We need to clarify the cogent reasons standard

Overview

California courts need a better way to evaluate California constitutional provisions that have federal analogues. Some California decisions have erroneously required that "cogent reasons" must exist before a California court construing a California constitutional provision may depart from the U.S. Supreme Court's construction of the analogous federal provision. That legal standard is suspect: it has no historical or doctrinal support, it is poorly reasoned, and it is inconsistently applied. We read the appropriate legal standard for interpreting analogous constitutional provisions as requiring reference to federal law only in a limited circumstance: when a long history exists of California courts applying federal law to functionally identical constitutional text that was borrowed from the federal constitution instead of another state constitution. Even then, federal law is only persuasive authority. And when a body of independent California constitutional law exists, or the California provision was not borrowed from the federal constitution, or a court considers a novel issue, the court should reach for California law first.

Analysis

The cogent reasons standard originally applied only to lower court rulings, not federal precedent.

In its current form the cogent reasons standard appears to require California courts to apply federal precedent to California constitutional provisions unless the court can find a good reason to depart from federal law.[1] References to this standard are common in modern California appellate decisions. This is typical:

> *The language of the federal and state due process guarantees are "virtually identical," and so California courts look "to the United States Supreme Court's precedents for guidance in interpreting the contours of our own due process clause and have treated the state clause's prescriptions as substantially*

overlapping those of the federal Constitution."[2]

So stated, it amounts to a presumption that federal law always governs. But in this modern choice-of-law incarnation the *cogent reasons* concept is not a well-reasoned and ancient principle. Instead, it was originally a standard of review preventing an appellate court from revising the lower court's ruling "except for the most cogent reasons." It has taken on a life of its own by accident and assumed the mantle of a canon only through frequent and unthinking repetition. It should not be applied as a hard presumption favoring federal law over California law.

The California Supreme Court first employed the phrase *cogent reasons* in 1858 in *Musgrove v. Perkins*, marking the initial statement of a standard-of-appellate-review rule that the court applied for decades: "The granting or refusing a continuance rests in the sound discretion of the Court below; and its ruling will not be revised, except for the most cogent reasons."[3] The court applied that rule generally to questions of reviewing trial court orders in various contexts.[4] At times it used the concept as a form of stare decisis.[5] But its main use was to grant trial courts broad discretion over continuances.[6] In that form, the cogent reasons standard was an early phrasing of the standard appellate courts employ to deferentially review trial court procedural rulings for abuse of discretion.[7]

Eighty years later, the California Supreme Court borrowed the *cogent reasons* phrase to refer to federal constitutional law in *Gabrielli v. Knickerbocker*: "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."[8] The court appeared to rely on a principle of statutory construction that a law framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, creates a strong presumption of intent to adopt the same construction as well as the language of the prior enactment.[9]

Yet even after *Gabrielli*, the California Supreme Court continued to use the phrase

cogent reasons to describe the standard for reviewing a trial court decision on procedural matters such as a continuance.[10] And the stare decisis version of the cogent reasons concept also continued well into modern times.[11] Thus, *cogent reasons* is the metric for both deferring to a lower court and for deferring to a higher court — situations so distinct that it is anomalous for the same standard to apply to both. Although *cogent reasons* may work well in the abuse-of-discretion context, there is no reasoned basis for applying a cogent reasons presumption to matters of state constitutional law.

Requiring cogent reasons to depart from federal law lacks historical support.

The *Gabrielli* court cited no California authority for its transformation of *cogent reasons* from a principle of appellate review into a rule of federal supremacy in state constitutional interpretation. Instead, *Gabrielli* cited to four other state court decisions, only one of which employed the cogent reasons phrase in the choice-of-law context.[12] And two of the cited decisions expressly rejected a federal law presumption.[13] Thus, *Gabrielli* stated no clear principle of California constitutional doctrine, found no compelling sister-state consensus, and may have simply borrowed a convenient phrase. Nor did *Gabrielli* draw from any historical or doctrinal precedent to announce the version of the cogent reasons standard that defers to construction of federal analogues when construing state constitutional provisions.

