All Sail and No Anchor—Judicial Review Under the California Constitution

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Introduction

Over the past several years, the California Constitution has supplanted the Federal Constitution as the basis for the California Supreme Court's judicial review of the actions of coordinate branches of state government. This trend reflects our state supreme court's desire to avoid Burger Court limitations on Warren Court decisions by insulating itself from United States Supreme Court review. Those pleased with its results hail this trend as a triumph of personal liberty, marking a shift in the balance of power between government and the governed. This characterization is oversimplified and misleading. Under the supremacy clause,[1] no state constitution can protect the individual against the actions of the federal government, the principal repository of power in this nation. Moreover, as state courts increasingly prove willing to protect their citizens under state constitutions, the Federal Supreme Court may feel less obliged to extend the protection of the federal charter.

Equally important, justifying state constitutional interpretation in terms of individual rights diverts attention from the fact that it represents a significant reallocation of power from state legislatures to state courts. State courts invoking their own constitutions not only escape federal judicial review, they are free to reformulate traditional standards for testing the constitutionality of legislation. Many state courts have done so, substituting for the familiar "reasonable relationship"

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1. U.S. CONST. art. VI, § 2.

due process standard, "substantial relation,"[2] "real and substantial relation"[3] and "close and substantial relationship"[4] tests. Each of these standards reduces judicial deference to legislative judgments. California is the birthplace of a "new judicial independence,"[5] but it remains to be seen whether our state supreme court is declaring independence from Washington, D.C. or Sacramento.

The California Supreme Court has not only rediscovered the state constitution, it has found in it inherent judicial powers.[6] These new powers are being asserted during a period which former United States Attorney General Edward Levi calls "the courtification of America."[7] Courts are being asked to involve themselves in wide variety of affairs which test their competence and legitimacy.[8] A federal court, for example, was required to determine whether the Fourteenth Amendment guaranteed to a guard in a women's basketball game the right to make a full-court dribble;[9] a California appellate court was called upon to decide whether a restaurant's exclusion of men, but not women, wearing leisure suits violated the Unruh Civil Rights Act.[10]

Part I of this article discusses the history, nature and scope of the power of state courts to interpret state constitutions. The power of a state court to interpret its state constitution is not challenged here, but the manner in which the California Supreme Court exercises that power is questioned. Accordingly, Part II analyzes judicial review under the California Constitution, with a view toward distinguishing between proper judicial interpretation of the state constitution and judicial incursion into legislative or executive power.

If our state courts endeavor to intensify and expand the scope of judicial review, they are obliged to develop institutional guidelines for checking their own powers. It is contended in Part III that unwar-

2. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 193, 272 A.2d 487, 492 (1971).

3. Coffee-Rich, Inc. v. Comm'r of Pub. Health, 348 Mass. 414, 422, 204 N.E.2d 281, 287 (1965).

4. Ravin v. State, 537 P.2d 494, 497-98 (Alas. 1975).

5. Note, *State Constitutional Guarantees As Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 740 (1976).

6. People v. Tenorio, 3 Cal. 3d 89, 95, 473 P.2d 993, 997, 89 Cal. Rptr. 249, 253 (1970).

7. E. Levi, Phleger Lecture, Stanford University, April 27, 1978 (unpublished).

8. *See* Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 15 (1978).

9. Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), *rev'd*, 563 F.2d 793 (6th Cir. 1977) (holding that physical differences between the sexes justified different rules).

10. Hales v. Ojai Valley Inn & Country Club, 73 Cal. App. 3d 25, 140 Cal. Rptr. 555 (1977) (construing section 51 of the California Civil Code (West Supp. 1979).

ranted reliance on the California Constitution or on dual federal and state constitutional provisions threatens to disrupt the balance of our system of government. Thus, the need for developing principles of self-restraint and predictable bases for invoking the state constitution is evident. This analysis is less than definitive, but more than impressionistic; if it is critical it is because, as Justice Frankfurter has reminded us, "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."[11]

I. The Power of a State Court to Interpret Its State Constitution

National, state and historical perspectives all confirm the power of a state court to construe its own state constitution. State charters anticipated the Federal Bill of Rights by as much as a decade.[12] After the first ten amendments were added to the Federal Constitution they were held not to limit state governments. In 1833, the Supreme Court declared: "The constitution was ordained and established by the People of the United States for themselves, for their own government, and not for the government of the individual states."[13] Before the adoption of the Fourteenth Amendment, only state constitutions protected individuals from their state governments.[14]

As the provisions of the Federal Bill of Rights were selectively incorporated into the Fourteenth Amendment, state constitutions diminished in importance. It is by no means clear that Supreme Court imposition of federal standards upon the states was inevitable. Professor Vern Countryman suggests that "the Supreme Court got into the business of developing the federal Bill of Rights through the default of

11. Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting).

12. People v. Brisendine, 13 Cal. 3d 528, 550-51, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975); Note, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE L. REV. 1, 6-13 (1975); Linde, Book Review, 52 OR. L. REV. 325, 332 (1973).

13. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). *See generally* Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711 (1978).

14. This was consistent with the Founders' federal scheme. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments; and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time each will be controlled by itself." THE FEDERALIST No. 51 (A. Hamilton or J. Madison) at 339 (Modern Library ed. 1937) (*quoted in Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 285 (1973)); *see* Mosk, *supra* note 2, at 719.

the state courts."[15] On the other hand, judicial restrictions on federal governmental powers were certain to follow *Marbury v. Madison*.[16] Since, under the supremacy clause,[17] state courts cannot limit national government, Supreme Court interpretation of the Bill of Rights was unavoidable. Had state court inaction not impelled the high court to extend such interpretations to the states, the Court nevertheless would have developed a federal model for state courts to accept or reject.

Despite the extension of federal constitutional protections to the states, state constitutions never completely lost their vitality. After 1937, when the Supreme Court stopped invalidating economic regulations on due process grounds, some state courts "continued to interfere freely with legislative policies" under state constitutional due process provisions.[18] State courts became sufficiently active in this enterprise to inspire one commentator to declare, "The courts of the states, in their efforts to strike a balance between the economic freedom of the individual and the power of government, may well cause state constitutional law 'to become of dominant importance'. . . ."[19] While this expectation remains unfulfilled, some state courts are doing their part by striking down, for example, legislative regulations prohibiting pharmacists from advertising their prices for dangerous drugs,[20] forbidding the manufacture of dairy products with non-dairy additives[21] and condemning the scalping of football tickets.[22] An additional factor in maintaining the strength of state constitutions is that state courts were obliged to apply state constitutional provisions whose federal analogues were not selectively incorporated until later years. California, for example, gave content to its double jeopardy provision[23] before the parallel Fifth Amendment guarantee was made applicable to the states through the Fourteenth Amendment in 1969.[24]

The essential similarity of federal and state constitutions nonethe-

15. Countryman, *Why A State Bill of Rights?*, 45 WASH. L. REV. 454, 464 (1970).

16. 5 U.S. (1 Cranch) 137 (1803).

17. U.S. CONST. art. VI, § 2.

18. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 92 (1950).

19. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226, 250-51 (1958).

20. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971).

21. People *ex rel.* Orcutt v. Instantwhip Denver, Inc., 176 Colo. 396, 490 P.2d 940 (1971).

22. Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973).

23. Cardenas v. Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961) (*followed in* Curry v. Superior Court, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970)).

24. Benton v. Maryland, 395 U.S. 784, 794 (1969).

less leads to conflict between federal and state court interpretations. Acknowledging this conflict, the United States Supreme Court has repeatedly recognized that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[25] The high court acknowledges that state courts "may indeed differ as to the appropriate resolution of the values they find at stake" in constitutional controversies.[26] "But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[27] The Supreme Court has thereby made explicit what is arguably implicit in supremacy clause language which provides that federal law shall be supreme "and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."[28]

Californians apparently have embraced the concept of a state constitution of independent force. In 1878, the California constitutional convention rejected a proposed amendment declaring: "We recognize the Constitution of the United States of America as the great charter of our liberties, and the paramount law of the land."[29] Moreover, in 1974, the electorate adopted article I, section 24 of the present California Constitution: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[30]

Federalism does place certain restraints upon a state court's power to implement its own constitution. A state court may not give such broad effect to a state constitutional provision as to interfere with a conflicting federal right. Accordingly, in *Diamond v. Bland*[31], a majority of the California Supreme Court held that the right of free speech guaranteed to initiative petitioners by the California Constitution could

25. Oregon v. Hass, 420 U.S. 714, 719 (1975). *Accord*, Cooper v. California, 386 U.S. 58, 62 (1967). Nevertheless, recent reliance upon state constitutions by state tribunals seeking to avoid Burger Court limitations on Warren Court decisions falls short of a renaissance. Only a minority of state courts have invoked state charters to evade Burger court rulings. Mosk, *supra* note 13 at 718. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

26. Lego v. Twomey, 404 U.S. 477, 489 (1972). *See* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting), Johnson v. Louisiana, 406 U.S. 356, 366-80 (1972) (Powell, J., concurring).

27. Oregon v. Hass, 420 U.S. 714, 719 (1975) (emphasis in original).

28. U.S. CONST. art. VI, § 2.

29. DEBATES AND PROCEEDINGS, CAL. CONST. CONVENTION 1878-1879, at 179 (1880), *quoted in* People v. Hannon, 19 Cal. 3d 588, 606 n.8, 564 P.2d 1203, 1214 n.8, 138 Cal. Rptr. 885, 896 n.8 (1977).

