An argument for zero-based state constitutional interpretation

Overview

Article I, section 24 of the California constitution states that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[1] Nevertheless, the California Supreme Court generally does not interpret the California constitution independently. Instead, the state high court generally follows the U.S. Supreme Court's interpretation of analogous constitutional provisions unless there are "cogent reasons" not to do so.[2] That is the wrong approach because it violates the will of the California voters to have the California constitution serve as an independent guarantee of rights, and it offends the California's independent sovereignty from the United States. California courts should adopt a "zero-based" method of constitutional analysis by actively ignoring the federal constitution and federal case law when interpreting California's constitution. Zero-based interpretation is appropriate for California because it would give full effect to California's sovereignty, would catalyze its role as a laboratory of democracy within the federalist system, and would lead to a more robust development of both California and federal constitutional law.

Analysis

Zero-based interpretation merits serious consideration

Zero-based interpretation is a method of state constitutional interpretation that disregards federal constitutional law when considering the meaning of state constitutional provisions, even for provisions that are analogous to the federal constitution. It is premised on the idea that federal opinions are issued by the high court of the United States, not California, and the Supreme Court of California has an obligation to give independent effect to our state constitution outside the influence of the U.S. Constitution and its high court. Zero-based interpretation is not absolute: federal constitutional decisions would be appropriate to consider if they

are part of the legislative history of a certain state constitutional provision. For example, 2022 Proposition 1, which enshrined abortion rights in the California constitution, was adopted in reaction to the U.S Supreme Court overturning *Roe v. Wade*, so interpretation of Proposition 1 would require considering both *Roe* and *Dobbs v. Jackson Women's Health Organization* as part of Proposition 1's genesis.[3] Yet subsequent federal decisions interpreting the U.S. Constitution regarding abortion rights would not be appropriate for the California Supreme Court to consider under zero-based interpretation, since they would share nothing in common.

Zero-based interpretation has not received enough consideration; even scholars who champion independent state constitutionalism have not advocated for full zero-based interpretation. For example, even the noted state constitutionalist Professor Robert F. Williams expressed doubts that zero-based interpretation would be possible when there is a "highly visible and controversial 5–4 Supreme Court decision casting its shadow over the state court proceedings."[4] And although Williams does argue for independent state constitutional doctrines, he dismisses full zero-based interpretation as "incoherent" and nonsensical.[5] But he never explains *why* zero-based interpretation "does not make sense," or why it would make state constitutional law incoherent.[6] That conclusion is backwards: zero-based interpretation not only is possible, but it would likely make state law *more* robust.

The law is slow to change. The primary reasons zero-based interpretation has not been seriously considered are because it has never been done for provisions that are analogous between the state and federal constitutions, and because there are doubts that it could be done correctly. Yet without examining the benefits and drawbacks of zero-based interpretation, it is imprudent to dismiss it out of hand. In fact, zero-based interpretation would likely achieve many of the independence and federalism goals advocated for by state constitutionalists. Zero-based interpretation demands serious consideration because it can fully realize independent state constitutionalism.

Zero-based interpretation would fully recognize California's sovereignty

Zero-based interpretation would be truer to California's status as an independent sovereign within a system of dual federalism. The states did not give up their full sovereignty when they joined the Union.[7] Instead, the 1789 constitution created a system that granted the federal government power only in a few key areas that affect all the states as a whole, such as interstate commerce or foreign relations, while retaining all other traditional sovereign powers within the individual states.[8] All powers not granted to the federal government are retained by the states, and the states are full sovereigns with all attendant powers.[9] Because of this — save for areas where federal law preempts state law — federal law should have no influence on the development of state law.

Zero-based interpretation would give full effect to California's status as an independent sovereign, with plenary power over its own affairs.[10] Each state has always had its own constitution and unique individual rights guarantees.[11] Nor was the federal the Bill of Rights meant to supplant rights guaranteed by the state constitutions — instead, it initially only limited action by the federal government, not the states.[12] Even when the 14th Amendment was ratified in 1868 with the requirement that states not deny due process to individuals, it took until the 1960s for most of the Bill of Rights guarantees to be incorporated to the states.[13]

Thus, for much of California's existence the state constitution was the sole guarantee of rights.[14] This is significant because for most of California's history, the state had sole power to define a constitutional rights jurisprudence. And just because the federal constitution has been incorporated to create a new floor for California, nothing about the 14th Amendment should be taken to supplant California's independent constitutional jurisprudence.

