SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING BOOK CHAPTER

FREEDOM OF EXPRESSION UNDER THE CALIFORNIA CONSTITUTION

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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

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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 newspersons' privilege that became section 2(b).[3] Section 2(a) now reads:

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[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).

order to show cause why he should not be adjudged guilty of contempt of court, Shortridge said he meant no disrespect; he was simply exercising his constitutional right of free speech. Found guilty and ordered to pay a $100 fine, Shortridge sought relief through writ of habeas corpus in the California Supreme Court, thereby giving rise to the first appellate decision on free speech rights under the state Constitution.[5]

Deciding in favor of Shortridge, the Court understandably made no mention of the federal Constitution or the First Amendment. In 1833 the U.S. Supreme Court had decided in *Barron v. Baltimore* that the federal Bill of Rights had no application to the states;[6] and it was not until 1908, in *Twining v. New Jersey,* that the Court suggested it was "possible that some of the personal eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[7] At the time *Shortridge* was decided, there was no authority for the proposition that the First Amendment might be among the amendments thus incorporated. Indeed, that authority did not exist until years later, when the U.S. Supreme Court in *Gitlow v. New York*, in the process of upholding Gitlow's conviction, grudgingly conceded that "[f]or present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment . . . ."[8]

And so it was that the *Shortridge* court spoke instead about state constitutions:

> The constitution of every state in the Union guarantees to every citizen the right to freely speak, write, and publish his sentiments on all subjects, and prohibits the passage of any law "to restrain or abridge the liberty of speech or of the press." What one may lawfully speak he may lawfully write and publish. The rights thus preserved by the constitution are dear to the heart of every American, and their exercise can be complained of by the courts in a

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5 *In re* Shortridge, 99 Cal. 526 (1893).

6 Barron v. Baltimore, 32 U.S. 243 (1833).

7 Twining v. New Jersey, 211 U.S. 78, 99 (1908).

8 Gitlow v. New York, 268 U.S. 652, 666 (1925).

> summary proceeding only when the publication or the speech interferes with the proper performance of judicial duty.[9]

The Court acknowledged but dismissed the English common law precedents which found the publication of even truthful accounts of pending cases to be contempt of court, saying,

> [P]recedents promulgated at a time when the ministers of the crown claimed and exercised the right to seize a newspaper and stifle the voice of its editor, when books were destroyed and speeches suppressed to subserve political purposes, are of little value in this age, and especially in this country.[10]

The Court instead relied on Cooley's *Constitutional Limitations* for the proposition that the constitutional liberty "implies the right to freely utter and publish whatever the citizens may please, and be protected against any responsibility for so doing . . . so long as it is not harmful in its character when tested by such standards as the law affords."[11] While a newspaper has "no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion of the merits of cases which are on trial," the Supreme Court said, Shortridge's article did not exceed these limitations, and the trial court's order was void.[12]

While the Court's reasoning in *Shortridge* seemed to invoke a general constitutional right existing beyond the language of any particular constitution, the Court's next free speech opinion was more narrowly focused. The events which gave rise to that focus, however, were far from narrow. In 1895, San Francisco was embroiled in a sensational murder trial which attracted nationwide attention.[13] A medical student by the name of

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9 *Shortridge*, 99 Cal. at 533.

10 *Id.* at 535.

11 *Id.* (citing Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (1868)).

12 *Id.*

13 The case was followed in the pages of the New York Times (*e.g.*, *Lunatic Tries To Kill Durrant: Rushes at Him as the Man Accused of Murder Entered the Court*, Aug. 5, 1895); Brooklyn Daily Eagle (*e.g.*, *Durrant and Miss Williams* (Apr. 23, 1895), *Damaging to the Pastor* (Apr. 25, 1895), *Police Stop the Play* (July 30, 1895), *Durrant Writes*

Theodore Durrant was accused of committing a pair of grisly murders in the Emmanuel Baptist Church in San Francisco. At his preliminary hearing damaging circumstantial evidence was produced, including somewhat dubious eyewitness testimony that placed Durrant in the vicinity of the church the night of the murders.