30. CAL. CONST. art. I, § 24 (West Supp. 1979).

31. 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974).

not, under the supremacy clause, defeat a shopping center owner's federally protected property interest. The *Diamond* court felt that these federal protections had been established in the United States Supreme Court's decision in *Lloyd Corp. v. Tanner*.[32]

However, the California Supreme Court has evidenced an intent to be circumscribed by more restrictive federal rights in only the narrowest of degrees. Only five years after deferring to the United States Supreme Court in *Diamond*, the California court reconsidered its prior holding. In *Robins v. Pruneyard Shopping Center*,[33] the court held that *Lloyd* "is primarily a First Amendment case."[34] Since after a narrow reading, the *Lloyd* opinion was held not to prescribe federally protected property rights, there was no longer a supremacy clause bar to a more expansive reading of the California Constitution:

> A closer look at *Lloyd Corp.* has revealed that it does not prevent California's providing greater protection than the First Amendment now seems to provide. We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.[35]

Accordingly, the court overruled *Diamond*. The United States Supreme Court will hear the *Robins* case, however.

Federal courts are not obliged to vindicate state constitutional provisions which confer greater protection than their federal counterparts. Where a defendant complains of evidence admitted at a state trial on grounds of illegal search or seizure, the Supreme Court instructs, "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably supressed."[36] As one commentator has expressed:

> The Court does *not* impose upon the lower federal courts a duty to enforce *all* state rules governing state officers. If state law condemns a given act, while under the Supreme Court interpretation the fourteenth amendment has not been violated, a duty to help

32. *Id.* at 335 n.4, 521 P.2d at 463 n.4, 113 Cal. Rptr. at 471 n.4 (relying on Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

33. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979).

34. *Id.* at 904, 592 P.2d at 343, 153 Cal. Rptr. at 856.

35. *Id.* at 910, 592 P.2d at 347, 153 Cal. Rptr. at 860 (citation omitted). The United States Supreme Court, on November 13, 1979, posponed a determination of jurisdiction in *Pruneyard Shopping Center v. Robins* until hearing the case on the merits. 48 U.S.L.W. 3322 (1979).

36. Elkins v. United States, 364 U.S. 206, 224 (1960) (*quoted in* United States v. Cella, 568 F.2d 1266, 1279 (9th Cir. 1978)).

enforce that state policy never arises.[37]

Federal officers acting pursuant to federal law are not governed by state law. A United States Attorney, for example, could directly obtain, and later use in a federal prosecution, bank records which, as a matter of state constitutional law, the California Supreme Court has held available only through legal process.[38] This procedure is possible only because the United States Supreme Court has held that such records are not protected by the Fourth Amendment.[39]

As has been demonstrated, within our federal framework, state courts have the power to interpret their own constitutions. The way in which that power has been and will be exercised, however, gives rise to serious questions. The following section will discuss the need for courts to exercise self-restraint in expanding state constitutional interpretation and to develop principled neutral bases for invoking the state, rather than the federal, constitution.

II. Principles of Judicial Review Under State Constitutions

A. Self-Restraint

"[T]he only check upon our own exercise of power is our own sense of self-restraint," Chief Justice Harlan Fiske Stone said of the United States Supreme Court.[40] This assessment is placed in perspective by the famous dictum of his predecessor, Chief Justice Charles Evans Hughes: "The Constitution is what the judges say it is."[41] For various reasons, not the least of which were a healthy respect for the coordinate branches of government and a sense of its own limitations, the Supreme Court developed doctrines of self-restraint which stay the exercise of its power in cases concededly within its jurisdiction. Many of these rules were elaborated by Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*.[42] He explained that the Court would not decide constitutional questions unless absolutely necessary, would decide cases on non-constitutional grounds when possible,

37. Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U.L. REV. 525, 546 (1960).

38. Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). California courts, however, would bar evidence seized by federal agents in violation of state—but not federal—law. People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749 (1973).

39. United States v. Miller, 425 U.S. 435 (1976).

40. United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting). Justice Stone became Chief Justice on October 6, 1941.

41. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 120 (1928).

42. 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring); *Accord*, Flast v. Cohen, 392 U.S. 83, 97 (1968); Poe v. Ullman, 367 U.S. 497, 503 (1961).

would not pass on the validity of a statute attacked by one who failed to show injury, and would not formulate a constitutional rule broader than necessary to decide the case at hand.[43] Professor Herbert Wechsler insists that judicial self-restraint simply means that courts should not impose their value choices on other branches of government, based upon the Constitution, unless "they are persuaded, on an adequate and principled analysis, that the choice is clear."[44]

It has been contended that state courts in general, and the California Supreme Court in particular, have failed to impose upon themselves constraints on the exercise of their powers.[45] The difference between the limited grant of judicial power contained in the Federal Constitution and the somewhat vague and, therefore, broader grant of power to judges found in the California Constitution offers a useful starting point for considering the extent to which federal doctrines of self-restraint should apply to California courts. Article III, section 2 of the United States Constitution, which limits federal judicial power to "cases" or "controversies,"[46] has been understood to forbid advisory opinions, that is, opinions which do not affect judgments.[47] The grant of judicial power in article VI of the California Constitution contains no similar express limitation.[48] Accordingly, the California Supreme Court has decided moot cases which it felt presented live issues.[49] When, if ever, it should do so is another matter.

It might be argued that the "cases" or "controversies" limitation itself reflects a notion of self-restraint absent from the text of the state constitution. However, the spirit of the federal limitation is manifested in the California Code of Civil Procedure section 1061,[50] which makes justiciability an integral part of California's Declaratory Judgment Act: "The Court may refuse to exercise the power granted by this chapter in

43. *Id.*

44. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 25 (1959). "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of other branches of the Government or of a state, those choices must, of course, survive." *Id.* at 19.

45. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248-49 (1972).

46. For the judicial definition of "cases" or "controversies", see Golden v. Zwickler, 394 U.S. 103, 108 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

47. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

48. CAL. CONST. art. VI, § 1.

49. *E.g., In re* William M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

50. CAL. CODE CIV. PROC. § 1061 (West 1955).

any case where its declaration or determination is not necessary or proper at the time under all the circumstances."[51] Moreover, the California high court's assertion of vast powers of state constitutional interpretation,[52] augmented by recently developed "inherent judicial powers,"[53] obligates it to make justiciability a meaningful concept in its decisional process.

Because it forms the apex of the federal judicial system, the United States Supreme Court does follow certain principles of self-restraint which are inapplicable to state courts. The related doctrines of abstention[54] and non-intervention[55] require federal deference to state courts as the initial—but not ultimate—guardians of federal rights. There are no analogous state court rules. Other rules of self-restraint are relevant to state courts, however, because the underlying purposes transcend the differences between the two court systems.

The California Supreme Court has acknowledged some principles of restraint but has not taken them seriously. In *People v. Williams* the court said, "[W]e do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us."[56] The court disregards this rule, however, when it decides cases on both federal and state constitutional grounds.[57] In *Syrek v. California Unemployment Insurance Appeals Board*,[58] the court recognized that:

> The power of a court to declare a statute unconstitutional is an ultimate power; its use should be avoided if a reasonable statutory construction makes the use unnecessary. Although in this

51. Notwithstanding the presence of an actual controversy, under this statute litigants have no absolute right to a declaration of their rights. Citizens' Comm. for Old Age Pensions v. Bd. of Supervisors, 91 Cal. App. 2d 658, 660-61, 205 P.2d 761, 763 (1949). Issuance of a declaratory judgment is left to the discretion of the trial court. People v. Ray, 181 Cal. App. 2d 64, 67, 5 Cal. Rptr. 113, 114-15 (1960).

52. *See, e.g.*, People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975).

53. *E.g., In re* Yurko, 10 Cal. 3d 857, 864, 519 P.2d 561, 565, 112 Cal. Rptr. 513, 517 (1974) (judicially declared rule of criminal procedure); People v. Vickers, 8 Cal. 3d 451, 461, 503 P.2d 1313, 1321, 105 Cal. Rptr. 305, 313 (1972) (judicially declared rule of criminal procedure); People v. Tenorio, 3 Cal. 3d 89, 95, 473 P.2d 993, 997, 89 Cal. Rptr. 249, 253 (1970) (statute invalidated as impinging upon judicial power).

54. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1250 (1977).

55. Younger v. Harris, 401 U.S. 37 (1971). *See Developments in the Law—Section 1983 and Federalism, supra* note 54, at 1274.

56. 16 Cal. 3d 663, 667, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976).

57. *In re* Roger S., 19 Cal. 3d 921, 944, 569 P.2d 1286, 1300, 141 Cal. Rptr. 298, 312 (1977) (Clark, J., dissenting). Justice Clark criticized the majority's reliance on both state and federal grounds, as well as the holding that a minor must be afforded procedural due process prior to commitment to a mental institution.

58. 54 Cal. 2d 519, 354 P.2d 625, 7 Cal. Rptr. 97 (1960).

> case it is the constitutionality of the application of the statutes, rather than the constitutionality of any statute itself, which is challenged, the reason for judicial abstention from deciding constitutional questions is at least as strong in this particular case.[59]

But recently, in *Hale v. Morgan*,[60] the court unanimously held an application of Civil Code section 789.3[61] unconstitutional on both federal and state due process grounds even though constitutional adjudication was not absolutely necessary. The statute imposed a penalty of $100 for each day a landlord deprived a tenant of utility services in an attempt to evict him. The plaintiff won a $17,300 judgment against a landlord who disconnected water and electrical lines for 173 days. The court narrowly construed the statute, thereby necessitating retrial on the amount of damages properly recoverable.[62] However, the court reached the statutory interpretation question only after condemning the existing judgment as unduly disproportionate to the injury inflicted and therefore violative of federal and state due process rights.[63] Why did the court denounce as constitutionally excessive a judgment admittedly erroneous as a matter of statutory law? The apparent reason is that the court wished to issue an advisory opinion to the Legislature: "a statute which applies such a mandatory, fixed, substantial and cumulative punitive sanction against persons of such disparate culpability is manifestly suspect."[64] Not simply this statute, the court indicated, but any similar statute is unlikely to survive judicial scrutiny. Judicial pronouncements of this kind clearly infringe on legislative prerogatives and overstep the limits of judicial power.

