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# COMMENTARY

## Some Reflections on State Constitutions\*

By JOSEPH R. GRODIN\*\*

In downtown Monterey, California, within walking distance of Fishermen's Wharf, stands a spacious building of yellow sandstone called Colton Hall. The first floor housed California's first public school. On the second floor there is a room, about sixty feet long and twenty-five feet wide, with a railing across the middle and four long tables. It is not a particularly imposing setting, but here, in September 1849, California history was made.

On the first day of that month delegates from various parts of what was soon to become the thirty-ninth state of the Union came together in that room in response to a call for a constitutional convention.<sup>1</sup> It was a tumultuous period in California. People were coming to the state by the thousands in search of fortune, or fame, or freedom, or whatever it is that inspires adventuresome people to pick up their roots and try their luck in a new and strange land. There was no central law, no centralized government, nothing but an accumulation of small and isolated communities, stretching from burgeoning San Francisco in the north to the *pueblo* of Los Angeles in the south, and from the coast to the foothills where, it was said, there was still much gold to be found. Authority, to the extent it existed at all, resided in a *de facto* military government,<sup>2</sup> and in make-

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1. For a general description of the California Constitutional Convention of 1849, see 6 H. BANCROFT, *HISTORY OF CALIFORNIA* 284-304 (1888), R. HUNT, *THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-1849)* 34-51 (1973), N. HARLOW, *CALIFORNIA CONQUERED* 338-53 (1982), and J. ROYCE, *CALIFORNIA: THE CONQUEST IN 1846 TO THE SECOND VIGILANCE COMMITTEE IN SAN FRANCISCO* 205-13 (1948).

2. See generally N. HARLOW, *supra* note 1, at 277-300 (describing the administration under military governor Colonel Richard B. Mason, 1847-1849).

shift local arrangements, largely of the vigilante variety.<sup>3</sup> It was apparent to everyone who thought about such things that there needed to be some orderly governance, but the Congress of the United States, anxious about having to confront the slavery issue in a new territory, was sitting on its collective hands.<sup>4</sup>

It was Brigadier General Bennet Riley, the de facto military governor, who was responsible for the remarkable gathering in Monterey. He had issued the call for a constitutional convention, decreeing that delegates should be chosen by grassroots meetings in the mining camps and communities throughout the land.<sup>5</sup> To observers it must have seemed an unlikely prospect, but almost at the last minute, it actually happened. And there they were, arriving by boat, carriage, and horseback, ready to participate in a process that was to provide the legal structure for California's admission in the Union.

They must have been a strange looking group; they were certainly diverse. Some had lived in California all their lives— these were the "Californios", the Spaniards with names like Vallejo,<sup>6</sup> De la Guerra,<sup>7</sup> Carrillo,<sup>8</sup> and Covarrubias.<sup>9</sup> Most of them, however, were newcomers—miners and lawyers, physicians and farmers, businessmen and trackers. They had come to California from the East Coast, or some of them, like John Sutter<sup>10</sup> and a man named William Shannon,<sup>11</sup> from places as far away as Switzerland or Ireland. The oldest among them was fifty-three, the youngest twenty-five, the average age thirty-six.<sup>12</sup>

An historian of the event was to observe: "It may be doubted if the members of any previous convention in the United States, with similar purpose, ever came together so totally unacquainted with each other and

3. See generally J. ROYCE, *supra* note 1, at 214-96, 328-66 (describing the development of popular justice in the mining camps to the formation of "vigilance committees" in San Francisco).

4. The United States Congress, deadlocked over the future of slavery in new territories, provided no legal form of government for California from the end of the Mexican War in 1848 until its admission into the Union on September 9, 1850. See J. ROYCE, *supra* note 1, at 202.