While the jurors were being selected for the trial, an entrepreneur by the name of William R. Dailey undertook to produce a play (*The Crime of a Century*) at the Alcazar Theater in San Francisco, based on the testimony at the preliminary hearing plus some imagination. Durrant's counsel, claiming that the production of the play during trial "would be an interference with the administration of justice, and deprive [Durrant] of a fair and impartial trial,"[14] asked Judge Murphy, the trial judge, to issue an order prohibiting the production. He did, but the production went on anyway, in defiance of the order. According to one account, "A great crowd attended the performance, which was hissed at intervals." In the middle of the third act, "[j]ust at the point when Debois, the character who is supposed to impersonate Durrant, was about to drag a woman to the belfry of a church, Sheriff Whelan and his deputies marched on the stage and arrrested the performers, eleven in all. The manager of the theater [Dailey] was also placed under arrest. . . . The whole company spent the night in jail."[15]

The next morning Dailey and the actors appeared in court. Judge Murphy found Dailey in contempt of his order, and sentenced him to three days in jail. The actors were released, based on their promise not to appear further in the production. Dailey sought relief through extraordinary writ in the California Supreme Court, invoking the free speech provision of the state Constitution, then article I, section 9.

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a Book (Nov. 6, 1895), and *Durrant Resentenced* (Apr. 11, 1897), *available at* http://afflictor.com/2011/06/12/old-print-articles-the-durrant-murder-case-brooklyn-daily-eagle-1895-99/; as well as in San Francisco's Examiner (*e.g.,* July 14, 1895) and Call (*e.g.,* July 30, 1895). The descriptions of the events are taken from these articles, as well as from the appellate court's opinion.

14 Dailey v. Super. Ct., 112 Cal. 94, 96 (1896). The concern was apparently well founded: newspaper accounts tell us that the first forty veniremen were disqualified for bias. The prosecutor joined in the request.

15 *Police Stop the Play*, Brooklyn Daily Eagle, July 30, 1895, *available at* http://afflictor.com/2011/06/12/old-print-articles-the-durrant-murder-case-brooklyn-daily-eagle-1895-99/.

The Court, in a 6–1 opinion by Justice Garroutte, held that the superior court's order was "an attempted infringement upon the rights guaranteed to every citizen by section 9":

> The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. . . . It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose. This provision of the constitution as to freedom of speech varies somewhat from that of the Constitution of the United States, and also more or less from the provisions of many state constitutions treating of this question; but, if there is a material difference in the various provisions, it works no harm to this petitioner, for the provision here considered is the broader, and gives him greater liberty in the exercise of the right granted. . . . The [superior] court had ample power to protect itself in the administration of justice after the contempt was committed. As to the offender, it could punish him; as to the defendant on trial, he could be deprived of no rights by any act of this petitioner. If the publication deprived him of a fair and impartial trial at that time, a second trial would have been awarded him.[16]

Consequently, the trial court's order was annulled.[17] Durrant was convicted anyway, and hanged, despite evidence that the pastor of the church may have been the culprit.

While *Dailey* stands as an early confirmation of the independent status of state constitutional rights, the holding in that case, insofar as it seems to prohibit any injunction against speech, has since been modified.[18] And

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16 *Id.* at 97–100.

17 *Id.* at 100.

18 *See* Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121 (1999) (permissible to enjoin repetition of speech found to be unlawful, distinguishing *Dailey* on the ground that the speech in that case had not been determined to be unlawful before the injunction issued).

the opinion's implication, contrary to the broad language in *Shortridge*, that the free speech provision of the California Constitution protects *only* against prior restraints, leaving the government unlimited power to impose sanctions upon expression, has since been rejected — not, however, before it was allowed to cause considerable damage.

II. THE RED SCARE CASES

In 1919 the California Legislature, responding to a national "Red Scare" which followed in the aftermath of World War I, enacted the Criminal Syndicalism Act.[19] The statute defined "criminal syndicalism" as "any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change . . . ." Anyone who advocated, encouraged, or "justified" criminal syndicalism, or who assisted in the organization of a society to teach, aid or abet criminal syndicalism, was guilty of a crime.