Gabrielli was wrong to impose a broad presumption favoring federal law when interpreting California constitutional provisions. Deferring to federal constitutional analogues often does not align with the actual history of state constitutions. The original state constitutions predated the federal constitution — indeed, the federal constitution borrowed from pre-existing state constitutions, not the other way around.[14] And when California's constitution was first drafted and adopted in 1849, the federal Bill of Rights limited only the federal government; it did not yet apply to the states. Thus, the 1849 California constitution relied on no federal authority: "[T]he language of the California Declaration of Rights was deliberately drawn from the constitutions of other states, not from the language of the federal

Constitution."[15]

Nearly all California constitutional provisions were drawn from other state constitutions.[16] In fact, much of California's original 1849 constitution was lifted wholesale from the constitutions of Iowa and New York:

> *As a matter of history it is well known that our Constitution is in many respects copied from that of Iowa. Upon motion of Mr. Gwin, the Constitution of Iowa was adopted by the Constitutional Convention as a basis for ours, for the reason, as stated by him, that it was one of the latest and shortest. Mr. Gwin in fact printed a copy of the Iowa Constitution for the members of the convention to use to draft the California Constitution at the Monterey convention in 1849.[17]*

Of the 1849 constitution's 137 sections, 66 were adapted from the Iowa constitution and 19 from the New York constitution, the remaining sections were copied from other state documents, and "reference by the framers of our basic document to the United States Constitution was at most fleeting and casual."[18] That remains true even after the 1879 constitution's adoption.[19] Thus, with few exceptions, deferring to federal constitutional provisions as if they were the original enactment is contrary to the actual history. The California constitution is an independent document that originates from other state constitutions, not the federal charter.

The deferential cogent reasons standard is poorly reasoned.

The independent force of state constitutions is well-established. In a pair of law review articles U.S. Supreme Court Justice William J. Brennan, Jr. argued that protecting individual rights requires state courts to independently interpret their own constitutions.[20] That is because, as Chief Judge of the U.S. Court of Appeals for the Sixth Circuit Jeffrey Sutton has explained, this country has 51 different constitutions, all but one being state constitutions.[21] Thus, Brennan's argument was not a new idea: state courts interpreting their own constitutions to adjudicate the protection of individual rights was the norm for the first 150 years of the nation's

history.[22] The federal Bill of Rights was not applied to the states until the early 1900s, when specific rights were selectively incorporated through the Fourteenth Amendment.[23] That history of drafting state constitutions independent from the federal charter creates both doctrinal reasons to interpret state constitutions independently, and a well-developed model for doing so.

State constitutions should be interpreted distinctly because they are not copies of or adapted from the federal constitution. The reverse is true: the first state constitutions were original creations — they took no influence from a federal charter that did not yet exist. The early state constitutions "are the oldest things in the political history of America."[24] The federal constitution (particularly the Bill of Rights) was based on the first 18 state constitutions.[25] Many drafters of the Articles of Confederation and the 1789 federal constitution had participated in writing their state constitutions, so the national documents drew from the state documents and the lessons their drafters learned in living with their state constitutional design choices.[26]

Being first in history and principal in guarding individual liberty are both good reasons for applying a state's constitutional law before considering federal cases. Professor (and later state supreme court justice) Hans A. Linde wrote that the state constitutional analysis is "logically prior to" reviewing the state's action under the Fourteenth Amendment: "Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection."[27] Disposing of state constitutional questions before invoking federal doctrine and authority gives "independent professional attention to the text, history, and function of state constitutional provisions," and doing so is necessary because the "logic of constitutional law demands that nonconstitutional issues be disposed of first, state constitutional issues second, and federal constitutional issues last."[28]