The power to formulate rules of evidence or criminal procedure which inheres in the judiciary is quite a different matter. This power is shared with, but inferior to, that of the Legislature. Accordingly, judicially declared rules, unlike constitutional decisions, may be modified by the Legislature. Adopting the exclusionary rule in *People v. Cahan*,[65] Justice Traynor emphasized that the court was announcing "a judicially declared rule of evidence."[66] Justice Traynor was well aware that the exclusionary rule could have been based on the state constitution and thus be beyond the reach of the Legislature, for rejecting it

59. *Id.* at 526, 354 P.2d at 629, 7 Cal. Rptr. at 101 (citations omitted).
60. 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978).
61. CAL. CIV. CODE § 789.3 (West Supp. 1979).
62. 22 Cal. 3d at 405-07, 584 P.2d at 523-24, 149 Cal. Rptr. at 386-87.
63. *Id.* at 397-405, 584 P.2d at 518-23, 149 Cal. Rptr. at 381-86.
64. *Id.* at 400, 584 P.2d at 519, 149 Cal. Rptr. at 382.
65. 44 Cal. 2d 434, 282 P.2d 905 (1955).
66. *Id.* at 442, 282 P.2d at 910.

thirteen years earlier in *People v. Gonzales*,[67] he had observed that "California is free to interpret its own Constitution."[68] One may infer that Justice Traynor wished to leave the last word about protecting the right of privacy to the Legislature.[69]

Other standards of justiciability, including standing and ripeness, do not concern a court's competency ultimately to decide a particular question but rather the propriety of deciding it in a particular case.[70] The basic idea is that a fully informed decision is more likely to result if the litigants have an actual and appreciable stake in the outcome. Similarly, courts may decline to exercise discretionary jurisdiction by reason of the absence of an interested party. For example, the California Court of Appeals recently refused to entertain a taxpayer's suit challenging the constitutionality of California's statutory bail scheme.[71] The court explained that the suit was an inappropriate vehicle for resolving constitutional claims because the issue was not being contested by "the prosecuting authorities (the district attorney and the Attorney General) who are best prepared to meet the legal challenge which has been launched,"[72] nor was it prosecuted by any plaintiff who was being denied bail. The California Supreme Court, however, granted a hearing.

As the foregoing cases illustrate, state court self-restraint is more essential than ever before because state courts now exercise greater powers. Apart from insulating their decisions from federal scrutiny, resort to state constitutions has allowed state courts to revise traditional standards of judicial review. These new standards demand less deference to legislative and executive judgments.[73] The need for self-restraint grows as one descends the judicial ladder since the power to construe the state constitution cannot be confined by logic to the highest court. If intermediate appellate courts and trial courts invoke the same power, however, near chaos could result. No federal precedent would be entirely safe; long-accepted rules would be opened to doubt. Fortunately, subordinate California courts understand this danger and

67. 20 Cal. 2d 165, 124 P.2d 44 (1942).

68. *Id.* at 169, 124 P.2d at 47.

69. *See* notes 119-24 and accompanying text *infra*.

70. *See* United States v. Fruehauf, 365 U.S. 146, 158 (1961); California Water & Telephone Co. v. County of Los Angeles, 253 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618, 622-24 (1967).

71. Van Atta v. Scott, 84 Cal. App. 3d 450, 148 Cal. Rptr. 717 (1978), *hearing granted*, November 9, 1978.

72. *Id.* at 453, 148 Cal. Rptr. at 719.

73. *See also* notes 176-83 and accompanying text *infra*.

have proceeded carefully.[74]

The fact that the California Constitution may be amended more easily than the Federal Constitution may justify affording greater latitude to state judges. However, this difference must be discounted to the extent that the California Supreme Court continues to inhibit the electoral process by basing its decisions on both state and federal constitutions.[75] United States Supreme Court decisions obviously have greater impact than those rendered by any state court. Still, the decisions of the California Supreme Court affect some twenty million people whose diversity reflects that of the nation. The impact of California decisions is therefore sufficiently broad to counsel self-restraint.

Alexander Bickel warned that "judicial review is at least potentially a deviant institution in a democratic society."[76] In his incisive commentary on state constitutional interpretation, Professor A.E. Dick Howard adds, "The case for an independent role for state courts should not be read as a case for unthinking activism. No judge, state or federal, is a knight errant, whose only concern is to do good."[77] Periodic public confirmation does not distinguish state judges from lifetime federal jurists in this respect. Professor Howard continues: "Judicial review, even when exercised by elected judges, is never without an anti-democratic flavor."[78] One may recognize the need for judicial independence as a safeguard of constitutional rights without approving unnecessary constitutional adjudication or decisions which reject value choices which the Legislature is more competent than the court to make. It is judicial self-restraint that makes the tolerable the necessarily anti-democratic nature of judicial review. A further, and necessary, check upon the exercise of judicial power, would be adherence to principled criteria to determine whether a decision should be based upon federal or state constitutional grants. Such criteria will be delineated in the following section.

74. *E.g.*, People v. Bertoldo, 77 Cal. App. 3d 627, 632, 143 Cal. Rptr. 675, 678 (1978) (refusing to interpret a newly adopted right of confrontation clause (CAL. CONST. art. I, § 15) as barring admission of a witness' prior inconsistent statements as substantive evidence). For a more expansive view of the role of inferior courts see Falk, *The Supreme Court of California 1971-1972—Foreword—The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273, 281 n.34 (1973).

75. *See* Part IIIA *infra*.

76. Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961). *Contra*, Bishin, *Judicial Review in Democratic Theory*, 50 So. CAL. L. REV. 1099 (1977).

77. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 940-41 (1976).

78. *Id.* at 941.

B. Criteria for Invoking the State Constitution

Recent reliance upon the California Constitution by our state supreme court has been viewed as result-oriented.[79] The state charter has been invoked to reach decisions contrary to existing or expected United States Supreme Court rulings.[80] At the same time, other decisions apparently have been based exclusively upon the Federal Constitution precisely because Supreme Court review was the desired result.[81] Judicial strategy in inviting or foreclosing federal review has been condemned as a basis for selecting a state or federal ground for decision.[82] Oregon Supreme Court Associate Justice (formerly Professor) Hans Linde has specifically criticized the California Supreme Court's alternating use of state and federal constitutional guarantees as "if not capricious, at least ambivalent."[83] Justice Linde is at least partially correct: while the California court's choice of constitutions may be considerably more purposeful than he suspects, the court has refused to establish any neutral criteria for selection.[84] This failure, too, has been

79. Thompson, *The Burger Court in the California Crystal Ball*, 5 SW. U.L. REV. 238, 247 (1973); Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 316 (1977).

80. *E.g.*, Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976) (adopting view contrary to that expressed in Williams v. Florida, 399 U.S. 78 (1970) and other Supreme Court cases which found that compelled disclosure of defense information did not violate a defendant's privilege against self-incrimination); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976). *Ramey* relied on state and federal constitutional grounds to prohibit entry into a home to effect a warrantless arrest absent exigent circumstances. The court's reliance on dual grounds may have been prompted by indications that the Supreme Court would narrow the warrant requirement. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583 (1974).

81. *See, e.g.*, Isbell v. County of Sonoma, 21 Cal. 3d 61, 577 P.2d 188, 145 Cal. Rptr. 368 (1978); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976). *But cf.* DeFunis v. Odegaard, 82 Wash. 2d 11, 37, 507 P.2d 1169, 1184-85 (1973), *vacated and remanded as moot*, 416 U.S. 312 (1974), where the Supreme Court of Washington relied on both the state and federal equal protection guarantees to uphold a law school minority admissions program.

82. Linde, Book Review, 52 OR. L. REV. 325, 338-39 (1973).

83. *Id.* at 336. *See also* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 250 (1972).

84. In People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975), the court specifically rejected what one commentator has called a "plea for guidance as to the nature of the higher standard for searches and seizures in California." Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 314 n.119 (1977). Concurring in Bloom v. Municipal Court, 16 Cal. 3d 71, 545 P.2d 229, 127 Cal. Rptr. 317 (1976), former Chief Justice Wright briefly discussed but did not significantly illuminate the subject, indicating only that certain cases presenting issues which had been decided by the Supreme Court inconsistently with prior California case law demanded immediate resolution on state grounds. *Id.* at 84, 545 P.2d at 237, 127 Cal. Rptr. at 325 (Wright, C.J., concurring).

criticized.[85] The too frequent result is that litigants do not know which constitution they were arguing about until after they receive the court's decision.[86]

This state of affairs follows the California Supreme Court's abandonment of its earlier policy of deferring to United States Supreme Court decisions. In 1938, in *Gabrielli v. Knickerbocker*,[87] the California court declared:

> State courts in interpreting provisions of the state Constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal Constitution. But . . . cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution.[88]

The court's present view holds to the contrary: with regard to civil liberties "our first referent is California law," and decisions of the federal high court "are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."[89] In short, United States Supreme Court decisions are "binding only to the extent the Court's reasoning is intellectually persuasive."[90] More accurately, California will follow the Supreme Court when a majority of the state court agrees with the choice among competing values made by a majority of the federal court.[91] That is not the kind of "co-

85. Note, *The Supreme Court of California 1975-1976—Criminal Procedure: Impeachment with Constitutionally Infirm Evidence*, 65 CAL. L. REV. 393, 402-03 (1977); Note, *supra* note 79, at 313-14.

86. This problem was recognized in one recent opinion and undoubtedly occurs frequently. *See, e.g., In re* Roger S., 19 Cal. 3d 921, 947, 569 P.2d 1286, 1302, 141 Cal. Rptr. 298, 314 (1977) (Clark, J., dissenting).

87. 12 Cal. 2d 85, 82 P.2d 391 (1938).

88. *Id.* at 89, 82 P.2d at 392-93 (citations omitted).

89. People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975). *Accord*, People v. Wheeler, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978).