A principal target of the Criminal Syndicalism Act was the Industrial Workers of the World (IWW), a radical labor organization widely accused of promoting "anarchy." In 1921 the California Supreme Court upheld the conviction of Nick Steelik, on the basis of evidence that he was a member of and organizer for the IWW, and that he "personally advocated revolution and preached some of the doctrines denounced as criminal in the act."[20] Rejecting Steelik's argument that the statute violated his "right of free speech guaranteed in the federal and state Constitutions," the Court declaimed,

> The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. . . . The right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. . . . It is expressly provided in our constitution that the publisher is liable for an abuse of this

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19 1919 Cal. Stat. 281 (repealed).

20 People v. Steelik, 187 Cal. 361 (1921); Stephen M. Kohn, American Political Prisoners: Prosecutions Under The Espionage And Sedition Acts 167 (1994).

> power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher . . . .[21]

By the time *Steelik* was decided, the U.S. Supreme Court had embarked, for the first time, upon the development of First Amendment jurisprudence, with its seminal decisions upholding convictions for subversive advocacy under the federal Espionage Act of 1917.[22] It is therefore interesting that the *Steelik* court made no reference to these cases — perhaps because at the time, and until the U.S. Supreme Court's 1925 decision in *Gitlow v. New York*,[23] there was no authority for the proposition that the First Amendment applied to the states at all. The *Gitlow* court, while establishing that states are limited by the First Amendment, nevertheless upheld New York's "criminal anarchy" statute, which was quite similar to the statute in California. And two years later, in *Whitney v. California*, the Court upheld California's Criminal Syndicalism Act against First Amendment challenge, over a strong dissent by Justices Brandeis and Holmes.[24] It did so, however, not on the reasoning of *Steelik,* but on the broader ground that the statute was within the "police power" of the state to protect against dangers to public peace and security.[25]

Nine years after *Steelik,* the California Supreme Court was confronted with another case involving subversive advocacy, this time under the state's "red flag law."[26] Adopted at about the same time as the Syndicalism Act, the law made it a felony to display a red flag in any public place "as a sign, symbol or emblem of opposition to organized government or as an

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21 *Id.* at 375. For good measure, the Court went on to say, not very convincingly, that Steelik was in any event "not in a position to raise the point, for he is not charged with or convicted of a violation . . . involving anything that he said or published . . . ." *Id.*

22 *See* Schenck v. United States, 249 U.S. 47 (1919) (opinion by Holmes, J.); Frohwerk v. United States, 249 U.S. 204 (1919) (opinion by Holmes, J.); Abrams v. United States, 250 U.S. 616 (1919) (Holmes and Brandeis, JJ., dissenting). In *Schenck,* Justice Holmes, who had previously expressed the view that freedom of expression was protected only against prior restraints, acknowledged that "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . ." 249 U.S. at 51–52.

23 Gitlow v. New York, 268 U.S. 652 (1925).

24 Whitney v. California, 274 U.S. 357 (1927).

25 *Id.* at 371–72.

26 Stromberg v. People of California, 283 U.S. 359 (1931); Cal. Penal Code § 403a (repealed 1933).

invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." Yetta Stromberg, age nineteen, was one of the supervisors at a summer camp for children between the ages of ten and fifteen, in the foothills of the San Bernardino Mountains. A member of the Young Communist League, an international organization affiliated with the Communist Party, Stromberg supervised a daily ceremony directing the children to raise a red flag, apparently a reproduction of the flag of the Communist Party of the United States. As part of the ritual, the children saluted and recited a pledge of allegiance "to the workers' red flag, and to the cause for which it stands, one aim throughout our lives, freedom for the working class." Stromberg was convicted of violating the statute.