Professor Robert Williams argues that the distinct history and drafting process for state constitutions precludes relying on federal precedent when interpreting a state constitution: "The often unstated premise that U.S. Supreme Court interpretations of

the federal Bill of Rights are presumptively correct for interpreting analogous state provisions is simply wrong."[29] This is because state constitutions "have different origins, functions, forms, and qualities from the federal document, all for rational reasons."[30] Thus, he argues that affording federal decisions presumptive correctness wrongly subordinates a state's constitution and assumes without evidence "that in the absence of one or more of the criteria identified, it is illegitimate for a state court to reject the reasoning or result of a Supreme Court decision in the same or similar context."[31]

Even the modern federal liberty jurisprudence that the cogent reasons standard would rely on is in many cases derivative, with federal courts following state constitutional law decisions.[32] In other cases, the history of the state constitutional provision at issue predated (by decades or more in some cases) the eventual incorporation of the federal analogue against the state. Thus, inverting history and reason by assuming the federal constitution to be the original source will hobble our understanding of constitutional liberty interests; conversely, properly valuing state constitutional liberty interests will benefit federal constitutional doctrine.[33]

Deferring to a court that applies a federalism discount to individual liberty makes little sense when considering a document like the California constitution that was expressly intended to grant broader liberty guarantees.[34] The U.S. 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," which suggests a need for "special restraint in that process."[35] This means that deferring to the U.S. Supreme Court when a state court interprets its state constitutional provisions may improperly restrict that state's liberty guarantees; that deference also undermines the federalist purpose of providing dual protection for individual rights.[36] If a state court must defer to something, deferring to sister state courts whose constitutional provisions "are more likely to share a common ancestry" is preferable to aping federal doctrine.[37]

Finally, California's direct democracy institutions make excessive deference to

federal constitutional analogues particularly unwise. California's constitution is often amended through California's robust direct democracy provisions.[38] More than a century of amendment and revision separates the California constitution from its historical inspirations. So even if a California constitutional provision has a federal analogue, any historical federal antecedents are just one source of interpretive evidence.

The cogent reasons standard is inconsistently applied.

The California Supreme Court has not consistently applied the cogent reasons standard in practice.[39] In some cases it invokes article I, section 24 and notes that by this provision the state's voters in 1974 removed any doubt that the California constitution is a document of independent force and effect.[40] The court has, for example, applied that article I, section 24 to conclude that the California constitution is "a document of independent force, and the people of this state are not dependent on the United States Constitution as the primary source of their protection."[41] The court often notes that article I, section 24 "confirmed that the California courts had the authority to adopt an independent interpretation of the state Constitution,"[42] and that it is an express grant of authority for California courts to interpret the state constitution as providing greater protection "than that extended by the federal Constitution, as construed by the United States Supreme Court."[43]

Indeed, California's high court often makes strong statements that its independent role as the arbiter of a state's highest law *requires* it to look first to the California constitution:

> *[W]e sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide*

> *no less individual protection than is guaranteed by California law.*[44]

And the court sometimes acknowledges that in relying on its state constitution a state high court is contributing to a key federalism process:

> *The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Accordingly, we affirmed in Brisendine that state courts, in interpreting constitutional guarantees contained in state constitutions, are independently responsible for safeguarding the rights of their citizens.*
>
> *. . . [T]his court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.*[45]

Yet when confronted with California constitutional law issues some Court of Appeal decisions simply cite *Gabrielli* for its cogent reasons standard.[46] This leads to the problem that it is unclear when cogent reasons apply, and applying it by default has become the norm. But the cogent reasons standard should apply at most only in a limited context.

California courts should only apply the cogent reasons standard in narrow circumstances.