Both lock-stepping and using federal constitutional law as persuasive authority make California's sovereignty subservient to the federal constitution.[15] These practices ignore both the voter's wishes for the California constitution to be a guarantee of independent rights, and the inherent independence of a state from the federal government.[16] Even if lock-stepping is abandoned and U.S. Supreme Court opinions

are only used for their persuasive effect, the frame of the conversation over what the California constitution means is colored by a distinct sovereign (the United States) that should have no influence on what California's constitution means.

Zero-based interpretation is necessary for California to function as a laboratory of democracy

Another benefit of zero-based interpretation is that it fully realizes the vision of states as laboratories of democracy.[17] This idea, developed by Justices William Brennan and Louis Brandeis, posits that states can and should experiment with different constitutional notions to see which prove to be best.[18] Other scholars similarly advocate for independent state constitutional interpretation as necessary for states to be true laboratories of democracy.[19] Zero-based interpretation would go even further: freed from federal constitutional law, the California Supreme Court would have to (rather, get to) develop its own constitutional doctrine for its constitution, requiring new constitutional ideas free from the influence of federal constitutional law.[20] With its current presumptive lockstep approach, the California Supreme Court risks infecting its California constitutional jurisprudence with ideas from the federal judiciary, which should have no bearing on state constitutional law in a true system of state laboratories.

Abandoning presumptive lock-stepping in favor of zero-based interpretation would, in the words of Justice Stanley Mosk, force California "to innovate and to create new bodies of law, and to experiment."[21] As matters stand, federal constitutional law "defines the issues, furnishes the concepts, supplies even [state] court's vocabulary."[22] Federal constitutional decisions have an outsized influence not only directly on state constitutional decisions, but on how justices think about state constitutional issues in the first place.[23] State constitutional law thus is being shaped by federal law language and concepts — to free itself from this federal yoke, state courts must stop using the language of federal case law. With zero-based interpretation, the California Supreme Court would have to develop state constitutional law without depending on federal precedent.[24] Doing so would

prevent federal caselaw from becoming what Professor Ellen Peters calls "a psychological impediment to independent construction of state constitutions."[25]

Zero-based interpretation would improve California constitutional law

Zero-based interpretation would also improve California constitutional law by reducing any arbitrariness that occurs when the California Supreme Court diverges from a federal interpretation of an analogous provision in the California constitution. A common counter to arguments for state judicial independence is that by refusing to follow the U.S. Supreme Court in interpreting an analogous state constitutional provision, state high courts are arbitrarily substituting their policy choice over that of the U.S. Supreme Court.[26] Williams addresses this concern by arguing that state court decisions can only be seen as results-driven if the federal decision arrives first.[27] This is sidestepping the issue — the federal cases often *do* arrive first, and so even if states would have decided things differently had they reached the issue first, the public perception will always be that the state high court is reacting to the federal case.

Zero-based interpretation, on the other hand, forecloses this arbitrariness argument. If advocates and courts cannot consider federal caselaw, a California court's rule-based divergence from those federal decisions will never be arbitrary or policy-based because there was no federal anchor to begin with. Courts will have to justify their interpretations of the California constitution independently, which will reduce at least the appearance of arbitrariness of Californian constitutional interpretation. Though this does remove one tool for judges and advocates (analogizing to federal caselaw) it also prevents this tool from being used as a crutch for an interpretive practice that should be focused on the California constitution. Zero-based interpretation will make it so that U.S. Supreme Court decisions will not be the "starting point, or referent, for legal reasoning."[28] Decisions interpreting the California constitution cannot be described as arbitrary policy disagreements with the U.S. Supreme Court if they stand alone.

Similarly, zero-based interpretation would ensure that state constitutional decisions are truly independent and not "reactionary" to federal constitutional decisions.