The Court of Appeal upheld her conviction, as against the claim that the statute violated both the First Amendment and article I, section 9 of the California Constitution,[27] on the ground that the definition of "sedition" under the statute included advocacy of violent overthrow of government, and there was evidence that Stromberg did engage in such advocacy.[28] The California Supreme Court declined to hear the case, but the U.S. Supreme Court granted *certiorari* and reversed.[29] While giving lip service to *Whitney* and *Gitlow*, it found the California statute, to use modern First Amendment language, unconstitutionally overbroad.[30] Twenty years later, in the context of another "red scare," the U.S. Supreme Court pronounced *Whitney* and *Gitlow* legally dead, and explicitly adopted the "clear and present danger" test long advocated by Holmes and Brandeis.[31]

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[27] This should not be taken as criticism of the lawyers, lest I be caught in my own critique. *See* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51 (1967), in which I put forth and the Court accepted a First Amendment claim on behalf of Women for Peace, who wished to place an ad on AC Transit buses. I doubt that my briefs mentioned the California Constitution, nor did the Court's opinion, though it was written by Justice Mosk, normally a strong proponent of independent state analysis. *See also infra* notes 103–06 and accompanying text.

[28] People v. Mintz, 106 Cal.App. 725, 731 (1930). Bella Mintz was one of three codefendants. The Court of Appeal reversed the convictions of defendants other than Stromberg on the basis that there was no allegation or proof of an overt act. The Court of Appeal issued two opinions, one of them by a judge assigned pro tem and the other by the two permanent justices of the court.

[29] *Stromberg*, 282 U.S. 359.

[30] *Id.* at 369.

[31] Dennis v. United States, 341 U.S. 494 (1951).

III. THE CALIFORNIA CONSTITUTION IN HIDING

For several decades after *Stromberg*, the free speech provision of the California Constitution seemed to go into hiding. This was not because there were no free speech cases that reached the California courts. Many did. But typically the courts would discuss the cases in terms of First Amendment law without mentioning the California Constitution at all. Or if they did mention it, they relegated it to a secondary position without independent analysis, finding the challenged governmental action to be valid or invalid on the basis of the First Amendment and then adding something like "and the result is the same under the California Constitution."

There are a number of possible explanations. During this period the U.S. Supreme Court was developing a substantial body of First Amendment jurisprudence, and lawyers invoking a constitutional claim against governmental action restrictive of speech turned naturally to those precedents. Even when lawyers did put forth a claim based on the state Constitution, it was easier for courts to rely on First Amendment analysis than to engage in the development of an independent state jurisprudence.[32]

All this was illogical, as Hans Linde of Oregon pointed out in an influential article,[33] arguing that a state could not be said to deprive a person of due process under the federal Constitution through action that was invalid under the state's own constitution.[34] It was, moreover, contrary to the principle of judicial restraint reflected in the doctrine that a court should not consider the constitutional validity of a statute if through reasonable interpretation the constitutional question could be avoided. And, reliance upon the federal Constitution to invalidate state action could prove to

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[32] As a judge I was probably on occasion guilty of that sin as well.

[33] Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 383 (1980). The practice of tagging on to federal interpretation continues in a number of free speech areas. *See, e.g.,* Keenan v. Super. Ct., 27 Cal.4th 413, 435–36 (2002) (holding California's "Son of Sam" law unconstitutional under First Amendment precedent and concluding that it also violated article I, section 2, because "neither party suggests any reason why it should provide lesser protection under the circumstances of this case").

[34] The Ninth Circuit follows Linde's advice, holding that federal courts "should avoid adjudication of federal constitutional claims when alternative state grounds are available." Vernon v. City of L.A., 27 F.3d 1385, 1391–92 (9th Cir. 1994).

be embarrassing if the U.S. Supreme Court did not agree. But as Holmes taught us, the life of the law is not necessarily logic.

Perspectives on the relationship between the state and federal constitutions in areas other than free speech began to change in the 1950s, when the California Supreme Court, at a time when federal law did not require exclusion of illegally obtained evidence, decided in *People v. Cahan* that evidence obtained in violation of the state Constitution was inadmissible in a criminal proceeding.[35] The trend picked up in 1972, when the Court held California's death penalty statute unconstitutional in *People v. Anderson*.[36] In the same year, the state Constitution was amended to add an explicit right of privacy[37] as well as an explicit statement of state constitutional independence: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[38] Finally, in 1979, the Court broke with federal precedent in the area of free speech.