As noted above the phrase *cogent reasons* first appeared in the federal constitutional authority context in *Gabrielli*, as a conceptual limit on the California constitution's independence. For California courts, with responsibility to respect the state constitution as an independent source of liberty protection, the presumption should be against deferring to narrower federal doctrine. This follows from *Raven v.*

Deukmejian, where the California Supreme Court used *cogent reasons* in the opposite sense of describing when the court would *not* defer to federal decisions on analogous constitutional provisions:

> *The foregoing authorities acknowledge and support a general principle or policy of deference to United States Supreme Court decisions, a policy applicable in the absence of good cause for departure or deviation therefrom. Yet it is one thing voluntarily to defer to high court decisions, but quite another to mandate the state courts' blind obedience thereto, despite "cogent reasons," "independent state interests," or "strong countervailing circumstances" that might lead our courts to construe similar state constitutional language differently from the federal approach.*[47]

Raven rejected strict application of a cogent reasons standard in the *Gabrielli* sense, relying in part on article I, section 24. *Raven* acknowledged the practice of some deference, but concluded that a court of last resort for interpreting California constitutional guarantees could not be compelled to so defer.[48] Even *Gabrielli* cautioned that "State courts in interpreting provisions of the state constitution are not necessarily concluded by an interpretation placed on similar provisions in the federal constitution."[49] *Raven* stands for the principle that nothing — neither the voters nor judicial rule — can force California courts to defer to anyone in interpreting the state constitution.

The upshot after *Gabrielli* and *Raven* is that cogent reasons cuts both ways: it can describe either a sound basis to follow federal law, or an equally good reason to follow California law. And the underlying problem with a "federal first" approach remains the same even in *Raven*'s formulation. This is why the cogent reasons standard sees seemingly inconsistent application. The most recent example of this is the contrast between *People v. Buza*,[50] where the California Supreme Court followed the federal constitutional line on search and seizure, and *People v. Aranda*,[51] where it departed from federal constitutional doctrine on double jeopardy.

Buza is an example of there being no preexisting independent body of California

precedent; on the contrary, California search-and-seizure law has long been locked to federal law, before and after Proposition 8.[52] Thus, in *Buza* the court found that cogent reasons existed to give U.S. Supreme Court decisions "respectful consideration," reflecting the "respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the states, the ultimate vindication of liberty and property against arbitrary and unconstitutional state legislation."[53]

Aranda is an example of established California precedent diverging from federal doctrine. In *Aranda*, the court rejected federal double jeopardy doctrine and upheld an independent California constitutional analysis. The court relied on existing California precedent: *People v. Hanson*, which rejected as "flawed" a Court of Appeal decision that found no cogent reasons to construe the state provision differently, and questioned whether cogent reasons were required for adhering to a preexisting interpretation of the California constitution.[54]

We would reconcile those cases and restate the cogent reasons standard as:

> *The determining factors in whether cogent reasons exist for following federal law or charting a different course through California law are whether the issue is novel, or if established California precedent already diverges from federal doctrine, or the California provision was not borrowed from the federal constitution; in those cases the court should reach for California law first.*

Criminal procedure is a good example of California courts (for good reason) following federal doctrine. Conversely, an existing body of distinct California law on an issue is a cogent reason to ignore federal precedent. Or the issue could be an open question, leaving the court a choice. In the open question scenario a court should first look to California law — that is how the California Supreme Court resolved the open issue in *Hanson*, where the issue "remained an open question as to both this court and the United States Supreme Court," which did not require applying the cogent reasons standard "to reassess matters firmly settled under state constitutional law."[55] By contrast, the issue in *Buza* had long been analyzed based

on federal doctrine, and California voters adopting Proposition 8 barred any other course.[56] Thus, how the cogent reasons standard applies depends on whether (and why) the issue has long been governed by federal law, or an independent California doctrine already exists.

From this review we conclude that California courts should find cogent reasons to follow federal law only when the question has long been governed by federal law, and there is no body of contrary California constitutional precedent on the issue. When such a body of state constitutional law exists on a textual analogue, or when the matter is an open question, the California constitution's independent vitality is a cogent reason to employ state law.[57] This is especially true when there is no historical evidence that the California provision was borrowed from the federal constitution.

