of life that the disabled or incompetent patient faced. What would the courts decide about a competent patient whose decision seemed far less rational to a court? For example, what about a teenage accident victim who wanted to refuse life-sustaining treatment because he did not desire to have an adult life with disabilities? A paradox exists because the court's decisions readily limit medical care for an *incompetent* patient whose diminished quality of life makes judges comfortable with the decision, despite the incompetent's inability to exercise the choice that represents the essence of the right protected.

The courts also must deal with issues of competency to make privacy choices. For example, psychotropic drugs that can provide therapeutic benefits also carry serious side effects. Many voluntary patients are competent to make treatment decisions, but many psychiatrists are opposed to allowing patients the right to refuse medication, the very treatment that allows many patients to live outside institutional settings. The courts will be called upon to decide how to enforce the patients' privacy interest when there is a strong conflict between doctor and patient in the context of powerful medication and psychological difficulties.[143]

2. *Access to Drugs or Other Treatment and Drug Testing*

Although article I, section 1 clearly protects an individual's access to recognized medical treatments,[144] it also clearly does not encompass

142. Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984).

143. A California court of appeal has ruled that patients have a statutory right to refuse psychotropic medication; the court did not address the constitutional privacy claim. Riese v. St. Mary's Hosp. and Medical Center, 209 Cal. App. 3d 1303, 259 Cal. Rptr. 669 (1987).

144. Conservatorship of Valerie N., 40 Cal. 3d 143, 162-63, 707 P.2d 760, 773-74, 219 Cal. Rptr. 387, 399-400 (1985) (sterilization); Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976) (electroconvulsive therapy).

the right to obtain either unproven therapeutic drugs[145] or illegal "recreational" drugs.[146]

Although article I, section 1 fails to confer a right of access to illegal drugs, it does provides protection against drug testing. In a context analogous to drug testing, the California Supreme Court recognized that an employer's legitimate interest in controlling theft does not mean that forcible administration of lie-detector tests is permitted in view of the substantial privacy invasion caused by such devices.[147]

Urinalysis drug testing was once used only in prisons and the armed forces. Technological advances have made drug testing less expensive and thus far more available to employers. Coupled with a public campaign to eradicate drug abuse, urine testing is now used by more than fifty percent of Fortune 500 companies.[148] In addition to random testing in employment, drug testing programs have been launched against student athletes and against pregnant women and their infants in hospitals.

This surge in drug testing has led to a surge of drug testing litigation. The United States Supreme Court has recognized only limited protection under the Federal Fourth Amendment for individuals who do not consent to drug testing.[149] Challenges to drug testing are only now reaching California appellate courts although the California Supreme Court has observed in dictum that urine testing, while not as physically invasive as blood testing, implicates "privacy and dignitary interests."[150] Superior courts have enjoined drug testing programs under article I, section 1 for testing of oil refinery workers,[151] bus drivers,[152] chemical plant work-

145. People v. Privatera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431, *cert. denied*, 444 U.S. 949 (1979) (laetrile).

146. People v. Davis, 92 Cal. App. 3d 250, 154 Cal. Rptr. 817 (1979) (cocaine); *cf.* Ravin v. State, 537 P.2d 494, 502 (Alaska 1975) (privacy clause of Alaska Constitution guarantees right to ingest marijuana in privacy of home).

147. Long Beach City Employee Ass'n v. City of Long Beach, 41 Cal. 3d 937, 944, 719 P.2d 660, 663-64, 227 Cal. Rptr. 90, 93 (1986).

148. Strauss, *Tests Detect Users of Poppy Seeds*, L.A. Daily J., Oct. 2, 1989, at 10 (citing United States Chamber of Commerce).

149. National Treasury Employees Union v. Von Raab, 57 U.S.L.W. 4338 (March 21, 1989); Skinner v. Railway Labor Executives' Ass'n, 57 U.S.L.W. 4324 (March 21, 1989).

150. People v. Melton, 44 Cal. 3d 713, 739 n.7, 750 P.2d 741, 754 n.7, 244 Cal. Rptr. 867, 880 n.7, *cert. denied*, 109 S. Ct. 329 (1988).

151. Price v. Pacific Refining Co., No. AO39203 (Contra Costa County Super. Ct. Mar. 11, 1987) (order granting preliminary injunction), *modified*, (July 10, 1987), *petition for writ of mandate denied*, Pacific Refining Co. v. Superior Court, No. AO39203 (Cal. Ct. App. July 21, 1987).

152. Amalgamated Transit Union Local 1277 v. Southern California Rapid Transit Dist., No. C628562 (Los Angeles County Super. Ct. Jan. 23, 1987) (order granting preliminary injunction).

ers,[153] hospital employees,[154] city workers,[155] and garlic ranch workers.[156]

The state constitutional privacy issues raised by drug testing are interesting because they involve both aspects of the right to privacy: informational privacy and bodily integrity. Drug testing implicates informational privacy protection because the tests reveal a broad chemical profile, beyond illicit drugs, including diet and other medications. The individual must also reveal other medications ingested so that test results will not be skewed. Urinalysis allows for broad chemical surveillance because of the number of potentially intimate matters revealed.[157] Drug testing raises questions about improper disclosure of intimate medical and personal information and about checks on the accuracy of the testing—one of the central abuses addressed by the voters in enacting the article I, section 1 explicit right to privacy. Drug testing invades protection for the anatomy because it often requires an individual to undress and expose private parts of the body in front of strangers for mandatory and monitored collection of urine.

