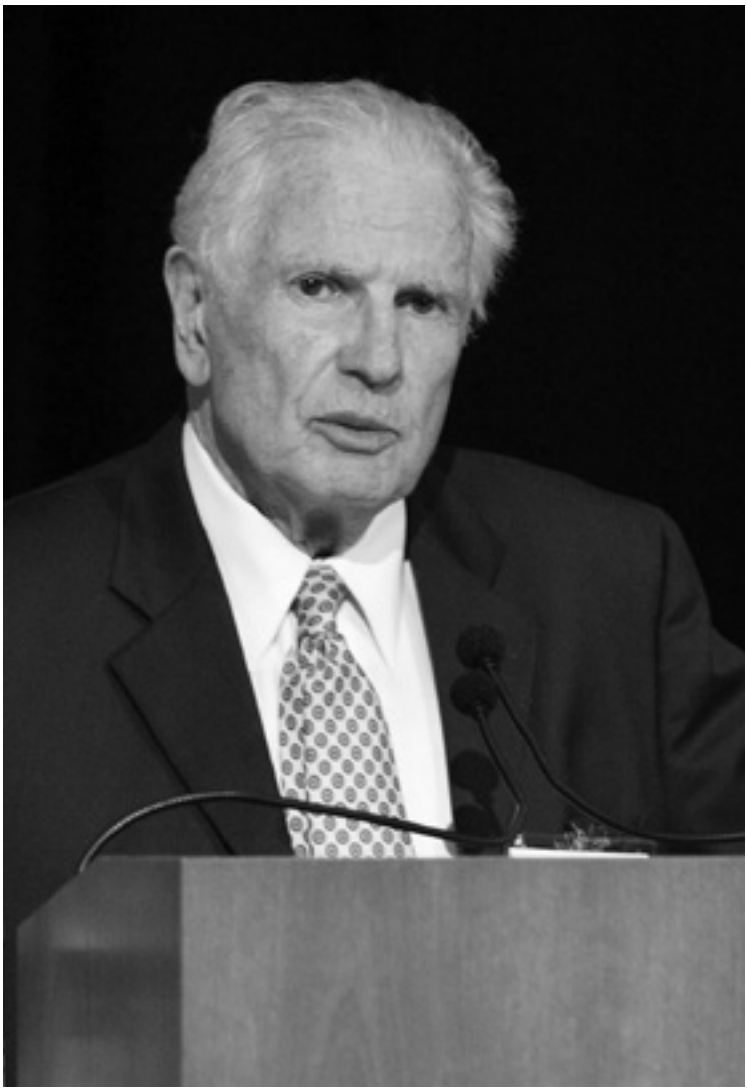
SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING BOOK CHAPTER



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LIBERTY AND EQUALITY UNDER THE CALIFORNIA CONSTITUTION

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INTRODUCTION

This is the second in a series of essays written with a larger project in view: a book on rights and liberties under the California Constitution. The essays, as well as the projected book, have as their principal focus the ways in which the state Constitution, through differences in text or differences in interpretation by the courts, may provide California citizens with greater protection than is available under the federal Constitution.[1] Within

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[1] I write on the assumption that the reader is generally familiar with the proposition that state constitutions may provide broader protection than the federal Constitution, and with the argument (which I endorse) that state courts should look to their own constitutions before reaching federal constitutional claims. *See* Joseph R. Grodin, *The*

that focus, I attempt to provide historical context, both because it helps in understanding the dynamics of state constitutional development, and because it is interesting in itself. The first essay in the series, on freedom of expression, was previously published in these pages.[2] This second essay covers protection for other kinds of liberty interests and for the principle of equality. The subject of the state Constitution's religion clauses, which implicate both liberty and equality interests, is reserved for later treatment.

The concepts of "liberty" and "equality" are analytically distinct, the former arising from a claim that one has a constitutionally protected right to engage in certain activity, the latter from a claim that one has a constitutionally protected right to be treated the same as others similarly situated. Jurisprudentially, however, there is often an overlap — a claim that one has a right to engage in particular activity without interference may be buttressed by a claim that others are permitted to do so — and in some of the cases it is not entirely clear which claim forms the basis for a court's decision. To that extent, there is some unavoidable overlap in discussing the decisions.