This proposal is consistent with the structure of our federal government and its intent to provide dual sources of protection for individual rights. If there is California precedent, then a court should engage with that precedent first, and prefer it over relying on federal caselaw. Even if there is no California precedent on the issue, there is no basis for following federal law unless the federal analogue actually served as the basis for the state constitutional provision. Because the sequence of history makes that a rare occurrence, California courts would be better served looking to sister state courts and their state constitutional provisions that inspired our own. Rote deference to similarly worded provisions in the federal constitution is ahistorical, illogical, and undermines the liberty-protecting purpose of having 51 constitutions protecting individual rights.

Conclusion

California's cogent reasons standard evolved with no basis in the history of state constitutions, without sufficient consideration of federalism principles, and without respect for the California constitution. With its unclear contours, courts can misread the *standard* to be a *rule* requiring deference to federal law. That misstates the cogent reasons standard, which can supply good reasons to follow *either* California or federal law. The standard needs restating to clarify that it suggests deferring to federal law only in the limited circumstance of California courts historically and

exclusively following federal law on the issue at bar. Even then, the cogent reasons a court might find to defer to federal law are not mandatory, and when the case requires it article I, section 24 always provides a reason to root the analysis of a California liberty interest in the state constitution.

The bottom line is that California courts should resist applying the cogent reasons standard as a rule requiring deference to federal law. Doing so places an ahistorical and unreasoned burden on the state constitution to have a stark-enough textual difference from its federal analogue to allow state courts to interpret a state constitution — the foundational source of individual liberty — as having sufficient independent force to protect individual rights more highly than federal law. Instead, courts should look to federal law only when no California precedent exists on an issue well-tread by federal precedent, *and* where the state constitutional provision actually draws from the federal analogue. Similarly worded provisions are not enough to warrant shirking the duty to interpret important documents of independent force, and too much deference to federal precedent risks failing to uphold the greater degrees of protection our state constitutions may afford.

—o0o—

David A. Carrillo is the executive director of the California Constitution Center. Brandon V. Stracener is an attorney in private practice and a senior research fellow at the California Constitution Center.

1. The usual citation for this standard is to *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 89: "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." ↑
2. *In re Harris* (2021) 71 Cal.App.5th 1085, 1098–1099 (citing to *Gabrielli*, 12 Cal.2d at 89). ↑
3. *Musgrove v. Perkins* (1858) 9 Cal. 211, 212. ↑
4. *Reese v. Mahoney* (1863) 21 Cal. 305, 307 ("The granting or refusing a motion to set aside a default, and for leave to answer, rests in the sound discretion of the Court, and its rulings will not be revised, except for the

most cogent reasons, nor unless it affirmatively appear that injustice has been done"). ↑

5. *Morris v. De Celis* (1875) 51 Cal. 55, 63 ("the rule having been acquiesced in for more than ten years, ought not to be disturbed except for the most cogent reasons"); *Carleton v. Townsend* (1865) 28 Cal. 219, 222 ("the conclusions announced in that case have been too frequently adopted and acted upon in subsequent cases to be now disturbed, except for the most cogent reasons"). ↑
6. *People v. Gaines* (1934) 1 Cal.2d 110, 113 ("It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons"); *People v. Dodge* (1865) 28 Cal. 445, 447 ("this Court will not interfere unless for the most cogent reasons, even though the Court below in its action approached very nearly to an arbitrary exercise of its discretion"). ↑
7. *See, e.g., People v. Wilson* (2005) 30 Cal.Rptr.3d 513, 548 ("The standard of review for a trial court's denial of a continuance motion is abuse of discretion"). ↑
8. *Gabrielli,* 12 Cal.2d at 89. ↑
9. *Holmes v. McColgan* (1941) 17 Cal.2d 426, 430. ↑
10. *See, e.g., Miller v. Miller* (1945) 26 Cal.2d 119, 125. ↑
11. *See, e.g., City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 532 ("judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons"). ↑
12. *Sperry & Hutchinson Co. v. State* (1919) 188 Ind. 173, 180 ("While a decision of the Supreme Court sustaining the validity of a state statute as not violative of any provision of the Fourteenth Amendment is not absolutely binding on the courts of the state when the statute is attacked as being in conflict with a provision of the state Constitution having the same effect, still, the federal decision in such cases is strongly persuasive as authority, and is generally acquiesced in by the state courts"); *People v. Budd* (1889) 117 N.Y. 1, 13–14, aff'd (1892) 143 U.S. 517 ("But the respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the states, the ultimate vindication of liberty and property against