Developing state constitutional law completely independently of federal law would prevent state constitutions from becoming what Collins calls "a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions." [29] Zero-based interpretation would alleviate concerns about state constitutions being employed politically, and instead show that structural or historical differences in state and federal constitutions are the driving forces.[30] All these together would lead to a more robust development of state law — enhanced by the diversity of states and their individual histories and cultures.

Zero-based interpretation would improve federal constitutional law

Beyond improving the quality of California's constitutional law, zero-based interpretation would enhance federal constitutional law by giving the U.S. Supreme Court more options to consider when interpreting the federal constitution. This would happen through what Professor Paul Kahn has called the "ongoing debate about the meaning of the rule of law in a democratic political order."[31] To Kahn, a healthy "diversity of state courts" would "enrich" the "meaning of American citizenship" and constitutionalism.[32] With a true independent California constitutional jurisprudence, California's development of constitutional ideas of rights would better inform the U.S. Supreme Court of the universe of doctrinal possibilities when it considers analogous federal constitutional provisions.

By contrast, lock-stepping restricts any benefit to the U.S. Supreme Court from surveying constitutional rulings from the states. If all states lock their doctrine to the federal constitution, this creates a feedback loop in which the U.S. Supreme Court would see only vindication of its own judgments when looking to state constitutional decisions. Lacking any new ideas challenging those rulings, this would destroy the constitutional debate that Kahn champions.

That debate value is enhanced by zero-based interpretation. If there were 50 truly independent state constitutional traditions, the U.S. Supreme Court would have a wide field of doctrinal approaches to consider when setting nationwide rules. But if federal case law is used as persuasive authority in all 50 states, every state's

jurisprudence will be infected with a common federal element. No matter what the U.S. Supreme Court chooses, it will always get that one element — which it created in the first place. This too creates a feedback loop where the U.S. Supreme Court is reinforcing its own decisions through evidence of the state courts' decisions, who in turn are basing their decisions at least in part on the U.S. Supreme Court.

Zero-based interpretation can break this loop. If the states refused to consider federal case law, the universe of reasoning the U.S. Supreme Court would have access to would be expand. This would reflect a far more diverse array of values, and the result the U.S. Supreme Court would reach would presumably be far more measured in what is the best *national* policy, instead of what best reflects the feedback loop they created. The states should not be a mirror, reflecting the U.S. Supreme Court's doctrine.

Unlike Kahn's notion that state courts should be in constitutional dialogue with the federal government, this should not be a two-sided debate, but rather a one-way street.[33] The reason circles back to the institutional differences between the state and federal high courts and to state sovereignty. California only makes law for California and retains sovereignty over most matters. The U.S. Supreme Court makes law for the entire nation and does not abrogate the sovereignty of the states, save for when the U.S. Constitution specifically provides otherwise. This creates larger risks for creating national policy through constitutional interpretation when the U.S. Supreme Court does it versus when the California Supreme Court acts. The U.S. Supreme Court can benefit from seeing what the various states have done with their respective constitutions, but California benefits only slightly, if at all, by considering what a national court has decided is good national policy.

Limits of zero-based interpretation

Zero-based interpretation does have its limits. For instance, it would only apply in instances where a right is being asserted under the California constitution. There are of course times where the California Supreme Court must apply federal law: when a federal right is at issue, federal caselaw is binding on its interpretation, so the California Supreme Court must be aware of and apply that body of federal law to the claim.[34]

And when parallel claims are made under both the California constitution and the U.S. Constitution, the Supremacy Clause dictates that federal rights control when a state's interpretation is less protective of an individual's rights than the federal interpretation.[35] This should not preclude the California Supreme Court from deciding the scope of a California constitutional provision first even if it ultimately ends up less protective than the federal analog and thus preempted.[36] Oregon Supreme Court Justice Hans Linde's "first things first" approach is a helpful tool for addressing parallel constitutional claims. In his analysis, state constitutional claims are decided before federal claims to better recognize state courts' roles in protecting individual rights.[37] Though such an approach may seem redundant, because federal law will ultimately control, without first considering the California provision in isolation from federal law the California Supreme Court will not know whether the state provision is more or less protective than the federal analog. Interpreting the correct scope of rights under the California constitution is a critical role for the California Supreme Court, even if those interpretations are ultimately preempted by the federal constitution.

