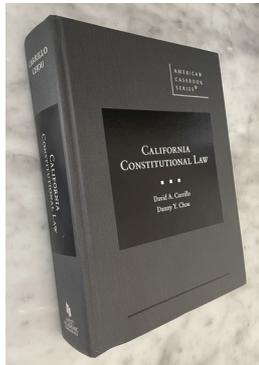


California Constitutional Law – The Casebook

BY TANI CANTIL-SAKAUYE

EDITOR'S NOTE: *In March 2021, David A. Carrillo,¹ (upper right) of UC Berkeley, and Danny Y. Chou,² (lower right) Judge of the San Mateo County Superior Court released their first-of-its-kind casebook addressing the California Constitution. With consent of West Academic Publishing, we are pleased to reprint here³ the Chief Justice's foreword to that nearly 1,200 page volume.*



THIS INAUGURAL CASEBOOK addressing the California Constitution reflects a welcome and growing awareness on the part of legal education professionals: State constitutions deserve the attention and examination of not just practitioners and judges, but also of law professors and their students.

Thirteen state constitutions predated the federal constitution. They significantly influenced both its drafting and, later, the addition of the first ten amendments to that document — the federal Bill of Rights. Today the constitutions of each of the fifty states continue to set forth declarations of rights and other provisions similar to those found in the federal Bill of Rights. Notably, under what has become known as the “independent state grounds” doctrine — championed by Justices William Brennan of the United States Supreme Court, Hans Linde of the Oregon Supreme Court, and both Stanley Mosk and Joseph Grodin of the California Supreme Court — some state constitutions’ declarations of rights, including parts of California’s, have been construed to provide protections *beyond* those afforded by the federal constitution, as interpreted by the United States Supreme Court. Yet because these sovereign state constitutions have their own history of development, revision, and amendment, their declared rights have been construed also to afford a different and, in some cases, even *less* expansive meaning than that of the comparable federal provision. In those instances, the

federal constitution, with whatever floor it sets, provides the controlling basis for decision.

In other significant ways state constitutions frequently differ from the federal model. First, and most obviously, state constitutions establish and enunciate the structure and powers of *state* and *local* government. A second substantial difference concerns the manner in which the two classes of documents articulate legislative power. The United States Constitution *grants* Congress limited and enumerated

governmental authority; hence the federal legislative branch possesses only those specific powers delegated to it by the national constitution. By contrast, California’s Legislature, like those of other states, is granted broad plenary legislative authority with respect to *all* potential legislative subjects, *except* as specifically limited by the state constitution. This, in turn, gives state legislatures room to act in many areas in which Congress may not.

A third difference concerns the ease and frequency by which the federal and state documents may be changed. State constitutions can be amended far more readily, and have been altered much more often, than the federal constitution — which, beyond the Bill of Rights, has seen only a handful of substantive rights amendments (most prominently, the Civil War provisions, and those expanding suffrage to women and 18-year-olds). The relatively easy amendability of state constitutions facilitates their expansion, and as a result they generally are, for better or worse, considerably longer and more detailed in comparison with the federal constitution. In California and 17 other states, state constitutional amendments can be submitted to the electorate not only by the state legislature, but alternatively via a citizens’ initiative ballot proposition — so-called “direct democracy” — which the framers of the federal constitution had considered and rejected. California, contrasted with other direct democracy states, imposes lower procedural requirements for such ballot measures, further facilitating such changes.

Fourth, in addition to provisions declaring rights that most state constitutions generally share in common with the federal version, and corresponding structural provisions establishing the organs of state and local government, state constitutions contain substantial and important provisions designed to respond to regional or local conditions. The results are substantive passages having no analogue in the federal constitution. Consider, for example, the California Constitution’s sections explicitly recognizing an individual’s right to privacy, education, and fishing; setting out

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1. Carrillo, J.S.D., has been a Lecturer in Residence and Executive Director of the California Constitution Center at Berkeley Law since 2012. Previously, Dr. Carrillo practiced law for 16 years, as a Deputy Attorney General with the California Department of Justice, and as a Deputy City Attorney in San Francisco.

2. Before being appointed to the bench in 2017, Chou was the Chief of Complex and Special Litigation and the Chief of Appellate Litigation for the San Francisco City Attorney’s Office, where he litigated some of the cases included in the casebook. Prior to that he was a supervising staff attorney at the California Supreme Court.

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reformed electoral and reapportionment procedures; and imposing limitations on property taxation. Likewise, provisions of other state constitutions cover substantial ground not addressed by the federal constitution. They treat and regulate, for example, various privacy protections; gender equality; natural resources and conservation of lands; native peoples and “Indian territory”; flood protection levees; minimum wages; and rights to bilingual education. Provisions like these support the observation that, as a practical matter, the lives of average Americans are affected at least as much, if not more, by state, rather than federal, law.

Recognizing all of this, in 1990 Professor Robert F. Williams published *State Constitutional Law: Cases and Materials* — the first casebook addressing state constitutions, which as of 2015 was in its fifth edition. A casebook dedicated to the Florida Constitution followed in 1992, with a fifth edition published in 2013. In 2010 the national Conference of Chief Justices encouraged law schools to offer courses concerning state constitutional law. That same year an additional casebook regarding state constitutions emerged, and as of 2020 is in its third edition: Sutton, Holland, McAllister & Shaman, *State Constitutional Law: The Modern Experience*.

In the meantime, California, the most populous state and one of the world’s largest and most vigorous economies, is fortunate to have seen attention focused on its constitution by both an excellent treatise and law school courses. In the past quarter century our lawyers, judges, professors, and public interested in our constitution’s complex history and myriad provisions have benefited from a comprehensive treatise authored by former California Supreme Court Justice Joseph Grodin. First published in 1994, in 2016 it was completely revised in a second edition: Grodin, Shanske, and Salerno, *The*

California Constitution. In addition, beginning in 2008, and ahead of the Conference of Chief Justices’ call for law schools to focus on state constitutional law, the authors of the present casebook, David A. Carrillo, of University of California’s Berkeley Law, and San Mateo Superior Court Judge Danny Chou, have offered courses and seminars at Berkeley Law addressing the California Constitution. Meanwhile, and laudably, other California law schools have offered similar classes. Augmenting these initiatives, Carrillo founded, and continues to oversee as Executive Director, the California Constitution Center at Berkeley Law. The Center has organized and held conferences focusing on the California Supreme Court and our state’s constitution — and it has published numerous related useful articles, chapters, books, and reports.

The present casebook, an outgrowth of the courses taught by Carrillo and Chou at Berkeley Law over the past dozen years, is a natural and welcome progression, building upon the earlier and ongoing work of others. This extensive compilation, covering all major (and some minor) articles and sections of the state constitution, formalizes the authors’ continuing significant contributions to this area of law and governance. At the same time, it facilitates the education of law students at all law schools of this great, vast, and promising state.

I look forward to a future in which legal training in California and nationwide is enhanced by works such as this. In the meantime, I am hopeful that legal educators in all jurisdictions will augment and expand upon the existing materials mentioned above in order to explore the rich history and important provisions of all state constitutions. The judicial system, in California and nationwide, stands to benefit. ★

TANI CANTIL-SAKAUYE is Chief Justice of California.