I. LIBERTY

As regards liberty, my goal in this essay is a modest one. The California Constitution, like the federal, contains numerous provisions protective of particular liberties — freedom of speech and press,[3] the right to assemble and petition,[4] freedom of religion,[5] and the rights of criminal defendants,[6] not to speak of the right to fish.[7] With some exceptions, I do not discuss these specific provisions here.[8] Rather, my focus is upon how California

California Supreme Court and State Constitutional Rights: The Early Years, 31 Hastings Const. L.Q. 141 (2004).

2 Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 Cal. Legal Hist. (Journal of the California Supreme Court Historical Society) 187 (2011).

3 Cal. Const. art. I, § 2.

4 Cal. Const. art. I, § 3.

5 Cal. Const. art. I, § 4.

6 *E.g.,* Cal. Const. art. I, § 12 (right to bail); § 13 (protection against unreasonable searches and seizures); § 15 (rights of defendants in criminal prosecutions).

7 Cal. Const. art. I, § 25.

8 An exception is the protection against unreasonable searches and seizures, which I discuss as part of the protection for privacy under the state Constitution.

courts have dealt with what in the federal arena would be called "unenumerated rights" — the sorts of rights which the federal courts have found to be supported by the general protection for "liberty" contained in the due process clauses of the fifth and fourteenth amendments.[9]

The California Constitution also contains a Due Process Clause with language virtually identical to the federal clauses,[10] but until 1974 it was buried in a provision dealing with criminal procedure, and with minor exceptions has never provided the doctrinal basis for judicial protection of a general liberty interest. Rather, that function has been served by article I, section 1 which, in its original form from 1849, read:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.[11]

This language, similar to that contained in a number of state constitutions, reflects a natural law social contract philosophy prevalent at the time of the Declaration of Independence. It embodies the notion that people have certain rights which exist independent of the state, and that the ceding of authority to government implies limits on what the state can do.[12] This notion of implied limits forms the basis for early decisions by the California Supreme Court supporting judicial review of legislative action, usually regulation of property or business. To that extent, article I, section 1 has served much the same function, though with different contours, as federal substantive due process.

As will be seen, its use in striking down legislation during the *Lochner* era was on occasion supplemented by reliance on a prohibition against

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9 U.S. Const. amend. V; amend. XIV, § 1.

10 Cal. Const. art. I, § 7(a) (providing in part: "A person may not be deprived of life, liberty or property without due process of law . . . .").

11 Cal. Const. of 1849, art I, § 1.

12 For more in-depth discussion of the historical context of article I, section 1 and its implications, *see* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 5–19 (1997). That article discusses also the potential for relying upon the language of the section as a basis for affirmative rights, *i.e.*, for finding obligation on the part of government to take affirmative action to meet certain needs of its citizens, so that they are able to survive and enjoy the liberties associated with a decent society. *Id.* at 29–33.

"special laws," reflecting an overlap between the liberty principle and notions of equality. Those cases are the focus of the first part of this essay.

Over a century after its first adoption, article I, section 1 was amended to substitute the word "people" for "men," and to add the word "privacy," so that the section in its present form reads:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

It is the word "privacy" that has given rise to a body of doctrine, virtually unique to California, which protects not only privacy in the sense of private information, but also an area of autonomy of action against government, and to some extent private, interference. To that extent, article I, section 1 serves much the same function as the word "liberty" under more modern notions of substantive due process. Those cases are the focus of the second part of this section of the essay.

A. REVIEW OF ECONOMIC REGULATION

1. The Early California Cases

Early cases reflect controversy over whether the language of article I, section 1 is merely hortatory, intended as guidance for the legislative branch, or whether it provides a basis for judicial review of legislative action,[13] and if the latter, what the scope of that review is intended to be. At issue in *Billings v. Hall* was the constitutionality of the Settler Law of 1856.[14] That law arose out of controversies between landowners who claimed title through old Mexican land grants and pioneers who, either oblivious of or in disregard of legal ownership, settled on the land and built homes and other improvements. The law, which represented a legislative victory for the settlers, would have required the legal owner of the property, in an ejectment action, to reimburse the defendant for the value of improvements that the

[13] This controversy appears to have been resolved by an 1870 amendment, now article I, section 26, which provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

[14] Billings v. Hall, 7 Cal. 1 (1857).