90. Falk, *supra* note 74, at 282, approving this approach.

91. This approach has been adopted over strong dissents. In People v. Brisendine, 13 Cal. 3d 528, 555, 531 P.2d 1099, 1117, 119 Cal. Rptr. 315, 333 (1975) (Burke, J., dissenting), Justice Burke argued: "Decisions of the United States Supreme Court as to the meaning of language in a federal constitutional provision are strongly persuasive as to what interpretation should be placed upon similar language in a state Constitution." In People v. Norman, 14 Cal. 3d 929, 942, 538 P.2d 237, 246, 123 Cal. Rptr. 109, 118 (1975) (Clark, J., dissenting), Justice Clark quotes the lower court opinion of Justice Thompson, urging that " 'the state system should accept the interpretation of the United States Supreme Court of language in the federal Constitution as controlling of our interpretation of essentially identical language in the California Constitution unless conditions peculiar to California support a different meaning.' "

gent reason" contemplated by *Gabrielli*.

It does not suffice that the California Supreme Court simply states, "Ours is the power." Instead, as one commentator has said, "[t]he court must convince the legal community and the citizenry at large that it was justified in its disagreements with the Supreme Court and that the state constitution supports different outcomes."[92]

Some early decisions made absolutely no attempt to explain resort to the state constitution rather than to the Federal Constitution. In *Department of Mental Hygiene v. Kirchner*,[93] *People v. Krivda*[94] and *Rios v. Cozens*,[95] the United States Supreme Court, having granted certiorari, found it necessary to remand to the California Supreme Court for a determination of whether the latter's judgment was based on the California or United States Constitution. In each case the state supreme court, without explanation, certified that its decision was based on state law. The state court appeared to be constitution shopping. Beginning with *People v. Brisendine*,[96] the court undertook an explanation of its reliance on the state constitution. It stressed the need for following California precedent in the area of search and seizure, noted the Supreme Court's acknowledgment that states are free to impose higher standards of police practice than the Federal Constitution requires, and emphasized the independent force of the California constitution.[97] The difficulty with *Brisendine* and later case-oriented explanations is that they establish no principled basis for repudiating federal precedent and, accordingly, furnish no basis for predicting the future course of decisional law.[98] This defect may be remedied by justifying reference to the state constitution in terms of neutral principles.

Before expounding those neutral principles it is necessary to deter-

92. Note, *supra* note 79, at 318 (footnote omitted).

93. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated*, 380 U.S. 194 (1965), *opn. on remand*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

94. 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated sub nom.* California v. Krivda, 409 U.S. 33 (1972), *opn. on remand*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

95. 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated sub nom.* Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973), *opn. on remand*, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973).

96. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (California Constitution interpreted to require a higher standard of reasonableness to justify search of an arrestee's effects—in this case an opaque bottle and envelopes containing contraband—than would federal Constitution).

97. *Id.* at 548-51, 531 P.2d at 1111-14, 119 Cal. Rptr. at 327-30.

98. "For litigants, the *Brisendine* approach to independent interpretation offers no great improvement over *Kirchner*'s cavalier treatment of the state constitution." Note, *supra* note 79, at 314 (footnote omitted).

mine whether a state court is free to choose between federal and state constitutions. Justice Linde has argued that a state court always must invoke its own constitution.[99] He insists that "[t]he logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last."[100] State and federal claims are alternative rather than cumulative, Linde reasons, because no Fourteenth Amendment violation occurs until the state courts uphold challenged state governmental action as consistent with the state constitution.[101] The corollary to Linde's rule is that if the state court invalidates governmental action under the state constitution, the court "cannot move on to a second proposition invalidating the state's action under the federal Constitution."[102]

The California Supreme Court's practices indicate that it does not accept Linde's hierarchy of constitutional analysis.[103] The question remains whether this analysis should be followed when granting a claimant constitutional relief. The answer is "no." First, Linde was writing about judicial review of legislative regulations. His theory does not apply to individual acts by executive officers. If a police officer enters a home without a warrant, absent exigent circumstances or consent, the Fourth Amendment violation is complete at the moment of entry. Subsequent state court condemnation of the intrusion as offensive to the state constitution does not alter this fact. Second, the existence of conflicting federally protected rights should foreclose resolution of a case on the basis of the state constitution, as in *Diamond v. Bland*.[104] Third, specific state constitutional provisions may conflict with federal constitutional guarantees.[105] Fourth, the subject matter may virtually require

99. Linde, *Without 'Due Process'—Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

100. *Id.* at 182.

101. *Id.* at 133-34. Linde's theory has been criticized on the ground that since it cannot logically be restricted to state court operations, it could be used to preclude federal judicial intervention until the highest state court had approved the state action. Project Report, *supra* note 14, at 288.

102. Linde, *supra* note 99, at 133.

103. *See, e.g.*, cases cited in note 81 *supra* which did not examine possible violations of the state constitution before ruling on federal constitutional claims.

104. 11 Cal. 3d 331, 521 P.2d 460, 113 Cal. Rptr. 468 (1974). *See* notes 31-32 and accompanying text *supra*.

105. For example, article I, section 11, of the Michigan Constitution, prohibiting unreasonable searches and seizures, adds: "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." United States Supreme Court decisions, however, require exclusion of evidence in circumstances specifically excepted by this provision. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

a rule of nationwide application. Fifth, the question presented may be such that any answer will so polarize society that the state court feels compelled to invoke the prestige of the Federal Constitution and, if only by denial of certiorari, to share responsibility for its decision with the United States Supreme Court.[106] Sixth, the state court may wish to influence the United States Supreme Court.[107] Finally, from a federalism standpoint, there is value in state courts assuming responsibility for protecting federal rights.

Significant differences in the texts of parallel provisions of the federal and state constitutions may warrant reliance upon the state charter.[108] For example, the difference between the negative command of the Eighth Amendment that "[e]xcessive bail shall not be required," and the positive assurance of California Constitution, article I, section 12 that "[a] person shall be released on bail by sufficient sureties, except for capital crimes," supports the conclusion that while Congress may deny bail to protect the public safety,[109] the California Legislature may not.[110] In contrast, California's constitutional guarantees against unreasonable searches[111] and self-incrimination[112] were derived directly from the Federal Constitution[113] and, therefore, offer no apparent basis for the divergent interpretations placed upon them in *People v. Brisendine*[114] or *Allen v. Superior Court*.[115]

If there are no meaningful differences between the texts of analogous federal and state guarantees, the state court should next look to other relevant provisions of its own constitution. On November 5, 1974, article I, section 1 of the California Constitution was amended to include a right of privacy. This provision, cited in support of a public policy favoring protection of privacy rights in *Tavernetti v. Superior*

106. *E.g.*, Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

107. *See* Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 748 (1972).

108. This was the rationale of People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

109. Carlson v. Landon, 342 U.S. 524, 545-46 (1952) (dictum); 18 U.S.C. § 3146 (1976).

110. *In re* Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

111. CAL. CONST. art. I, § 13.

112. CAL. CONST. art. I, § 15.

113. *See* J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, 1849 at 47-48, 293-94 (1850), discussed in Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481, 486, 500-01 (1974).

114. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). *See* notes 96-98 and accompanying text *supra*.

115. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976). *See* note 80 *supra*.

Court,[116] in all probability will be relied upon to distinguish federal precedent on the ground that the Federal Constitution contains no parallel provision. Whether it makes sense to extend the exclusionary rule to coincide with the broader scope of privacy resulting from the amendment to section 1 of article I is, however, an altogether different question.[117] A course more in keeping with the intent of the voters who approved the amendment might be to view the privacy right as furnishing a tort cause of action against private infringement.

Departure from Supreme Court precedent may be justified when state constitutional history clearly reflects an intention to confer greater protection against state government than the Federal Constitution affords from federal government, or an intention to resort to decisional criteria different from those established by federal courts. Debates and proceedings during California's two constitutional conventions are of particular relevance where adequate records were kept. Unfortunately, "the reliability and quality of the available historical sources frequently render such an inquiry difficult and its results uncertain . . . ."[118]

It has been suggested that federal precedent may be rejected on the basis of state statutes expressing a public policy relevant to the issue decided.[119] California Penal Code section 653n,[120] for example, makes privacy in public restrooms a state policy. The statute, cited in *People v. Triggs*,[121] can be found to create an expectation of privacy protected by California law if not by the Fourth Amendment.[122] The California statute may be viewed as affecting judicial construction of what constitutes an unreasonable search under the California Constitution.[123] Thus, a reasonable search by Fourth Amendment standards could, under the circumstances set forth in the privacy statute, be held to violate the California Constitution, even though the two provisions are essentially identical. One drawback of making constitutional rights de-

116. 22 Cal. 3d 187, 194, 583 P.2d 737, 742, 148 Cal. Rptr. 883, 888 (1978). *Cf.* Ravin v. State, 537 P.2d 494, 500-04 (Alaska 1975), which acknowledged a similar right of privacy in Alaska.

117. Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481, 502-04 (1974).

118. *Id.* at 510. California's historical sources are surveyed in *id.* at 485-93.

119. People v. Norman, 36 Cal. App. 3d 879, 112 Cal. Rptr. 43, 50 (1974), *vacated*, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975).

120. CAL. PEN. CODE § 653n (West 1970) provides in part: "Any person who installs or who maintains . . . any two-way mirror permitting observation of any restroom, toilet [or] bathroom . . . is guilty of a misdemeanor."

121. 8 Cal. 3d 884, 893, 506 P.2d 232, 238, 106 Cal. Rptr. 408, 414 (1973).