IV. EXPRESSIVE ACTIVITY ON PRIVATE PROPERTY: *PRUNEYARD* AND ITS PROGENY

"The Pruneyard"[39] is the name of a typical large shopping center in San José, with some twenty-one acres containing shops, restaurants, and a cinema connected by roads, walkways, and plazas, bordered on two sides by public sidewalks and streets. One Saturday afternoon in the late 1970s a group of high school students appeared at Pruneyard's central courtyard, set up a card table in the corner, and proceeded to solicit passersby for their signatures to a petition to be sent to the White House expressing their opposition to a United Nations resolution against "Zionism." The students were informed by Pruneyard security personnel that their activity violated Pruneyard regulations prohibiting public expressive activity unrelated

35 People v. Cahan, 44 Cal.2d 434 (1955); *see also* Cardenas v. Super. Ct., 56 Cal.2d 273 (1961) (holding that although the defendant's mistrial did not place him in jeopardy under the federal Constitution, "his jeopardy is real" under the Court's construction of the California Constitution).

36 People v. Anderson, 6 Cal.3d 628 (1972).

37 Cal. Const. art. I, § 1.

38 Cal. Const. art. I, § 24. The section goes on to state: "This declaration of rights may not be construed to impair or deny others retained by the people."

39 Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

to the commercial purposes of the shopping center. The students left, and sued.

The status of shopping centers in relation to the First Amendment had, prior to *Pruneyard*, a checkered history in the U.S. Supreme Court. Initially that Court, by extension of its holding in *Marsh v. Alabama* that a company-owned town could not exclude Jehovah's Witnesses who wished to distribute literature on its sidewalks,[40] held in *Amalgamated Food Employees v. Logan Valley Plaza* that a privately owned shopping center could not preclude striking workers from picketing a store within it.[41] Without directly addressing the "state action" requirement for applying the federal Bill of Rights, the Court stated:

> [B]ecause the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[42]

A few years later, however, in *Lloyd Corp. v. Tanner,* involving anti-Vietnam War protestors, the Court held that *Logan Valley Plaza* did not apply to speech that was unrelated to the business of the shopping center.[43] Finally, in *Hudgens v. National Labor Relations Board* the Court, emphasizing that "the constitutional guarantee of free speech is a guarantee only against abridgment by government," rejected the distinction advanced in *Lloyd* on the ground that it was content based.[44] The Court expressly overruled *Logan Valley Plaza* and held that "the constitutional guarantee of free expression has no part to play in a case such as this."[45]

Meanwhile, before its decision in *Pruneyard* the California Supreme Court had on four occasions upheld a right to expression on private

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40 Marsh v. Alabama, 326 U.S. 501 (1946).

41 Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) [hereinafter *Logan Valley Plaza*].

42 *Id.* at 319–20 (quoting *Marsh*, 326 U.S. at 508).

43 Lloyd Corp. v. Tanner, 407 U.S. 551, 563–64 (1972).

44 Hudgens v. NLRB, 424 U.S. 507, 513, 520 (1976).

45 *Id.* at 521.

property. In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* the Court, presaging the U.S. Supreme Court's decision in *Logan Valley Plaza*, held on the basis of balancing the right of free expression against property rights, that a shopping center was not entitled to an injunction excluding a union from picketing a business within the center.[46] In *In re Hoffman*, the Court held that anti-Vietnam War protestors had a constitutional right to distribute leaflets within Union Station in Los Angeles, though it was owned by three railroads,[47] and that a municipal ordinance purporting to prohibit such activity was invalid.[48] In *In re Lane* the Court held that a union representative had a constitutional right to pass out handbills on a privately owned sidewalk leading from a parking lot to the Calico Market in Concord, a large "super-market-type" grocery store with whom the union had a dispute.[49] And in its initial decision in *Diamond v. Bland* (*Diamond I*) the Court relied on these precedents and the federal cases to hold that People's Lobby, an environmental organization, had a constitutional right to solicit signatures on initiative petitions inside a shopping mall, and ordered the trial court to enjoin the shopping mall owner from interfering with that right.[50]

Following the U.S. Supreme Court's decision in *Hudgens*, however, the mall owner in *Diamond v. Bland* sought and obtained a dissolution of the injunction on the ground that *Hudgens* had undermined the reasoning in *Diamond I* and had established a federally protected constitutional property right on the part of a shopping center or mall to exclude expressive activity if it wished.[51] And in a 4–3 decision (*Diamond II*), the California

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46 Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, Local No. 31, 61 Cal.2d 766 (1964).