arbitrary and unconstitutional legislation, and the fitness of things, emphasize and enforce, in the particular case, the settled rule that only when required by *the most cogent reasons*, nor, indeed, unless compelled by unanswerable grounds, will a court declare a statute to be unconstitutional") (emphasis added). ↑

13. *Watson v. State* (1922) 109 Neb. 43 [189 N.W. 620, 621] ("Notwithstanding this fact and that no federal question is here involved, the defendant insists that these cases are binding on this court and decisive of this question. This, of course, is not so. It has long been recognized that the highest court of the state has the right to determine whether an act of the state Legislature is in violation of the state Constitution"); *State v. Henry* (1933) 37 N.M. 536 [25 P.2d 204, 207] ("We [New Mexico] used the exact language of the Fourteenth Amendment. While, according to the well known principle, we did adopt, with the language, the interpretation it had received, and while we would naturally go with the federal tribunal in the development of the law of due process, still the federal question and the state question are not necessarily the same"). ↑
14. Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 322–23 (discussing prior-construction canon). ↑
15. Grodin, *Some Reflections on State Constitutions* (1988) 15 Hastings Const. L.Q. 391, 395. ↑
16. *See, e.g.,* Browne, Report of the Debates in the Convention of California (1850). The debates included discussion of specific language from other states' constitutions, such as the state of Virginia, and the history within certain states such as New York. *See id.* at 38–39. *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 111 Cal.Rptr.2d 336, 345 (noting that many of the framers of the 1849 California Constitution came from New York and so "[not surprisingly" they borrowed from the New York Constitution free speech clause in drafting California's analogue, so "the history behind New York's clause is relevant to interpreting California's free speech clause). ↑
17. *Tos v. State* (2021) 72 Cal.App.5th 184, 202–203, reh'g denied (Dec. 16, 2021), review denied (Mar. 16, 2022) (internal quotations and citations omitted). *See also Los Angeles Alliance For Survival v. City of Los Angeles*

(2000) 93 Cal.Rptr.2d 1, 9 n.9 ("The California free speech provision was modeled verbatim upon article I, section 8 of the New York Constitution of 1846, which in turn was derived from article VII, section 8 of the New York Constitution of 1821. At the time of California's 1849 Constitution, most of the states then in the Union had constitutional provisions similar to the New York model.") (citations omitted); Holland et al., State Constitutional Law: The Modern Experience (1st ed., West 2010) pp. 42–43. ↑