122. *See generally* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

123. CAL. CONST. art. I, § 13.

pendent upon statutes is that the legislature can repeal its enactments. It could be argued that repeal of Penal Code section 653n would destroy any expectation of privacy in public restrooms and thereby constitutionalize surreptitious police surveillance in that context.[124]

Subject matter may have a bearing in occasional cases. The United States Supreme Court might decline to find a violation of the Fourteenth Amendment guarantee of equal protection where to do so would deeply involve federal courts in supervising complex operations of state government. In *San Antonio Independent School District v. Rodriguez*,[125] the Supreme Court refused to invalidate a state public school financing system, emphasizing that

> every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.[126]

Reaching a contrary conclusion under the equal protection provisions of the state constitution[127] in *Serrano v. Priest*,[128] the California Supreme Court justified its rejection of *Rodriguez* on the ground that "[t]he constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions."[129] Specifically, the California Supreme Court contrasted its own familiarity with matters of state financing and state educational policy with the United States Supreme Court's admitted lack of expertise.[130]

That state courts are in a better position to adjudicate certain matters than federal courts does not mean that any and all subject matter is amenable to judicial review. The argument used in *Serrano* to dist-

124. Professor Anthony Amsterdam has attacked the actual expectation of privacy element of Mr. Justice Harlan's reformulation of Katz v. United States, *supra* note 122, on the ground that governmental action could diminish one's expectation and, consequently, one's constitutional right, of privacy. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

125. 411 U.S. 1 (1973).

126. *Id.* at 44.

127. CAL. CONST. art. I, § 7, art. IV, § 16.

128. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

129. *Id.* at 766-67, 557 P.2d at 952, 135 Cal. Rptr. at 368.

130. *Id.* at 766, 557 P.2d at 951, 135 Cal. Rptr. at 367 (citing San Antonio Independent School District v. Rodriguez, 411 U.S. 1 at 42 (1973)). *See* Lipson, *Serrano v. Priest, I and II: The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F. L. REV. 697, 708 (1976).

inguish *Rodriguez* has been employed elsewhere to justify judicial interference with legislative economic regulations. Striking down a statute forbidding a pharmacist from advertising his prices for dangerous or narcotic drugs, the Supreme Court of Pennsylvania reasoned that while

> in the federal courts the "due process barrier to substantive legislation as to economic matters has been in effect removed," the same cannot be said with respect to state courts and state constitutional law. This difference between federal and state constitutional law represents a sound development, one which takes into account the fact that "state courts may be in a better position to review local economic legislation than the Supreme Court. State courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs."[131]

The judicial philosophy expressed by the Pennsylvania court is reminiscent of the doctrine of substantive due process, replete with many of the "superlegislature" problems long recognized by the Supreme Court.[132]

"Few legal doctrines have been subjected to more bitter criticism than this testing of regulatory legislation by the due process clause," Professor Monrad Paulsen writes.[133] The same should be said about judges imposing their economic and political philosophies upon legislators through equal protection clauses. Since 1937, the United States Supreme Court has not voided economic legislation by applying a doctrine that eventually came to be viewed as anti-democratic.[134] Courts should be wary of other doctrines that have similar effects. Because proximity is not synonymous with competency, federalism offers a weak argument for judicial incursion into legislative territory.

Subject matter is significant in another respect: the need for nationwide uniformity may outweigh a state's interest in diversity. As one advocate of independent state grounds for constitutional adjudication has acknowledged,

> [c]ertainly greater reliance on state constitutions by state courts may foster some confusion as each state develops its particular

131. Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 190, 272 A.2d 487, 490 (1971) (footnote omitted). *Cf.* Karr v. Schmidt, 401 U.S. 1201 (1971) (opinion of Mr. Justice Black as Circuit Judge for the Fifth Circuit); Dunkerson v. Russell, 502 S.W.2d 64 (Ky. App. 1973).

132. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) quoting Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952).

133. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

134. *Id.* at 92.

> jurisprudence. In an age of ever increasing technology and mobility, the American people may find it "curiouser and curiouser" that conceptions of their fundamental rights should change dramatically when they merely cross a state line.[135]

If personal mobility favors constitutional uniformity,[136] that need is even more evident than in the area of personal searches. A "vast majority"[137] of states considering the question have followed the decisions of the United States Supreme Court in *United States v. Robinson*[138] and *Gustafson v. Florida*,[139] authorizing personal searches incident to custodial arrest. The need for a single rule understood by all citizens is buttressed by the need for a uniform rule comprehensible to federal and state officers. Accordingly, in *State v. Florance*,[140] the Oregon Supreme Court abandoned its earlier contrary approach and adopted the rule of *Robinson*, stating that "[t]he law of search and seizure is badly in need of simplification. . . . Not adopting the rule of *Robinson* would add further confusion in that there would then be an 'Oregon rule' and a 'federal rule.' "[141] A bare majority of the California Supreme Court rejected *Robinson* in *People v. Brisendine*[142] without responding to the dissenting justices' argument that "[t]o have two sets of rules under essentially identical constitutional provisions would create confusion."[143]

Although less compelling, a case can be made for uniform federal and state rules of evidence. Adopting the rule of *Lego v. Twomey*,[144] that confessions may be proved voluntary by a preponderance of the evidence, the Supreme Court of Minnesota observed that its holding meant that "the same standard applies in both state and Federal courts in Minnesota."[145] Divergent federal and state rules on the same subject may confuse lawyers and unsettle lay notions about the rule of law.

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135. Lipson, *Serrano v. Priest, I and II: The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F. L. REV. 697, 721 (1976).

136. *Cf. In re* Lane, 58 Cal. 2d 99, 111-15, 372 P.2d 897, 901-05, 22 Cal. Rptr. 857, 861-65 (1962) (Gibson, C.J., concurring) (mobility favoring uniformity of municipal ordinances).

137. Howard, *supra* note 77, at 898.

138. 414 U.S. 218 (1973).

139. 414 U.S. 260 (1973).

140. 270 Or. 169, 527 P.2d 1202 (1974).

141. *Id.* at 183-84, 527 P.2d at 1209.

142. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

143. *Id.* at 555, 531 P.2d at 1117, 119 Cal. Rptr. at 333 (Burke, J., dissenting, joined by McComb and Clark, JJ.). *See also* Kaplan v. Superior Court, 6 Cal. 3d 150, 162, 491 P.2d 1, 8, 98 Cal. Rptr. 649, 656 (1971) in which three members of the court concurred in the majority opinion upholding California's vicarious exclusionary rule. (Burke, J., concurring in the result, joined by Wright, C.J., and McComb, J.).

144. 404 U.S. 477 (1972).

145. State v. Wajda, 296 Minn. 29, 32, 206 N.W.2d 1, 3 (1973).

Uniformity was not a factor discussed by the California Supreme Court in *People v. Jimenez* wherein the *Lego* approach was rejected.[146] *Lego's* invitation to the states to formulate different rules[147] did not make uniformity irrelevant. As Professor Howard points out, state courts too rarely debate the need for national uniformity.[148]

Lastly, the existence of a state rule contrary to a subsequent United States Supreme Court decision is a pertinent neutral factor. Adherence to the earlier state rule may be justified on the basis of *stare decisis* and the need for predictability. The case for retention is strongest where the prior rule was grounded on state law;[149] it is weakest where the earlier state rule was based upon federal law. The state's interest in continuity rarely, if ever, warrants perpetuating a misinterpretation of federal law.[150]

The foregoing principles, if consistently and explicitly applied, would ensure that state courts did not merely substitute their notion of justice for that of legislative bodies or of the United States Supreme Court. Unfortunately some state courts, particularly the California Supreme Court, recognize no obligation to base constitutional rationales on these neutral criteria. The problems which arise from disregard of this obligation will be discussed in the following section.

III. The Dangers of State Constitutional Interpretation

A. Frustrating the Political Process

Easily the most troubling and the least justifiable feature of the California Supreme Court's mode of state constitutional interpretation is its "dual reliance" technique. By invoking the state constitution the

146. 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978). *Jimenez*, however, announced a judicially declared rule of criminal procedure, not a state constitutional requirement. Accordingly, the decision does not bar enactment of a different rule by the legislature. *Id.* at 605, 580 P.2d at 677, 147 Cal. Rptr. at 177.

147. 404 U.S. at 489.

148. Howard, *supra* note 77, at 937.

149. *E.g.*, Curry v. Superior Court, 2 Cal. 3d 707, 716, 470 P.2d 345, 350, 87 Cal. Rptr. 361, 366 (1970).

150. *E.g.*, People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969), *disapproved in* People v. Chojnacky, 8 Cal. 3d 759, 764, 505 P.2d 530, 533, 106 Cal. Rptr. 106, 109 (1973) (plurality opinion). *But cf.* People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978) (California supreme court refused to follow decision of United States Supreme Court interpreting the federal right against self-incrimination under nearly identical circumstances); People v. Johnson, 85 Cal. App. 3d 684, 697-704, 149 Cal. Rptr. 661, 668-74 (1978) (Roth, P.J., dissenting) (arguing that the court should have extended the Sixth Amendment right to counsel to defendant attorneys conducted before formal charges were brought).

court insulates its decisions from federal judicial review; by simultaneously invoking the Federal Constitution, the court effectively blocks popular review through the initiative process. In a sense, this dual reliance makes the people of California the prisoners of the privileges conferred by their own state constitution.

The dual reliance technique in particular, and state constitutional interpretation in general, are made attractive by the United States Supreme Court's independent adequate state ground doctrine. This concept was best explained by Justice Jackson in *Herb v. Pitcairn*:[151]

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. 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.[152]

This view was reaffirmed in *Jankovich v. Indiana Toll Road Commission*:[153] "It is undoubtedly 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' "[154]

Although the independent state ground doctrine may be self-imposed rather than constitutionally compelled,[155] there is no good reason to believe that it will be discarded[156] or significantly modified[157] by the present Supreme Court. Therefore, it is the responsibility of state courts not to abuse the doctrine.

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151. 324 U.S. 117 (1945).

152. *Id.* at 125-26.

153. 379 U.S. 487 (1965). *Accord*, Fay v. Noia, 372 U.S. 391, 428 (1963).

154. *Id.* at 489, quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

155. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 201 (1965).

156. Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729, 751 (1976). *But cf.* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974) (Fourth Amendment does not extend to sights observed in "open fields").