47 *In re* Hoffman, 67 Cal.2d 845 (1967). The fact that Union Station was privately owned was not emphasized or separately analyzed in the Court's opinion, which focused instead upon whether the activity interfered with the operation of the facility.

48 *Id.* at 853–54. The ordinance made it unlawful for any person "to loaf or loiter in any waiting room, lobby, or other portion of any railway station . . . airport, or bus depot . . . or to remain in any such [place] longer than reasonably necessary to transact such business as such person may have to transact . . . ." The Court characterized the ordinance as "defin[ing] the law of trespass applicable to this situation."

49 *In re* Lane, 71 Cal.2d 872 (1969).

50 Diamond v. Bland (*Diamond I*), 3 Cal.3d 653 (1970).

51 Diamond v. Bland (*Diamond II*), 11 Cal.3d 331, 333 (1974).

Supreme Court agreed.[52] After *Hudgens* it was clear that the First Amendment did not protect the People's Lobby in gathering signatures, and it was also clear, said the majority, that they could not derive protection from the liberty of speech clauses of the California Constitution because the state Constitution could not be used to deprive the owners of their federally protected property interest.[53]

This, then, was the legal background to *Pruneyard*. If *Diamond II* was still good law, the students who sought to distribute handbills inside the Pruneyard shopping center would lose. But the composition of the California Court had changed by 1979, and in a 4–3 opinion by the recently appointed Justice Newman, joined by Chief Justice Bird and Justices Tobriner and Mosk — both of whom had dissented in *Diamond II* — the Court held that the *Diamond II* majority was wrong in refusing to take the California Constitution into account.[54] The Court said the U.S. Supreme Court's decision in *Hudgens* ought not be interpreted to preclude a state from defining property rights in such a way as to accommodate state-protected rights of expression; on the basis of the California Constitution, the students had a right to do what they were doing.[55]

In reaching this conclusion the Court relied upon evidence showing the growth in importance of suburban shopping centers as a place where large numbers of people gather, and hence their potential as a forum for communication;[56] upon the distinctive language of article I, section 2 ("Though the framers could have adopted the federal Bill of Rights they chose not to do so");[57] upon the right to petition in article I, section 3;[58] and upon the Court's prior opinion in *Diamond I*. While acknowledging

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52 *Id.* at 335.

53 *Id.* at 334–35.

54 Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

55 *Id.* at 905–06, 910.

56 *Id.* at 907.

57 *Id.* at 908. While the Court in *Pruneyard* did not identify the significance of differences in text between the state and federal constitutions, it had occasion to do so later, in *Gerawan Farming, Inc. v. Lyons*, observing that "article I's free speech clause, unlike the First Amendment's, specifies a 'right' to freedom of speech explicitly and not merely by implication . . . and does not merely safeguard some such right against encroachment." 24 Cal.4th 468, 491–92 (2000).

58 *Pruneyard*, 23 Cal.3d at 907. Article I, section 3 declares the right of people to "petition government for redress of grievances." In California, the Court observed, this

that the Court in *Diamond I* "relied partly on federal law," the Court said, "California precedents [i.e., *Schwartz-Torrance, Lane,* and *Hoffman*] were also cited [and] [t]he fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent. . . . The duty of this court is to help determine what 'liberty of speech' means in California. Federal principles are relevant but not conclusive so long as federal rights are protected."[59] Overruling *Diamond II*, the Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[60]

The Court went on to elaborate on the "reasonably exercised" qualification: the right recognized by the opinion could be limited by "time, place, and manner rules," and quoting from Justice Mosk's dissent in *Diamond II,* it would not necessarily apply to "an individual homeowner or the proprietor of a modest retail establishment . . . A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations . . . would not markedly dilute defendant's property rights."[61]

Pruneyard's initial holding — that the federal Constitution did not preclude states from requiring shopping center owners to accommodate reasonable rights of free expression — was quickly validated by the U.S. Supreme Court. Chief Justice Rehnquist's opinion in *Pruneyard Shopping Center v. Robins* confirmed that the high court's reasoning in *Lloyd* "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," and that, given the allowance for limitations acknowledged by the California Court's opinion, there was no "taking" of property in violation of the Fifth Amendment or deprivation of property without due process of law.[62]

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right is "vital to a basic process in the state's constitutional scheme — direct initiation of change by the citizenry through initiative, referendum, and recall." *Id.* at 907–08.

