

SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING
BOOK CHAPTER

FREEDOM OF EXPRESSION UNDER THE CALIFORNIA CONSTITUTION

JOSEPH R. GRODIN*

Most of us, when we want to refer to constitutional protection for expressive activity, refer to our “First Amendment rights.” But when delegates to the first California constitutional convention gathered in Monterey in 1849 to draft a Declaration of Rights, the First Amendment was not a subject of discussion. Not only had the First Amendment never been interpreted by the U.S. Supreme Court, at that time the federal Bill of

* Associate Justice of the California Supreme Court, 1982–1987; Distinguished Emeritus Professor, University of California, Hastings College of the Law; coauthor with Calvin Massey and Richard Cunningham of *THE CALIFORNIA STATE CONSTITUTION* (Oxford Univ. Press 2011) (1993). The author has published numerous articles on the subject of state constitutions, including *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 *HASTINGS CONST. L.Q.* 141 (2004). For more general treatment, with references to other books and articles about state constitutionalism nationwide, see ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* (Oxford Univ. Press 2009).

This article is intended to be the first in a series on rights and liberties under the California Constitution, focusing primarily on areas in which the state Constitution has been interpreted, or is subject to being interpreted, as providing greater protection than the federal Constitution. The author appreciates the helpful suggestions he received from readers of the draft, including Ann Brick and Karl Olson, and its excellent editing by his research assistant, Monica Smith.

Rights had no application to the states.¹ Instead, in drafting what became the first article of the Constitution, the delegates chose as models primarily the constitutions of New York and Iowa; and while most state constitutions had similar provisions relating to freedom of speech, it was the New York Constitution of 1846 that provided the text.² Article I, section 9 of California's first constitution read:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

And section 10 read:

The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

The language of sections 9 and 10 was incorporated without change into the Constitution of 1879, and has survived with only minor changes. In 1974, section 9 was renumbered as section 2, and in 1980 it became section 2(a), supplemented by a provision creating a newsmen's privilege that became section 2(b).³ Section 2(a) now reads:

¹ *Barron v. Mayor & City Council of Baltimore*, 32 U.S. 243 (1833).

² The language in the 1846 New York Constitution derived in turn from earlier constitutions in New York, and from earlier constitutions in other states. For discussion of the history and its significance to interpretation, see Christian G. Fritz, *More Than Shreds and Patches: California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13 (1989); Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 HASTINGS CONST. L.Q. 111 (1989); Margaret C. Crosby, *New Frontiers: Individual Rights Under the California Constitution*, 17 HASTINGS CONST. L.Q. 81 (1989). See also the extensive discussion by the California Supreme Court in *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468 (2000).

³ See *infra* Section VII.

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Section 10 was renumbered as section 3 in 1974, then as section 3(a) in 2004. It was changed in 1974 to read:

The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

It was to be expected, notwithstanding the independent origins of the free speech and assembly provisions of the California Constitution, that their interpretation would be influenced over time by the First Amendment and its interpretation by the U.S. Supreme Court. This article's principal undertaking, however, is a description of the ways in which interpretation by California courts of the state constitutional provisions has given rise to a somewhat different jurisprudence, providing protections for expressive activity and association beyond the First Amendment. Toward the end of the article, I will discuss the justification for and methodology of such a distinctive state approach.

I. EARLY CASES

The year was 1893; the place was a courtroom in San José. The case was *Price v. Price*, a hotly contested divorce proceeding, and the evidence (according to the lawyers) “would probably be of a filthy nature.” The trial judge — anxious, he said, to protect decorum and public sensitivity — issued an order closing the courtroom to members of the public and directing that “no public report or publication of any character of the testimony in the case be made.”

Charles Shortridge,⁴ the editor and publisher of the *San Jose Mercury*, promptly violated the court's order by publishing the next day what purported to be the testimony of the witnesses. Appearing in response to an

⁴ Charles was part of an illustrious family that came to California from Iowa and that included his sister, Clara Shortridge Foltz, the first woman lawyer in California, and brother, Samuel Shortridge, who later became U.S. senator from California. See BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* (2011).