157. Modification was suggested in Note, *State Constitutional Guarantees As Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 757 (1976).

Once the state court has invalidated state action under its own constitution there is no need to buttress that conclusion by reference to the Federal Constitution, as the California Supreme Court did in, *inter alia, People v. Ramey*,[158] *People v. Scott*,[159] and *People v. Edwards*.[160] As a matter of constitutional logic, Justice Linde points out, when the state court rules under its own constitution "it cannot move on to a second proposition invalidating the state's action under the federal Constitution."[161] An alternative to the Linde analysis would be to first address the federal constitutional question, and if the court finds state action violative of the federal constitution it should inquire no further. Chief Justice Wright, concurring in *Jolicoeur v. Mihaly*,[162] wrote:

> There is no stronger statement of governing policy considerations in any particular circumstance than an express declaration embodied in our federal Constitution. Where, as here, such a declaration is manifestly dispositive of the single issue no good purpose is served by a concurrent examination of state or federal policies, or legislative histories, in an attempt to ascertain that the supreme law of the land must be adhered to because lesser policy considerations likewise require the same result.[163]

The disproportionate consequence of even a casual reference to a second constitution has prompted severe criticism of the California Supreme Court. One dissenting justice complained:

> [B]y relying on both the state and federal Constitutions this court, in effect, prevents any other institution, state or federal, from reconsidering the issues presented by this case. By invoking the state Constitution this Court insulates itself from review by the

158. 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340, 127 Cal. Rptr. 629, 636 (1976). Occasionally an intermediate appellate decision has invoked both federal and state constitutions. *E.g.*, Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

159. 16 Cal. 3d 242, 250, 546 P.2d 327, 333, 128 Cal. Rptr. 39, 45 (1976).

160. 71 Cal. 2d 1096, 1105, 458 P.2d 713, 718, 80 Cal. Rptr. 633, 638 (1969). "Dual reliance" implies express reference to both federal and state constitutional provisions. As a practical matter, the same result generally follows from ambiguous reference to constitutional guarantees of unspecified origin. *E.g., In re* Moye, 22 Cal. 3d 457, 467, 584 P.2d 1097, 1103, 149 Cal. Rptr. 491, 497 (1978) ("principles of equal protection" invoked without reference to any constitutional text). *See* Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380 (1978) (Justice Rehnquist sitting as Circuit Justice for the Ninth Circuit); Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Minnesota v. National Tea Co., 309 U.S. 551 (1940). In People v. Triggs, 8 Cal. 3d 884, 891-92 n.5, 506 P.2d 232, 237 n.5, 106 Cal. Rptr. 408, 413 n.5, (1973), the court recognized that with respect to California search decisions "it is often difficult to determine whether a case was disposed of on the basis of state or federal constitutional law. The issue is, of course, crucial to federal review of our decisions."

161. Linde, *supra* note 99 at 133.

162. 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971).

163. *Id.* at 583, 488 P.2d at 12, 96 Cal. Rptr. at 708 (Wright, C.J., concurring, joined by McComb and Burke, JJ.) *quoted in In re* Roger S., 19 Cal. 3d 921, 945, 569 P.2d 1286, 1301, 141 Cal. Rptr. 298, 313 (1977) (Clark, J., dissenting) (citations omitted).

> United States Supreme Court. . . . By resting its decision on the federal Constitution as well this court severely inhibits political review through the legislative or initiative process. No court should presume that it is so immune from error that it may foreclose every means of challenging its decisions.[164]

Commentators have made the same point. Professor Scott Bice has characterized as "illegitimate" the use of the dual reliance technique to chill the political process.[165] "Such action uses the limitations on the power of federal courts in the federal system to increase the state court's decision-making power vis-à-vis other branches of state government, perhaps beyond the effective control of even a super-majority of the state's citizens."[166] Justice Linde adds that attempting to amend the state constitution in order to relitigate dictum about the federal constitution is "politically unsatisfactory."[167] Except on the most emotionally charged issues, persuading the electorate to amend the state constitution without an immediate prospect of changing the law is simply not feasible. Apart from the popular rejection of the California Supreme Court's invalidation of the death penalty,[168] there appears to be no other instance in which a later state constitutional amendment overrode an unpopular court decision.[169] It is to be hoped the California Supreme Court will agree that "the possibility of reversal of judicial decision through the political process is not an evil, but a necessary check on judicial power. Without the possibility of constitutional amendment, courts would in effect be a continuing constitutional convention, functioning almost entirely outside the democratic process."[170] If the court truly accepts this proposition, it should refrain from using the dual reliance technique which, as has been demonstrated, impedes the democratic process. In addition to blocking the political process, dual reliance, and state constitutional interpretation in general, often usurp the power of the legislative branch.

B. Assuming the Legislative Function

State constitutional interpretation often results in a reallocation of

164. *In re* Roger S., 19 Cal. 3d 921, 945-46, 569 P.2d 1286, 1301, 141 Cal. Rptr. 298, 313 (1977) (Clark, J., dissenting).

165. Bice, *Anderson and the Adequate State Ground*, 45 So. Cal. L. Rev. 750, 757 (1972).

166. *Id.* at 757-58. *See also id.* at 766.

167. Linde, Book Review, 52 Or. L. Rev. 325, 337 n.37 (1973).

168. Cal. Const. art. I, § 27 reinstated the death penalty after the California court held it to be cruel and unusual punishment in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

169. Wilkes, *supra* note 156, at 751 (1976).

170. *The Supreme Court of California 1974-1975*, 64 Calif. L. Rev. 239, 451 (1976).

power from state legislatures to state courts. Judicial willingness to oversee and, on occasion, to assume the legislative function is based in part upon a distrust of the legislative process. Justice Holmes insisted that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[171] Not all state courts share his view. The California Supreme Court declared:

> Courts have explained that powerful economic forces can obtain substantial representation in the halls of the Legislature and in the departments of the executive branch and thus do not impel the same kind of judicial protection as do the minorities: the unpopular religions, the racial subgroups, the criminal defendants, the politically weak and underrepresented.[172]

The Nebraska Supreme Court has spoken in plainer language, warning that legislatures may become "subservient to pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another. . . ."[173]

Two fundamental objections to this concept of the judicial role are immediately apparent. First, courts are not competent legislatures. "They cannot marshall the facts necessary to play out the legislative role. They cannot conduct legislative hearings to obtain evidence and testimony, and they cannot, without doing violence to the adversary system, go outside the record to find additional information upon which to base a particular decision."[174] Second, the lack of direct accountability of judges to the people may be as much a vice as a virtue. The danger is that courts will "substitute their social and economic beliefs for the judgment of legislative bodies" and "hold laws unconstitutional when they believe the legislature has acted unwisely."[175]

Reliance upon state constitutions has afforded state courts new freedom in applying established standards of judicial review. The California Supreme Court has invoked the strict scrutiny equal protection standard by finding fundamental interests[176] and suspect classifications[177] where the United States Supreme Court has not. Almost inevi-

171. Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904).

172. Bixby v. Pierno, 4 Cal. 3d 130, 142-43, 481 P.2d 242, 250, 93 Cal. Rptr. 234, 242 (1971).

173. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 788, 104 N.W.2d 227, 234 (1960).

174. Cameron, *The Place for Judicial Activism on the Part of a State's Highest Court*, 4 HASTINGS CONST. L.Q. 279, 282 (1977).

175. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

176. *Compare* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) *with* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education as a fundamental interest).

177. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (classification based on gender).

tably, strict scrutiny is fatal to legislation.[178] More important, state courts are free to fashion new standards of judicial review which afford less deference to legislative judgments. Thus, the reasonable relationship test of due process has, in various state courts, yielded to a substantial relation test,[179] to a real and substantial relation test,[180] and even to a close and substantial relationship test.[181] In each instance, legislative action was invalidated. Discontented with their present broad powers of judicial review, two justices of the California Supreme Court now propose a new standard for review under the state equal protection guarantee. Legislation affecting important interests or creating sensitive classifications can survive only if the court concludes that the statute significantly furthers important state interests.[182] This standard is described by California's Chief Justice as "a veto power over almost any legislation."[183]

The extent to which courts may mistake personal preferences for constitutional compulsion can be appreciated only by considering specific examples. In *American Motorcycle Association v. Davids*,[184] a Michigan Court of Appeals struck down on state constitutional grounds a statute requiring motorcyclists to wear helmets. This "admittedly wholesome legislation"[185] abridged the right to be let alone, the court opined, without hearing a real and substantial relationship to the public health, safety and welfare.[186] Eight years later this decision was overruled by a divided Michigan Supreme Court.[187] The reasoning in *Davids* was followed, however, in *People v. Fries*.[188] There the Supreme Court of Illinois invalidated a similar protective headgear statute because "[t]he manifest function of the headgear requirement in issue is to safeguard the person wearing it—whether it is the operator or a passenger—from head injuries. Such a laudable purpose, however, cannot justify the regulation of what is essentially a matter of per-

178. *See* Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

179. Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954).

180. Sperry & Hutchinson Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418, 30 N.E.2d 269, 275 (1940).

181. Ravin v. State, 537 P.2d 494, 498 (Alaska 1975).

182. Hawkins v. Superior Court, 22 Cal. 3d 584, 601, 586 P.2d 916, 927, 150 Cal. Rptr. 435, 446 (1978) (Mosk, J., concurring, joined by Newman, J.).

183. *Id.* at 608, 586 P.2d at 932, 150 Cal. Rptr. at 451 (Bird, C.J., concurring).

184. 11 Mich. App. 351, 158 N.W.2d 72 (1968).

185. *Id.* at 356, 158 N.W.2d at 75.

186. *Id.* at 358, 158 N.W.2d at 76.