Zero-based interpretation is also explicitly barred in certain contexts. For example, under 1982 Proposition 8 a California trial court can only exclude evidence in a criminal case if exclusion is mandated by the federal constitution.[38] This change arguably provides less protections to criminal defendants because it abrogated exclusionary rule decisions rooted in the California constitution and left only the federal floor.[39] Direct provisions like Proposition 8 that touch on other constitutional protections can block zero-based interpretation.

But ballot initiatives cannot entirely eliminate zero-based interpretation. In *Raven v. Deukmejian* the California Supreme Court held that the voters cannot by initiative force the California Supreme Court to follow U.S. Supreme Court interpretations for all analogous constitutional provisions.[40] This recognition that constitutional interpretation is a core judicial function confirms that the legislature or the electorate cannot restrict judicial power "in a way which severely limits the independent force and effect of the California Constitution."[41] Which methods the

California Supreme Court uses to interpret California's constitution is for the judiciary to decide alone.[42] Barring a constitutional revision, zero-based interpretation cannot be blocked by statute or constitutional amendment; although specific decisions can be overturned by amendment, the general interpretive power of California's courts remains untouchable.

Conclusion

Judges and scholars have yet to see the benefits of zero-based interpretation. Yet it is the logical conclusion to arguments by state constitutionalists from Brandeis to Mosk to Williams about state sovereignty and the nature of our federalist system. For the California Supreme Court to develop California law to protect the rights of Californians, it makes no sense to refer, even persuasively, to the decisions of a federal court that is considering a different document that binds a different sovereign and impacts an entirely different populace. Justice Brennan's invocation of the "independent protective force of state law" will only be fully realized if there is zero-based interpretation of the California constitution.[43] Adopting zero-based interpretation would start a cultural shift in what state constitutions mean to state judges. In that same vein, lawyers and citizens could deemphasize the influence of the U.S. Supreme Court in favor of their own, more local state courts, attuned to California's own issues and interests.

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1. Cal. Const. art. I, § 24. ↑
2. *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89. ↑
3. Ballot Pamp., Gen. Elec. (Nov. 8, 2022), analysis of Prop. 1, p.1 (citing recent U.S. Supreme Court decision on abortion rights as motivating factor for the Proposition.); *Roe v. Wade* (1973) 410 U.S. 113; *Dobbs v. Jackson Women's Health Organization* (2022) 142 S.Ct. 2228. ↑
4. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of*

Supreme Court Reasoning and Result (1984) 35 S.C. L. Rev. 353, 378. For other examples of this view, see Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights* (1981) 27 Wayne L. Rev. 413, 429 (arguing that "when the federal issue significantly overlaps the state question . . . analysis and decision of the state claim cannot take place without close attention to federal doctrines and precedents, for even the most independent-minded state courts do no engage in zero-based interpretation."); The Harvard Law Review Association, *Developments in the Law: The Interpretation of State Constitutional Rights* (1982) 95 Harvard L. Rev. 1324, 1419 (dismissing zero-based interpretation as "irrational chauvinism."). ↑

5. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication* (1997) 72 Notre Dame L. Rev. 1015, 1063–64 ↑

6. Professor Williams does reference a New Hampshire case (*State v. Bradberry* (N.H. 1986) 129 N.H. 68, 83) where Justice Souter makes same the incoherence claim, but it is similarly conclusionary with little explanation. ↑

7. *See, e.g., Shelby Cnty. v. Holder* (2013) 570 U.S. 529, 544 ("Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States.") ↑

8. *See Gibbons v. Ogden* (1824) 22 U.S. 1, 22 (". . . the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass and . . . the original powers of the States are [to be] retained if any possible construction will retain them." ↑

9. *See id.; see also* U.S. Const. amend. X, XI. ↑

10. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 544 n.35 (C.J. Cantil-Sakauye, concurring) ("'It is accepted constitutional doctrine that state government is a government of inherent powers and that a state constitution unlike the Constitution of the United States is a document of limitations and not of grant, i.e., whereas the federal government has only

specifically delegated powers, state government has all the powers of government except insofar as these powers are constitutionally limited." (citation omitted)); *see also* The Federalist no. 45. (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."). ↑