5. See N. HARLOW, *supra* note 1, at 338-39; R. HUNT, *supra* note 1, at 34-35.

6. General Mariano Guadalupe Vallejo, delegate from Sonoma.

7. Pablo de la Guerra, delegate from Santa Barbara.

8. José Antonio Carrillo, delegate from Los Angeles.

9. José M. Covarrubias, delegate from San Luis Obispo.

10. Captain John A. Sutter, delegate from Sacramento. It was the discovery of gold in Sutter's sawmill that touched off the Gold Rush of 1849 and gave impetus to California's quest for statehood.

11. William E. Shannon, delegate from Sacramento.

12. 6 H. BANCROFT, *supra* note 1, at 288. For a general description of the delegates, see W. HANSEN, *THE SEARCH FOR AUTHORITY IN CALIFORNIA* 97-105 (1960).

so entirely wanting in general concert of plans or policies of action."<sup>13</sup> No doubt that is true. But one cannot read the record of their proceedings, which were duly recorded,<sup>14</sup> without being impressed with their dedication and intelligence. Some delegates had considerable experience with political matters in other states;<sup>15</sup> one delegate, William M. Gwin, had served in Congress and in another state constitutional convention.<sup>16</sup> Most did not have that kind of experience. But all of them took their jobs seriously, and they put together a document which served the new state quite well until 1879, when a second constitutional convention was held and substantial changes were made.<sup>17</sup>

One part of the 1849 constitution that was not changed in any significant respect was article I, called the Declaration of Rights.<sup>18</sup> Article I was in fact the first item of business considered at the Monterey Convention, immediately after the seating of delegates. It was the product of a drafting committee, and it consists of sixteen sections. Mr. Gwin, a spokesman for the committee, reported that half the sections came from the constitution of New York, and half from the constitution of Iowa.<sup>19</sup> Copies of the committee draft were distributed to the delegates. One delegate requested an adjournment for two reasons: first, so that copies of additional state constitutions could be located and brought to the convention room, and second, so that the draft could be translated into Spanish for the benefit of the native Californians.<sup>20</sup> Mr. Gwin explained that translations had already been made; nevertheless, the convention was adjourned until the following day.

After several days of discussion in committee, the delegates as a whole proceeded to consider, one by one, the sections of the Declaration

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13. R. HUNT, *supra* note 1, at 37.

14. The debates of the convention were officially recorded by J. Ross Browne. See J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1849 (1850).

15. Winfield S. Sherwood, delegate from Sacramento, had served in the New York Legislature prior to emigrating to California. Charles T. Botts, delegate from Monterey, had been active in politics in Virginia.

16. William M. Gwin, delegate from San Francisco, had previously served as a member of the United States Congress from Mississippi and had attended the Iowa Constitutional Convention of 1846. Subsequent to his participation in the California Convention of 1848, Gwin served as one of California's first two United States Senators.

17. The second constitution was adopted in convention March 3, 1879, and ratified by the people May 7, 1879.

18. CAL. CONST. art. I.

19. J. BROWNE, *supra* note 14, at 31.

20. A bit of historical irony, perhaps, in light of the recently adopted initiative in California declaring piously that English is the official language of the state. See CAL. CONST. art. III, § 6.

of Rights. As to some there was no debate; as to others there was considerable discussion. Mr. Botts,<sup>21</sup> an immigrant from Virginia, rose to question some language in section 3, pertaining to freedom of religious practices and worship. The language to which he objected was a proviso which read: "the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the State."<sup>22</sup> What is the meaning of this language, Mr. Botts inquired. Would it authorize the legislature to outlaw the Roman Catholic Church? Why not, suggested Mr. Botts, use "the most eloquent and beautiful" language on freedom of worship from the constitution of Virginia.<sup>23</sup>

Mr. Sherwood,<sup>24</sup> from New York, rose in reply. The gentleman from Virginia, he opined, was evidently not acquainted with the history of the new religious sects in the State of New York, or he would see the propriety of the restrictions contained in the proposed language. "There have been sects known there to discard all decency," advised the proper Mr. Sherwood, "and admit spiritual wives, where men and women have herded together, without any regard for the established usages of society."<sup>25</sup> The restrictive language was deemed necessary, he concluded, so "that society should be protected from the demoralizing influence of fanatical sects, who thought proper to discard all pretensions to decency."<sup>26</sup> Following which, the proposed language was adopted, over Mr. Botts' objection.<sup>27</sup>

Among the delegates was Mr. Hastings, a lawyer of sorts who also held himself out as a guide to overland routes.<sup>28</sup> A thoughtful man, Mr.