18. *Diamond v. Bland* (1974) 11 Cal.3d 331, 338 (Mosk, J., dissenting, referencing Paul Mason in Constitutional History of California (1951) p. 83). *See also* Fritz, More Than Shreds and Patches: California's First Bill of Rights (1989) 17 Hastings Const. L.Q. 13, 18–19 (Gwin reported to the convention that half of the proposed bill of rights provisions "came from Iowa's constitution and half from New York's"); *People v. Sidener* (1962) 58 Cal.2d 645, 660 (Schauer, J., dissenting) (most of the provisions of the 1849 constitution were modeled on corresponding provisions of the constitutions of Iowa, New York, and other common law jurisdictions); *Bourland v. Hildreth* (1864) 26 Cal. 161, 25 (Sanderson, C. J., dissenting) ("As a matter of history it is well known that our Constitution is in many respects copied from that of Iowa"). ↑
19. Fritz, More Than Shreds and Patches: California's First Bill of Rights (1989) 17 Hastings Const. L.Q. 13, 13–14 ("Although the 1849 constitution was superseded by the 1879 constitution, the original bill of rights provisions have largely survived and remain applicable today. Indeed, of the twenty-eight sections that compose California's present bill of rights, only eight are not directly based on the protections guaranteed under the 1849 constitution."); Palmer and Selvin, The Development of Law in California, West's Ann. Const. Code, vol. 1, p. 14 ("many of the problems with which the 1849 Convention concerned itself were necessarily quite dissimilar from those which had given the drafters of the Federal Constitution the most difficulty. Such differences were not illogical or anomalous. The broad, guiding principles and methods of a federation were an objective quite different from the exigent details of sovereign state government.") and id. at 16 (California's bill of rights "has been elaborated somewhat through the years, but today California's Bill of Rights still rests on the bedrock

'Declaration of Rights,' of the 1849 Constitution"). ↑

20. Brennan, State Constitutions and the Protection of Individual Rights (1977) 90 Harv. L. Rev. 489; Brennan, The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights (1986) 61 N.Y.U. L. Rev. 535. ↑
21. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) pp. 2, 11, 17. ↑
22. Sutton at p. 13; *see* Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. at 493. ↑
23. *See, e.g., Gideon v. Wainwright* (1963) 372 U.S. 335, 341 (incorporating the right to counsel in all felony cases); *Malloy v. Hogan* (1964) 378 U.S. 1, 5–6 (incorporating the right to be free from self-incrimination); *Pointer v. Texas* (1965) 380 U.S. 400, 403 (incorporating the right to confront adverse witnesses); *McDonald v. City of Chicago* (2012) 561 U.S. 742, 791 (incorporating the 2nd Amendment); *Timbs v. Indiana* (2019) 139 S. Ct. 682, 686 (incorporating the Excessive Fines Clause); *Ramos v. Louisiana* (2020) 140 S. Ct. 1390, 1397 (incorporating the Sixth Amendment right to a jury trial). ↑
24. Bryce, The American Commonwealth Vol. 1 (2d Ed., Macmillan 1981) p. 434. ↑
25. Williams, The Law of American State Constitutions (2009) p. 37 ("Constitutional scholars have long recognized that many of the features of the U.S. Constitution were modeled on the earlier state constitutions"). ↑
26. Holland et al., State Constitutional Law: The Modern Experience (1st ed., West 2010) at 125 ("[S]tate constitutional liberties predated the federal Constitution's Bill of Rights and the Fourteenth Amendment. Indeed, several revolutionary era state constitutions served as models for the Bill of Rights which James Madison introduced in the first session of Congress."). ↑
27. Linde, Without "Due Process": Unconstitutional Law in Oregon (1970) 49 Oregon Law Review 125, 135. ↑
28. Id. at 182, 185. ↑
29. Williams, The Law of American State Constitutions (2009) p. 135. ↑
30. Id. at 36. ↑
31. Id. at 148. ↑