187. Adrian v. Poucher, 398 Mich. 316, 247 N.W.2d 798 (1976).

188. 42 Ill. 2d 446, 250 N.E.2d 149 (1969).

sonal safety."[189] The court based its decision on the state constitution and the Fourteenth Amendment.[190] The case of *Simon v. Sargent*[191] makes clear that the Federal Constitution compels no such result. The expense to the public and the increased liability to other motorists involved in motorcycle accidents constitute such obvious justifications for the statutes that one can only conclude that these courts did not try very hard to find them.

In an opinion which completes the merger of the old substantive due process[192] with the new equal protection,[193] the Alaska Supreme Court held the state's marijuana law invalid under the state constitution to the extent that it proscribed personal home use.[194] The prohibition, the court reasoned, interfered with a state constitutional right of privacy "consonant with the character of life in Alaska,"[195] and bore no close and substantial relationship to any legitimate state interest.[196] The court reached this conclusion after surveying medical literature on the subject.[197] Greater deference customarily is, and should be, shown to legislation which "incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America."[198]

State constitutions frequently have been the source of a judicial rule of reason limiting the power of legislatures to deal with economic affairs.[199] Advertising,[200] price fixing,[201] licensing,[202] and manufactur-

189. *Id.* at 450, 250 N.E.2d at 151.

190. *Id.*

191. 346 F. Supp. 277 (D. Mass. 1972), *aff'd*, 409 U.S. 1020 (1972).

192. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

193. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

194. Ravin v. State, 537 P.2d 494 (Alaska 1975).

195. *Id.* at 504.

196. *Id.* at 511.

197. *Id.* at 504-08.

198. United States v. Kiffer, 477 F.2d 349, 352 (2d Cir. 1973). *See also* People v. Privitera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979) (upholding the constitutionality of a state statute forbidding treatment of cancer patients with laetrile).

199. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226 (1958); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 879-91 (1976); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

200. *E.g.*, Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971). *See* note 131 and accompanying text *supra*.

201. *E.g.*, Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973); Gillette Dairy, Inc. v. Nebraska Dairy Prods. Bd., 192 Neb. 89, 219 N.W.2d 214 (1974).

202. *E.g.*, Hertz Drivurself Stations, Inc. v. Siggins, 359 Pa. 25, 58 A.2d 464 (1948); Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946).

ing regulations[203] have been struck down under state charters. It would be difficult to characterize the rationales of these decisions as anything but based on substantive due process, particularly since they concern the type of economic judgments which have long been considered best left to legislatures.

Regarding California's philosophy, it would be comforting to accept the assurance of *Bixby v. Pierno*[204] that "[t]he courts have realized that in the area of economic due process the will of the majority as expressed by the Legislature . . . must be permitted to meet contemporary crucial problems."[205] But this is not an accurate historical assessment, unless one takes a constricted view of the term "crucial problems." In *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*,[206] for example, the California Supreme Court invalidated on federal and state due process grounds a statute authorizing a board appointed by the governor to set minimum prices for dry cleaning. Dissenting, Justice Traynor protested that the majority's reasoning "proceeds from a misconception of this court's function in passing upon the constitutionality of a legislative enactment."[207] It is true that the California Supreme Court has stated that the state constitution will be the court's first referrent "in the area of fundamental civil liberties."[208] However, in *Thrift-D-Lux*, the majority's assertion that the legislature may not impose unnecessary and unreasonable restrictions on the pursuit of private business activities[209] "clearly implies the view that there is a constitutional right to engage in a gainful occupation."[210] It remains to be seen just how far the California court will extend this type of reasoning.

Article I, section 1 of the California Constitution now provides: "All people . . . have inalienable rights. Among these are . . . acquiring, possessing, and protecting property."[211] Conceivably legislation regulating business affairs could be stricken down as an impermissible interference with this specified, and therefore fundamental, right. Arguments advanced by other state courts to justify review of economic

203. People *ex rel.* Orcutt v. Instantwhip Denver, Inc., 176 Colo. 396, 490 P.2d 940 (1971).

204. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

205. *Id.* at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242.

206. 40 Cal. 2d 436, 254 P.2d 29 (1953).

207. *Id.* at 453, 254 P.2d at 39.

208. People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975).

209. 40 Cal. 2d at 441, 254 P.2d at 33.

210. Hetherington, *supra* note 199, at 227.

211. CAL. CONST. art. I, § 1.

legislation, such as state court familiarity with local economic needs and conditions and legislative susceptibility to lobbying groups, already have been recognized by the California Supreme Court.[212] Thus there is at least cause for some concern that California courts will enter this new arena. Even if the present court does not impose its preferences in the area of economic regulation, a future court, armed with the state constitutional precedent currently in the making, very well may.

The California Supreme Court's willingness to assume functions it has previously entrusted to the legislature is illustrated by *People v. Drew*.[213] For twenty-five years the court refused to abandon the M'Naghten test for sanity in a criminal case, each time declaring that reform was for the Legislature.[214] In *Drew*, however, the court discarded M'Naghten in favor of the American Law Institute test. At the time *Drew* was decided, the question was under legislative consideration.[215] One dissenting justice expressed the hope that "the legislative response will be swift and certain in restoring our state's established system of mental defenses."[216] Should the Legislature codify California's version of the M'Naghten Rule, it will remain to be seen whether the court will constitutionalize its own preference for a different standard or defer to the legislature's judgment.

Considerable insight into the respective roles that California's judicial and legislative branches will play may be gained from the state supreme court's determination of a pending case in which the constitutionality of California Evidence Code section 1235 is challenged.[217] That statute provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing."[218] The statute altered prior law by permitting the jury to consider the inconsistent statement as substantive evidence rather than merely for its impeachment value. In

212. *See, e.g.*, Serrano v. Priest, 18 Cal. 3d 728, 766-67, 557 P.2d 929, 952, 135 Cal. Rptr. 345, 368 (1976); Bixby v. Pierno, 4 Cal. 3d 130, 142-43, 481 P.2d 242, 250, 93 Cal. Rptr. 234, 242 (1971).

213. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

214. *Id.* at 353, 583 P.2d at 1329-30, 149 Cal. Rptr. at 286-87 (Richardson, J., dissenting).

215. *Id.* at 355, 583 P.2d at 1331, 149 Cal. Rptr. at 288 (Richardson, J., dissenting).

216. *Id.* at 361, 583 P.2d at 1335, 149 Cal. Rptr. at 292 (Clark, J., dissenting).

217. After this writing, in People v. Chavez, Crim. 20673, filed on January 29, 1980, a 4 to 3 majority of the California Supreme Court ruled that the state constitutional confrontation clause is not violated by the admission of a prior statement of a witness who testifies at trial and is subject to full cross-examination by the defendant at that time.

218. CAL. EVID. CODE § 1235 (West 1966).

People v. Johnson[219] and *People v. Green*,[220] the California Supreme Court concluded that section 1235 violated the Sixth Amendment confrontation clause because it failed to provide for contemporaneous cross-examination. The United States Supreme Court, however, reached a contrary conclusion in *California v. Green*.[221] That decision was necessarily accepted by the state court, on remand, as dispositive of the federal question.[222]

A few years later, California Constitution, article I, section 15 was amended to provide that an accused has the right "to be confronted with the witnesses against the defendant."[223] The question is whether the supreme court will invoke article I, section 15, to reestablish its choice of values over those made by the legislature.[224] The significance of the question derives from the fact that it is difficult to conceive of a stronger case for upholding legislation. Evidence Code section 1235 is not the work of any special interest group; it is the product of the Law Revision Commission's nine year study.[225] The Commission reasoned that

> [t]he dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. . . . The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency.[226]

Moreover, section 1235 codifies the rule favored by Chadbourn[227] and McCormick,[228] and is the rule followed in federal courts[229] and in a growing number of state courts.[230] Since the legislature's power to for-

219. 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied*, 393 U.S. 1051 (1969).

220. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *vacated and remanded sub nom.* California v. Green, 399 U.S. 149 (1970).

221. 399 U.S. 149 (1970).

222. People v. Green, 3 Cal. 3d 981, 989-90, 479 P.2d 998, 1003-04, 92 Cal. Rptr. 494, 499-500 (1971).

223. CAL. CONST. art. I, § 15.

224. The court has already indicated its concern over "[t]he considerable potential that a jury, even with . . . a limiting instruction, will view prior inculpatory statements as substantive evidence of guilt rather than as merely reflecting on the declarant's veracity." People v. Disbrow, 16 Cal. 3d 101, 112, 545 P.2d 272, 279, 127 Cal. Rptr. 360, 367 (1976).

225. *See* CALIFORNIA LAW REVISION COMMISSION, REPORT AND RECOMMENDATION ON THE CALIFORNIA EVIDENCE CODE (1965).

226. Law Revision Commission, Comment to CAL. EVID. CODE § 1235 (West 1966).

227. III J. WIGMORE, EVIDENCE § 1018, at 996-97 n.2 (Chadbourne rev. ed. 1970).

228. C. MCCORMICK, EVIDENCE § 39 (2d ed. 1972).

229. FED. R. EVID. 801(d)(1)(A) (1973).

230. *See, e.g.*, ARK. STAT. ANN. § 28-1001 (Supp. 1978); FLA. STAT. ANN. § 90.801 (West 1979); ME. REV. STAT., Rules of Evidence, Rule 801 (Supp. 1979); MINN. STAT. ANN., Evid.

mulate rules of evidence is superior to that of the courts,[231] the modern rule may be rejected only by embedding it in constitutional concrete. Such rigidity should only be introduced into the hearsay rule for compelling reasons.[232] Since a state court's distaste for a rule formulated by the Law Revision Commission, enacted by the Legislature, and approved by the United States Supreme Court is not a compelling reason, the necessary compulsion must be sought in the text of the California Constitution. Three California appellate courts have been unable to find it there[233] because the texts of the federal and state confrontation clauses are indistinguishable—the language of the California provision is taken from the Sixth Amendment—and because both the California Constitution Revision Commission[234] and the electorate[235] thought that article I, section 15, added new support, not new content, to the existing federal guarantee. It is therefore apparent that should the California Supreme Court again strike down Evidence Code section 1235 it will have assumed the legislative function. As the next section will demonstate, judicial activism, achieved through unjustified reliance on the state constitution, has grave consequences for the judicial system, as well as upon the legislative and political processes.