Drug testing clearly implicates article I, section 1 privacy. Many entities conducting drug tests have a significant interest in preventing substance abuse on the job. The issues posed for the courts center primarily on whether drug testing is necessary to achieve a drug-free environment. The related issues question whether testing represents sufficiently precise methodology (since it cannot measure current impairment and is subject to mechanical and human error) and whether other less restrictive methods of detecting abuse can be devised. These questions involve the courts in highly technological inquiries. Although evaluating technology seems somewhat remote from traditional constitutional adjudication, it was foreshadowed by the passage of article I, section 1, motivated in part by California voters' concern about computer technology.

---

153. Mora v. 3M Co., No. 94233 (Ventura County Super. Ct. Jan. 6, 1987) (ruling granting preliminary injunction).

154. Farley v. Estelle Doheney Eye Hosp. No. C629354 (Los Angeles County Super. Ct. June 23, 1987) (ruling granting preliminary injunction).

155. Loder v. City of Glendale, No. C616659 (Los Angeles County Super. Ct. Sept. 8, 1987) (ruling granting preliminary injunction), *appeal pending*.

156. Perry v. A&D Christopher Ranch, No. 661337 (Santa Clara County Super. Ct. July 20, 1988) (order granting temporary restraining order); *see also* Hill v. NCAA, No. 619209 (Santa Clara County Super. Ct. Oct. 31, 1989) (enjoining drug testing of college atheletes).

157. For example, urine tests can reveal pregnancy. The District of Columbia Police Department secretly tested its female job applicants for pregnancy until this practice was revealed by the press. Nat'l Fed'n of Fed. Employees v. Carlucci, 680 F. Supp. 416, 434 n.17 (D.D.C. 1988).

3. *AIDS Testing*

Mandatory testing of certain populations for the HIV virus, which causes AIDS, raises many of the same issues. California has recently adopted testing programs for inmates and defendants accused of certain offenses.[158] California voters and legislators have declined to enact numerous other compulsory testing and reporting programs; efforts to enact such laws continue. Challenges to these programs may include claims that mandatory reporting of results to officials violates informational privacy, which protects sensitive medical information; forced testing violates the right to bodily integrity; and, because mandatory testing coupled with disclosure of results will discourage individuals from seeking treatment and confidential testing, the testing programs interfere with the right to seek recognized medical treatment. These challenges, like drug testing cases, will combine both informational and substantive privacy and force the courts to delve into complicated technological and medical questions. The interest in preventing the spread of so serious an infection is undoubtedly compelling; the focus of court challenges will be on whether testing and reporting laws in fact promote that goal and whether less restrictive alternatives can accomplish the stated objective.

F. Summary of Privacy

While the federal right to privacy seems destined to be confined to a limited number of choices, California's right to privacy has kept pace with developments that have threatened individual privacy, in the areas of both informational privacy and autonomy. Privacy is an area of constitutional law in which it is easy to see how much would be lost if Californians did not have a State constitutional right and their only constitutional protection were derived from the implicit federal right of privacy. Article I, section 1 has limited the compilation of data banks and intrusive interrogation during litigation. It has also protected unconventional choices in a pluralistic society.

Returning to the debate among the Justices in *Hardwick* about the institutional competence of the judiciary to define the scope of privacy, it seems clear that California courts, while expanding the contours of privacy protection beyond a nucleus of family-related choices, have created a principled body of law in defining article I, section 1. There are limits to the State constitution's protection for unconventional choices. It does not, for example, render the State powerless to criminalize drug use or

158. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 199.95-.99 (Deering Supp. 1989) (Proposition 96, approved November 8, 1988); CAL. PENAL CODE §§ 1524.1, 7500-7553 (Deering Supp. 1989).

commercial sex. Within a broad zone, however, the State right of privacy guarantees far more liberty in intimate spheres than the federal right.

Article I, section 1 also has fulfilled its function of protecting privacy in a technological age. Although computers constitute the specific threat perceived in the 1972 privacy initiative, the courts have invoked article I, section 1 to delineate the limits of other technology that intrudes into personal privacy: life-sustaining treatment, lie detectors, drug testing, and AIDS testing. Future developments in science—technology that Californians in 1989 cannot even imagine—will undoubtedly pose challenges. The State right to privacy guarantees at least serious debate over the need for these developments, and that they will not be casually implemented without judicial oversight to ensure that the privacy sacrificed by scientific advances is justified by only the most significant public concerns.

Conclusion

The State constitutional law movement has been led by judges and by law faculty. In California, it has resulted in an outstanding body of state constitutional law protecting individual rights. It is time to spread this revolution beyond the courts and law schools: to the press, to the public, and to decision makers. Many legislators and executive officials do not understand their duty to obey both federal and state constitutions. It is important to teach state constitutional principles not only in law schools, but also in civics classes.

The day should come when Californians speak of "article I, section 2 rights" instead of "first amendment rights," recognizing what is becoming reality: that the State constitution is the primary protection for their individual freedom.