21. See *supra* note 15.

22. J. BROWNE, *supra* note 14, at 38-39. Proposed article I, § 3, to which Mr. Botts was referring, read in full:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious beliefs; but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.

*Id.* at 30.

23. *Id.* at 38-39.

24. Winfield S. Sherwood, delegate from Sacramento.

25. J. BROWNE, *supra* note 14, at 39.

26. *Id.*

27. *Id.* Later in the proceedings the irrepressible Botts rose to inquire whether another provision, under consideration at the time was also derived from the constitution of New York. If it were, Botts declared, he wanted to vote for it, so that he could be, for a change, in the majority. *Id.* at 41.

28. Lansford W. Hastings, delegate from Sacramento. Mr. Hastings' qualifications as a guide were rather suspect—historians of the period say he was more of a promoter. See 4 H.

Hastings came forward with what must have seemed a rather startling proposal. He suggested that the committee draft be amended to outlaw capital punishment on the ground that it is as immoral for the state to take a human life as it is for an individual to do so.<sup>29</sup> After what appeared to have been some polite, if condescending discussion, the amendment was defeated.<sup>30</sup> The report of the proceedings does not record the vote.

And so it went. In the end, the committee draft of the Declaration of Rights was adopted with minor changes. One significant change was the addition of a provision prohibiting slavery.<sup>31</sup> Some of the draft provisions received a good deal of discussion; some, at least so far as it was reported, received none at all. Nonetheless, for the reader interested in the relationship between the California and federal Constitutions, the debate vividly illustrates two important lessons.

The first lesson is that the language of the California Declaration of Rights was deliberately drawn from the constitutions of other states, not from the language of the federal Constitution. Despite the frequent use of language similar and indeed, in some cases, identical to the federal Bill of Rights, the delegates were not looking to the federal Constitution as their model. The constitution of New York, which formed the basis for roughly half of the language, was adopted before the federal Constitutional Convention in Philadelphia.<sup>32</sup> The constitution of Iowa, though adopted after the federal Convention, was an equally independent document.<sup>33</sup>

The second lesson is that, just as the framers of the California Constitution were not looking to the federal Constitution as a model for drafting, neither were they looking to it as a legal basis for protecting rights and liberties from interference by the new state. It would be another twenty years before the federal Constitution would be amended to provide protection against state action,<sup>34</sup> and another sixty years after that before the United States Supreme Court would recognize the due

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BANCROFT, *supra* note 1, at 396-99. The fact that his book on emigrant routes was relied upon by the ill-fated Donner Party is scarcely a recommendation.

29. J. BROWNE, *supra* note 14, at 45-46. The proposed amendment provided: "As the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in this State." *Id.* at 46.

30. *Id.* at 46.

31. Delegate Shannon successfully introduced the declaration: "Neither slavery nor involuntary servitude . . . shall ever be tolerated in this State." *Id.* at 43-44.

32. The New York Constitution was adopted in 1777. The Federal Constitutional Convention convened in Philadelphia in May 1787; the document was ratified in 1788.

33. The Iowa Constitution was adopted in 1846.

34. U.S. CONST. amend. XIV, § 1 (adopted in 1868).

process guaranty of the Fourteenth Amendment as incorporating most of the protections of the Bill of Rights and making them applicable to the states.<sup>35</sup> If anything was clear to the delegates in 1849, it was that if there was to be any constitutional protection for the rights and liberties of Californians against action by the state, it was through the constitution they were drafting, in that modest schoolhouse in Monterey.