C. Undermining the Judicial Process

Part of the price of state constitutional independence is the reduced accountability of the highest state court. Immunity from the United States Supreme Court may produce opinions which misstate either the case or the law. Worse, relieved of the necessity of persuading higher judicial authority that its decision is correct, a state supreme court may not explain its decision at all. If these fears seem unrealistic, consider the following three decisions of the California Supreme Court.

People v. Scott[236] condemned a weapons frisk made by police of-

Rule 801 (West Supp. 1979); MONT. R. EV., Rule 613 (1977); N.M. STAT. ANN. R. EVID. 801 (1978), N.D. CENT. CODE, Rules of Evidence, Rule 801 (Supp. 1979); WIS. STAT. ANN. § 908.01 (West 1975).

231. People v. Buckley, 143 Cal. 375, 393, 77 P. 169, 177 (1904) (Beatty, J., concurring). *See also* People v. Spriggs, 60 Cal. 2d 868, 872, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (where the legislature does not address an issue, a court may fill the gap).

232. *See* Comment, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

233. People v. Bertoldo, 77 Cal. App. 3d 627, 143 Cal. Rptr. 675 (1978); People v. Contreras, 57 Cal. App. 3d 816, 129 Cal. Rptr. 397 (1976); People v. Browning, 45 Cal. App. 3d 125, 119 Cal. Rptr. 420 (1975).

234. *See* PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION, pt. 5, at 24 (1974); CALIFORNIA CONSTITUTION REVISION COMMISSION, REPORT IV ON CRIMINAL PROCEDURE, at 7 (1970).

235. CAL. VOTERS PAMPHLET (General Election November 5, 1974) at 26.

236. 16 Cal. 3d 242, 546 P.2d 327, 128 Cal. Rptr. 39 (1976).

ficers for their self-protection when they elected to transport an apparently intoxicated man and his small child to the home of the child's mother instead of arresting the father. The court stated: "The People contend that the fact of proposed transportation in a police vehicle is a special circumstance which per se justifies a pat-down search any time an individual is to be so transported."[237] The court refused to adopt such an exception to the warrant requirement "[b]ecause of the potential ramifications."[238] The State, however, did not advance the contention attributed to it; instead it expressly disavowed that position, explaining:

> In his petition for hearing appellant states that this appeal presents the question of "whether, as the Court of Appeal below held, the element of transportation in a police vehicle justifies a pat-down search in every non-arrest situation." . . . Most emphatically, that is not the question in this case nor could it be in any case. "There is no formula for the determination of reasoableness. Each case is to be decided on its own facts and circumstances."[239]

The State insisted that a weapons frisk was justified because it was a lesser intrusion into privacy than the arrest which otherwise would have occurred. It was, of course, easier for the court to reject the broad contention attributed to the State than the narrow claim they actually advanced.[240]

Secure in the knowledge that United States Supreme Court review is unavailable, a state court may take undue liberties with federal precedent in order to strengthen its own state constitutional interpretation. *People v. Ramey*[241] held that absent exigent circumstances or consent, a police officer entering a home to effect an arrest must have a warrant. The decision was founded on both the federal and state constitutions.[242] Although *Ramey* was "at variance with the recent views of the United States Supreme Court,[243] the California Supreme Court insisted that in *Coolidge v. New Hampshire*[244]

> five members of the [federal high] court expressed agreement

237. *Id.* at 247, 546 P.2d at 331, 128 Cal. Rptr. at 43.

238. *Id.* at 250, 546 P.2d at 332, 128 Cal. Rptr. at 44.

239. Respondent's Supplemental Brief at 13. The court's attention was drawn to its misstatement of the People's position in Respondent's Petition for Rehearing at 2. The petition was denied on March 24, 1976.

240. *See* Note, *Arrest: The California Prerequisite for a Pretransportation Pat-Down Search for Weapons*, 65 CAL. L. REV. 416, 425 (1977), criticizing the *Scott* decision.

241. 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976).

242. *Id.* at 275, 276, 545 P.2d at 1340, 1341, 127 Cal. Rptr. at 636, 637.

243. Note, *Warrantless Arrests Within the Home*, 65 CAL. L. REV. 406, 407 (1977).

244. 403 U.S. 443 (1971).

> with the proposition that "[i]t is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.' "[245]

For this proposition the California court accepted the Supreme Court's reliance upon some of Justice Harlan's statements in *Jones v. United States*.[246] But Justice Harlan did not endorse the quoted dictum. Rather, he stated that on the issue of the validity "of a warrantless entry into a man's house to arrest him on probable cause . . . the Court again leaves [the question] open . . . . I intimate no view on this subject."[247] Contrary to the state court's representation, therefore, four not five Supreme Court justices concurred in that portion of *Coolidge* relied upon in *Ramey*.[248] Nor should it be said that the *Ramey* majority was unaware of its misreading of *Coolidge*. As the dissent pointed out, the decision was cloaked with undeserved federal authority.[249]

A further device which erodes confidence in the judiciary is the court's occasional failure to delineate the rationale for its decision. One example is *Allen v. Superior Court*,[250] in which the California Supreme Court transformed Justice Traynor's two-way street of discovery[251] into a blind alley for the prosecutor. Specifically, the court disapproved a trial court order requiring disclosure of the names of prospective defense witnesses to prospective jurors.[252] Although the trial court had enjoined the prosecutor from contacting named defense witnesses until their identities were disclosed during the course of trial, the procedure was found violative of the state constitutional privilege against self-incrimination.[253] The plurality opinion relied upon and expanded

245. 16 Cal. 3d at 271, 545 P.2d at 1337-38, 127 Cal. Rptr. at 633-34 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971)).

246. 357 U.S. 493, 499-500 (1958) (Harlan, J.) (*quoted in* 16 Cal. 3d at 271-72, 545 P.2d at 1338, 127 Cal. Rptr. at 634).

247. 403 U.S. at 492 (Harlan, J., concurring).

248. Comment, *The Legal Efficiency of Probable Cause Complaints in Light of People v. Ramey*, 13 CAL. W.L. REV. 456, 462 (1977).

249. 16 Cal. 3d at 278 n.1, 545 P.2d at 1342 n.1, 127 Cal. Rptr. at 638 n.1 (Clark, J., dissenting).

250. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).

251. Jones v. Superior Court, 58 Cal. 2d 56, 60, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962).

252. The trial court's order contemplated that witnesses' names would be read to potential jurors to ascertain if any of them were acquainted with prospective witnesses. 18 Cal. 3d at 523, 557 P.2d at 67, 134 Cal. Rptr. at 776.

253. *Id.* at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776.

Prudhomme v. Superior Court.[254] The rule enunciated in *Prudhomme* rested on the court's perception of the trend of federal requirements. As subsequent developments made clear, however, this perception was erroneous.[255] All prosecution discovery was thus effectively barred[256] on the basis of an opinion which relied on federal policies that had been repudiated by subsequent United States Supreme Court decisions. Why? The court did not say. Thus, as one commentator has criticized: "*Allen* approved *Prudhomme* on the authority of an independent interpretation of the California Constitution, but did not offer any reasoning to support its conclusion."[257]

Allen offends the spirit of California Constitution article VI, section 14,[258] which commands that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." If, as Professor Wechsler believes, "[t]he virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees,"[259] *Allen* is indefensible. The court cannot expect such unexplained decisions to be respected or carefully followed. Until "the California Supreme Court once more decides to address the difficult question of the constitutional limits of prosecutorial discovery, California will have a 'rule in search of a reason.' "[260]

If *Scott, Ramey* and *Allen* are not representative of the California Supreme Court's opinions, they do reflect several ways in which the court's newly asserted independence and result-oriented approach have undermined confidence in its decisions.

Conclusion

The growing use of the doctrine of independent state grounds, combined with a minimum of judicial restraint, threatens irreparable harm to our system of government. It emasculates the people's right to govern through the legislative process, and substitutes for legislation

254. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

255. *See* United States v. Nobles, 422 U.S. 225 (1975); Williams v. Florida, 399 U.S. 78 (1970).

256. Note, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 66 CAL. L. REV. 332, 339 (1978).

257. *Id.* at 335.

258. CAL. CONST. art. VI, § 14.

259. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19-20 (1959).

260. Note, *supra* note 156, at 332, 338 (quoting Allen v. Superior Court, 18 Cal. 3d at 529, 557 P.2d at 69, 134 Cal. Rptr. at 778 (Richardson, J., dissenting)).

the judicial decree process. This process destroys the people's sense of certainty in relying on the decisions of the nation's highest court. It lowers confidence in our representative form of government for it prohibits our elected lawmakers from responding with certainty to public needs.

A judiciary which intentionally undertakes the task of making legislative decisions will, by necessity, become enmeshed in the political process. It ceases to be above the moods and passions of the moment, yet it does not possess the ability to conduct a thorough and open examination of the entire subject before it. Such a judiciary ceases to be perceived as a bastion of rights and justice, and when courts are perceived as anything else, the entire fabric of our judicial system begins to unravel.

The current trend, however, can be reversed. The court itself can begin to exercise the restraint which is inherent in its proper role. It can stop substituting its political judgments for those of the legislature. It can cease the gamesmanship of dual reliance on both the state and federal constitutions. Unless the Supreme Court imposes these or similar constraints on its own power, Californians may find that their state constitution is all sail and no anchor.

If the court fails to reform itself by internal policy, then the people can effect the reform by other means. For example, the doctrine of independent state grounds can be restricted by constitutional amendment so as to prevent its misuse in the future. Further, judicial legislation can be promptly repealed by proper legislative action.

Such measures are not lightly undertaken nor should they be. But then, preservation of our system of government has never been a matter lightly taken or easily achieved.