32. *See, e.g., Perez v. Lippold* (1948) 32 Cal.2d 711 (invalidating laws prohibiting interracial marriage as violative of equal protection) followed by the same conclusion in *Loving v. Virginia* (1967) 388 U.S. 1; *Mulkey v. Reitman* (1966) 66 Cal.2d 529 (state constitutional provision allowing property owners to discriminate on the basis of race violated the federal equal protection clause) followed by the same conclusion in *Reitman v. Mulkey* (1967) 387 U.S. 369; *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 579 (alienage is a suspect classification under the Fourteenth Amendment) followed by the same conclusion in *Graham v. Richardson* (1971) 403 U.S. 365. ↑
33. Sutton, 51 Imperfect Solutions at 19–20 ("Respect for state constitutional law as an independent source of rights, and its revitalization as a litigation tool, may be the best thing that could happen for federal constitutional law"). ↑
34. Cal. Const., art. I, § 24; Fritz, 17 Hastings Const. L.Q. at 20 ("the final bill of rights adopted in Monterey offered significantly broader coverage and protection of individual rights than did the Federal Bill of Rights"). ↑
35. Ibid. ↑
36. The Federalist, No. 51 (Madison) ("a double security arises to the rights of the people" from the federalist design). ↑
37. Grodin, 15 Hastings Const. L.Q. at 402. ↑
38. *See generally* Carrillo et al., California Constitutional Law: Direct Democracy (2019) 92 S. Cal. L. Rev 557. ↑
39. *See, e.g., People v. Hanson* (2000) 97 Cal.Rptr.2d 58, 64 which concerned whether imposition of a restitution fine on resentencing came within the California rule prohibiting a more severe punishment after a successful appeal. The Court of Appeal noted that the U.S. Supreme Court had interpreted the federal double jeopardy clause as not precluding a more severe sentence, and it held there were no cogent reasons to construe the California provision differently. The California Supreme Court rejected that analysis as "flawed" and questioned whether cogent reasons were required for adhering to a preexisting interpretation of the state constitution. ↑
40. Cal. Const., art. I, § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"). ↑

41. *People v. Barrett* (2012) 54 Cal.4th 1081, 1112. ↑
42. *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353. ↑
43. *People v. Fields* (1996) 13 Cal.4th 289, 298. ↑
44. *People v. Longwill* (1975) 14 Cal.3d 943, 951 n.4 (overruled on other grounds in *People v. Laiwa* (1983) 34 Cal.3d 711); *see also Raven*, 52 Cal.3d at 354. ↑
45. *Com. to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 261 (quotation marks, italics, and citations omitted). ↑
46. *See, e.g., Mandel v. Hodges* 1975 WL 13892 at *2 n.3, vacated (1976) 54 Cal.App.3d 596 (relegating the issue to a footnote). Some Court of Appeal decisions perceive that cogent reasons does not always apply. *See, e.g., People v. Saibu* 2022 WL 2932568 at *15 (cogent reasons applies only where the issue has not been "firmly settled" under state constitutional law). ↑
47. *Raven*, 52 Cal.3d at 353. ↑
48. *Id.* at 354. ↑
49. *Gabrielli*, 12 Cal.2d at 89. ↑
50. *People v. Buza* (2018) 4 Cal.5th 658. ↑
51. *People v. Aranda* (2019) 6 Cal.5th 1077. ↑
52. *Id.* at 685 (after Proposition 8 in 1982 federal Fourth Amendment law "is often not only persuasive, but controlling in criminal cases . . . . This means that in California criminal proceedings, issues related to the suppression of evidence seized by police are, in effect, governed by federal constitutional standards."). And even before Proposition 8 the California Supreme Court "ordinarily resolved questions about the legality of searches and seizures by construing the Fourth Amendment and article I, section 13 in tandem." *Id.* at 686. ↑
53. *Buza*, 4 Cal.5th at 684. ↑
54. *Hanson*, 97 Cal.Rptr.2d at 64. ↑
55. *Hanson*, 97 Cal.Rptr.2d at 65. Note that *Hanson* distinguished *People v. Monge* (1997) 16 Cal.4th 826 (which reasoned that no cogent reasons existed to interpret the state double jeopardy clause differently from its federal equivalent). ↑
56. *Id*. at 686. ↑
57. Cal. Const., art. I, § 24; *Buza*, 4 Cal.5th at 684 ("the California Constitution

is, and has always been, ‘“a document of independent force”’ that sets forth rights that are in no way ‘dependent on those guaranteed by the United States Constitution’) (citations omitted). ↑