Both these lessons are well-known, of course, to any student of constitutional history. But, if my own experience is any guide, they are typically known in an abstract, and thus less compelling, way. In 1970, when I went to teach for a year at the University of Oregon Law School, Hans Linde (now an Oregon Supreme Court Justice, but then a law professor and the leading proponent of the independence of state constitutions) did his best to persuade me of his point of view. Linde's thesis was, basically, that state constitutions are prior to the federal Constitution both historically and logically. Historically, states have constitutions with bills of rights which predate the federal government's. Logically, state constitutions are prior in the sense that there is no more reason for a state court to reach a federal constitutional issue when the case can be decided by application of the state constitution than there is for any court to reach any constitutional issue when the case can be decided on statutory or other nonconstitutional grounds.<sup>36</sup>

While I recognized the logic of Linde's position, I was less than enthusiastic about accepting its implications. This was so, I like to think, not so much because of the novelty of the theory as that it seemed a bit artificial, and redundant as well. After all, in areas like freedom of speech, equal protection, and due process, the United States Supreme Court seemed to be doing a pretty good job; and in any event it had been doing the job for some decades, while state constitutional jurisprudence in the human rights arena was virtually nonexistent. To suggest that state courts should suddenly begin to give flesh to state constitutional skeletons in the face of such weighty pronouncements from on high seemed like academic *chutzpah*, and in any event of little significance.

The significance, of course, became apparent as the Burger and Rehnquist Courts began to retreat from some of the Warren Court's interpretations of the federal Bill of Rights. This retreat made it more attractive to explore the possibility, which had always existed, that people

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35. See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (applying sixth amendment right to counsel to state criminal prosecutions); *Gitlow v. New York*, 268 U.S. 652 (1925) (applying first amendment guaranty of free speech to the states).

36. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BAL. L. REV. 379, 380-84 (1980).

might have rights under the constitutions of their respective states which they did not have under the federal Constitution.<sup>37</sup> In California, the implications were made explicit in a constitutional amendment, adopted by voter initiative in 1974, providing: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."<sup>38</sup>

These developments accelerated acceptance of state constitutions as independent sources of civil rights and liberties. Concomitantly, however, they also laid proponents of state constitutional jurisprudence open to the charge of using state constitutional theory in a result-oriented fashion to bypass the United States Supreme Court. And in that atmosphere, the logical and historical arguments for the independence of state constitutions tended to get lost.

In my case, at any rate, it was not until I became a judge, and began to look at the state constitution in the light of its history and in the context of cases which I was called upon to decide, that I became fully persuaded of the Linde view. The reports of the California Convention of 1849<sup>39</sup> are themselves adequate to convince any skeptic that the framers intended the California Declaration of Rights to stand as an independent document. Moreover, the records of the subsequent convention, in 1879, are replete with discussions which evidence an intent to establish rights which arguably exceeded the scope of federal protection.<sup>40</sup> I decided that I simply could not be faithful to the oath I took upon becoming a judge, without giving full and independent consideration to the constitution of California. I became a convert.

It is not that I am proud of my tardy conversion, nor do I imagine that my personal intellectual development is of any great interest in itself, particularly as I am no longer on the bench. My reason for describing my experience is that I suspect that I am not alone, and that the legal community is in fact full of people—lawyers, judges, and legal scholars—whose acceptance of the independence of state constitutional protection for individual rights is less than full.

It is true that state constitutional theory has made great strides. The United States Supreme Court has squarely confronted and accepted the proposition that a state may grant its citizens rights greater than those

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37. For an excellent treatment of this subject, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-502 (1977).