11. *In re Love* (1974) 11 Cal.3d 179, 189 ("Our Constitution is, of course, a separate and independent source upon which decisions might be grounded."); *see also* Brennan, Jr., *State Constitutions and the Protection of Individual Rights* (1977) 90 Harvard L. Rev. 489, 491; Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts* (1985) 63 Tex. L. Rev. 977, 979. ↑

12. *Id.* ↑

13. Tarr, *Constitutional Theory and State Constitutional Interpretation* (1991) 22 Rutgers L.J. 841, at 853–54. ↑

14. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts* (1985) 63 Tex. L. Rev. 977, 979. ↑

15. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result* (1984) 35 S.C. L. Rev. 353, 356. ↑

16. Cal. Const. art. I, § 24; *see Shelby Cnty. v. Holder* (2013) 570 U.S. 529, 544. ↑

17. The high court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Arizona State Legislature v. Arizona Independent Redistricting Com'n* (2015) 576 U.S. 787, 817. ↑

18. *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the

country."); Brennan, Jr., *State Constitutions and the Protection of Individual Rights* (1977) 90 Harvard L. Rev. 489. ↑

19. *See, e.g.,* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result* (1984) 35 S.C. L. Rev. 353, 398; SCOCAblog, David A. Carrillo and Brandon V. Stracener, We need to clarify the cogent reasons standard, August 29, 2022. ↑

20. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result* (1984) 35 S.C. L. Rev. 353, 356. ↑

21. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach* (1981) 9 Hastings Const. L. Q. 1, 7. ↑

22. Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights* (1981) 27 Wayne L. Rev. 413, 431. ↑

23. *See id.* at 431–432. ↑

24. *See id.* (quoting Collins & Welsh, *Portions of Unpublished Interview with Justice Stanley Mosk* (San Francisco, Calif., Jan. 24, 1981)). ↑

25. *See* Peters, *State Constitutional Law: Federalism in the Common Law Tradition* (1986) 84 Mich. L. Rev. 583, 592. ↑

26. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication* (1997) 72 Notre Dame L. Rev. 1015, 1060. ↑

27. *Id.* ↑

28. *Id.* ↑

29. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach* (1981) 9 Hastings Const. L. Q. 1, 14. ↑

30. *Id.* at 14. ↑

31. Kahn, *Interpretation and Authority in State Constitutionalism* (1993) 106 Harvard L. Rev. 1147, 1147–48. ↑

32. *Id.* at 1148, 1168. ↑

33. *Id.* at 1166. ↑

34. *See, e.g., Felder v. Casey* (1988) 487 U.S. 131, 153 ("Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court."). ↑

35. *See* Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution* (2011) 115 Penn St. L. Rev. 1035, 1050 ("The Supremacy Clause may render state constitutional law irrelevant where it conflicts with federal law, but that does not necessarily mean that state courts must interpret state constitutional law so as to avoid such conflict."). ↑

36. Currently it is rare for a right to be protected less under the California constitution compared to the federal constitution, but it has happened in certain contexts such as the right to a speedy trial. *See Serna v. Superior Ct.* (1985) 40 Cal.3d 239, 250, as modified on denial of reh'g (Dec. 19, 1985). ↑

37. Linde, *First Things First: Rediscovering the States' Bills of Rights* (1980) 9 U. Balt. L. Rev. 379. ↑

38. *People v. Banks* (1993) 6 Cal.4th 926, 934. ↑

39. Cal. Const. art. I, § 28(f)(2); Latzer, *California's Constitutional Counterrevolution*, in Constitutional Politics in the States 149, 165 (G. Alan Tarr ed., 1996). ↑

40. *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350–55. ↑

41. *Id.* at 353. ↑

42. The California Supreme Court's choice of interpretive methods is likely one of its core powers that the legislature or executive cannot materially impair under the doctrine of separation of powers. *See* Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2011) 45 U.S.F. L. Rev. 655, 682–685. This broad principle is limited only by general constitutional provisions such as Article I, section 26 (provisions mandatory and prohibitory) and similarly general requirements that the judiciary uphold the law. ↑

43. Brennan, Jr., *State Constitutions and the Protection of Individual Rights* (1977) 90 Harvard L. Rev. 489, 491. ↑