38. CAL. CONST. art. I, § 24 (adopted Nov. 5, 1974).

39. See *supra* note 14.

40. *Mitchell v. Superior Court*, 43 Cal. 3d 107, 119 n.11, 729 P.2d 212, 219 n.11, 232 Cal. Rptr. 900, 907 n.11 (1987).



they have under the federal Constitution.<sup>41</sup> State court decisions resting upon independent state grounds have proliferated in recent years,<sup>42</sup> and with them law review articles and symposia<sup>43</sup> discussing and analyzing the development. The better lawyers have learned to make state constitutional arguments, the Association of State Attorney Generals has established an office for the exchange of information on the subject<sup>44</sup> and—the mark of true acceptance—there is at least one law school casebook in the offing.<sup>45</sup>

Still, acceptance is slow. Few law schools attempt to teach their students about state constitutional developments in any substantial way. Most lawyers, confronted with a constitutional issue, do not think about their state constitution unless it comes to their attention through research or court direction. And courts themselves are not always consistent in dealing with the question of priority—a fact which tends to undermine legitimacy in the eyes of the legal community.<sup>46</sup>

Sometimes, a state court in declaring a governmental act unconstitutional will refer only to the federal Constitution, without mentioning the state constitution at all. This is understandable, even if analytically impure, when unconstitutionality under federal decisions seems quite clear. But it entails substantial risk. If, as has been known to occur, the United States Supreme Court grants certiorari, reverses, and throws the case back into the state court's lap, the state court is confronted with a situation which, at best requires duplication of effort, and at worst—if the state court reaffirms its original ruling on the basis of the state constitution—is hardly conducive to confidence in the judicial branch.<sup>47</sup>

State courts have also been known to mention both constitutions and to waffle as to which one is the basis for decision.<sup>48</sup> While such

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41. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (affirming the authority of states, in the exercise of police power or sovereign right, to adopt in their own constitutions individual liberties more expansive than those conferred by the federal Constitution).

42. See generally, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367-1493 (1982) (discussing state court interpretations of state constitutions.).

43. See, e.g., Brennan, *supra* note 37; Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959-1375 (1985).

44. National Association of State Attorney Generals has established a clearing house project on state constitutional law.

45. R. WILLIAMS, *UNDERSTANDING STATE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* (1988).

46. See, e.g., Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 987-91 (1979).

47. See, e.g., *People v. Ramos*, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

48. See, e.g., *Allen v. Superior Court*, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976). For a criticism of *Allen* see Deukmejian & Thompson, *supra* note 46, at 1008-09.

ambiguity may be the product of imprecise opinion writing, one suspects that another factor may sometimes be an unwillingness on the part of the state tribunal to accept full responsibility for what may be an unpopular decision. The United States Supreme Court's declaration in *Michigan v. Long*,<sup>49</sup> that it will consider a state court's constitutional decision to be based on federal grounds unless it clearly appears that the opinion is based on independent state grounds, was aimed at forcing state courts to avoid such ambiguity.<sup>50</sup> And so far as I am aware it has had that effect. I am quite sympathetic to the plight of state court judges faced with the necessity of unpopular decisions. I share the concern Justice Stevens voiced in his dissent about the priorities of the United States Supreme Court when it reviews state court decisions granting citizens more rights than the high court thinks they have.<sup>51</sup> However, I do not view the *Long* holding as hostile to the system of constitutional federalism. Rather, I agree with Justice O'Connor that it is better for the integrity of that system that state courts, in finding governmental acts unconstitutional, be precise and candid about the basis for their decisions.<sup>52</sup>

Then there are the state courts which indulge in a double play, holding that a governmental act violates *both* the federal and state constitutions.<sup>53</sup> Critics have maintained that this double play is foul because it inappropriately insulates the decision both from United States Supreme Court review and from change through amendment of the state constitution.<sup>54</sup> Technically, the critics are wrong about the latter. Opponents of the decision can still seek state constitutional amendment through the voter initiative process or other prescribed procedures, and thereafter, assuming they succeed, seek federal review of the state court's ultimate determination of federal law. Practically, however, a state court's pronouncement on unconstitutionality under the federal Constitution is likely to make such a course of action politically more difficult, and in any event such a pronouncement violates the customary practice of

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49. 463 U.S. 1032 (1983).

50. *Id.* at 1040-42.

51. *Id.* at 1065-72 (Stevens, J., dissenting) (pointing out that the Court's shift in priorities has created a misallocation of the Court's resources, resulting in "a docket swollen with requests by states to reverse judgements that their courts have rendered in favor of their citizens.").

52. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved.

*Id.* at 1041.

53. *See, e.g., Michigan v. Long*, 413 Mich. 461, 320 N.W.2d 866 (1982).

54. *See, e.g., Deukmejian & Thompson, supra* note 46, at 996-99.

courts to avoid deciding more than they are called upon to decide. This judicial preference for dispensing claims by means of statutory interpretation rather than reaching serious constitutional questions<sup>55</sup> seems more appropriate here, and to that extent I agree with the critics.

There is another criticism with which I do *not* agree. It concerns the situation arising when a state constitutional provision is identical in language to its federal analogue, and there is no constitutional history to distinguish its meaning. It is all very well for a state court to rely upon its state constitution to provide a higher level of protection for individual rights than the federal Constitution, say some critics, but there must be some basis for doing so either in the distinctive language of the state constitution or its legislative history.<sup>56</sup> If the language is the same, and there is nothing peculiar to the state provision that the court can point to in support of a different meaning, then, say these critics, for a state court simply to disagree with the United States Supreme Court on the meaning of identical language constitutes unjustified judicial activism and demonstrates a lack of proper hierarchical deference.

I do not find this criticism persuasive. The presence of distinctive language or history obviously presents the most comfortable context for relying upon independent state grounds. In the absence of such factors, however, state courts are still obliged to find meaning in the provisions of the state constitution. And however they interpret their constitutions—whether on the basis of text, intent, or a more broad criterion for constitutional adjudication<sup>57</sup>—neither logic nor history requires that they accord state constitutional language the same meaning as the United States Supreme Court has accorded a comparable provision of the federal Constitution.

Certainly, a state court should consider and give deliberative weight to such a decision by the High Court. And arguably a state court should accord greater deference to the decision of another court—state or federal—in the arena of basic human rights, in the interest of maintaining whatever consensus may exist on the meaning of such core constitutional concepts as due process, freedom of speech, or self-incrimination. But consensus is not the only relevant value, and when there is already disagreement within the United States Supreme Court and among state courts, consensus is likely to be elusive.

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55. See, e.g., *United States v. Clark*, 445 U.S. 23, 27 (1980); *San Francisco Unified School Dist. v. Johnson*, 3 Cal. 3d 937, 942, 479 P.2d 669, 670, 92 Cal. Rptr. 309, 310 (1971).

56. See, e.g., *Deukmejian & Thompson*, *supra* note 46, at 987-96.

57. See J. ELY, *DEMOCRACY AND DISTRUST* (1980); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Address by Judge Robert Bork, San Diego Law School (Nov. 18, 1985).

While I was on the California Supreme Court, the case of *People v. Houston*<sup>58</sup> came before us. *Houston* illustrated this problem in a dramatic way. In *Houston*, police had obtained the defendant's confession after he was given his *Miranda* warnings but while an attorney who had been retained by the defendant's friends and family was waiting at the police station to talk to him. The question presented was whether the police had an obligation to advise the defendant of the attorney's presence, and whether their failure to do so rendered the confession inadmissible. Numerous state courts had confronted this question, and their virtually unanimous response was that the confession should not be admitted.<sup>59</sup> But, while *Houston* was pending, an almost identical case, *Moran v. Burbine*,<sup>60</sup> was on the United States Supreme Court docket. The Court managed to render an opinion first, holding six to three that the Fifth and Sixth Amendments to the federal Constitution did not bar admission of the confession.<sup>61</sup>

There were no relevant textual differences between the California and federal Constitutions,<sup>62</sup> nor could we point to any distinctive history in support of a different interpretation. But then the United States Supreme Court did not rely upon history in its decision either; it was a matter, rather, of applying existing principles in the light of fairness and practicality.<sup>63</sup> A decision of the United States Supreme Court in such a case was entitled, we said, to "respectful consideration."<sup>64</sup> But our majority agreed with the three dissenters in *Burbine*,<sup>65</sup> and thus applied the California Constitution as they would have applied the federal

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58. 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).

59. See, e.g., *State v. Matthews*, 408 So. 2d 1274 (La. 1982) (attorney's request to speak with defendant was refused and his subsequent instruction to cease interrogation was ignored); *State v. Jones*, 19 Wash. App. 850, 578 P.2d 71 (1978) (police failed to inform defendant that counsel had been retained for him or that counsel had instructed him not to speak); *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983) (police denied lawyer's request to be present during interrogation and failed to inform defendant that the request had been made).

60. 475 U.S. 412 (1986).

61. *Id.* at 434.

62. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. CONST. amend. V. "Persons may not . . . be compelled in a criminal cause to be a witness against themselves. . . ." CAL. CONST. art. I, § 15. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence. . . ." U. S. CONST. amend. VI. "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defence. . . ." CAL. CONST., art. I, § 15.

63. 475 U.S. at 421-23 (police followed *Miranda* procedures in obtaining defendant's written waiver prior to eliciting his confession; his waiver was held valid as a matter of law because defendant was not coerced and knew he could remain silent and request a lawyer).

64. 42 Cal. 3d at 610-11, 724 P.2d at 1174, 230 Cal. Rptr. at 149.

65. 475 U.S. at 434-68 (Stevens, J., dissenting) (joined by Brennan, J. and Marshall, J.).

Constitution.<sup>66</sup>

The merits of the underlying issue in *Houston* are irrelevant to my point.<sup>67</sup> My point is that there does not seem to be any stronger reason for our court to have deferred to the six-to-three decision of the United States Supreme Court on the meaning of the federal Constitution than there would have been for that Court to defer to a narrowly divided decision of our court on the meaning of the California Constitution had we managed to file our opinion first.

Indeed, a somewhat stronger argument can be made that state courts should defer to the decisions of sister state courts on the meaning and application of cognate state constitutional provisions. Historically, such provisions are more likely to share a common ancestry.<sup>68</sup> Moreover, as other commentators have observed, the United States Supreme Court operates within a system that imposes constraints that are either not present or not present to the same degree in state systems.<sup>69</sup> In declaring the content of the federal Bill of Rights, the United States Supreme Court must take into account that it is setting the constitutional floor for fifty states, and principles of federalism—not present in the state systems—caution special restraint in that process. It must also take into account the fact that, for all practical purposes, its constitutional word will be final, whereas state constitutions are much more readily subject to amendment. In all these respects, sister state courts are operating within a similar political environment that is independent of the federal system.

I have one final observation. If state constitutions are to be accorded the respect they deserve by the legal community, ultimately there must be some understanding and acceptance of that process by the general community. Yet I doubt that many nonlawyers are even aware of the existence of state bills of rights, much less their contents or their independent significance. Moreover, I strongly suspect that not much is being done to remedy this situation, either in the schools or in the various fora of public education. I suggest that we lawyers, individually and through our bar associations, have a responsibility in this regard as well.

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66. 42 Cal. 3d at 614, 724 P.2d at 1177, 230 Cal. Rptr. at 152.

67. Justice Lucas wrote a fine dissent on the merits, without emphasizing the points discussed here. 42 Cal. 3d at 617-26, 724 P.2d at 1180-86, 230 Cal. Rptr. at 155-61.

68. See Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 734-53 (1982).

69. *Id.* at 787-92.