59 *Id.* at 908–09 (citations omitted).

60 *Id.* at 910.

61 *Id.* at 910–11.

62 Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 83–84 (1980).

Questions remained, however, as to the scope of the *Pruneyard* principle under California law, and answering those questions was complicated by the fact that the Court's opinion in *Pruneyard* is unclear as to the basis for its holding. Did the Court mean to say that because of the difference in language between the First Amendment ("Congress shall make no law") and the language of the California Constitution ("Every person may freely speak"), there is no "state action" requirement for application of article I, section 2? Or did it mean to say that there is a state action requirement, but it is more easily met than under federal law?[63] If, as the Court said in *Pruneyard*, that case would not necessarily apply to a homeowner or a modest retail establishment, was that because there would be no "state action," or for some other reason, perhaps because the public importance of allowing free communication on the premises was outweighed by the owner's interests in restricting access? Would the answers to these questions depend upon who was speaking to whom? Or would that inquiry be precluded by the First Amendment as content based? And finally, where the *Pruneyard* principle did apply, would the reasonableness of time, place, and manner restrictions be assessed by the same standards that would apply in a public forum, or, because private property interests are implicated, would different standards apply?

For over a decade the Court of Appeal grappled with these questions without guidance from the Supreme Court. Without directly confronting the "state action" issue, Court of Appeal opinions denied application of

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63 Before *Pruneyard*, the California Court read prior U.S. Supreme Court cases as finding "state action" in the shopping center's refusal to permit the exercise of "First Amendment rights in such areas as sidewalks, parks, and malls." Diamond v. Bland, 3 Cal.3d 653 at 666 n.4 (1970). Of course, the state acts when its judicial branch issues an injunction, and in other areas of the law, even the U.S. Supreme Court has found state action on the basis of judicial action to enforce common law rules. *E.g.,* Shelley v. Kraemer, 334 U.S. 1, 15 (1948) (state action found in judicial enforcement of restrictive covenant); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (state action found in judicial enforcement of tort law); Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (state action found in enforcement of promissory estoppel doctrine). That Court has stopped short of finding state action in the enforcement of trespass laws generally. Bell v. Maryland, 378 U.S. 226 (1964); *but see id.* at 252–60 (Douglas, J., concurring). This remains a murky area under federal law, and a fertile area for the development of a more coherent jurisprudence under the state Constitution. *Cf.* Intel Corp. v. Hamidi, 30 Cal.4th 1342 (2003) (considering but not deciding the state action issue).

Pruneyard in cases involving access by abortion opponents to the property of medical clinics where abortions were being performed, on the ground that such property was not generally open to the public;[64] access to a bank, on the ground that it was the sort of "modest retail establishment" mentioned in *Pruneyard*;[65] and access by a signature-gatherer to patrons entering and exiting the Trader Joe's store in Santa Rosa, on the basis of a balancing test: Trader Joe's interests in preventing such activity were stronger than in the case of a shopping mall owner because it invites people to come and shop, not "to meet friends, to eat, to rest, or to be entertained"; and the public's interest in allowing free expression was not so strong because Trader Joe's, as a stand-alone facility, was "not a public meeting place and society has no special interest in using it as such."[66] Other cases involved time, place, and manner restrictions adopted by shopping center malls.[67]

The Supreme Court consistently denied review in these cases until, in 1999, it agreed to review a Court of Appeal decision involving the Golden Gateway Center, a large apartment complex in San Francisco, which sought the assistance of the courts in enforcing a rule prohibiting any solicitation or leafleting within the building except as specifically requested by a tenant.[68] The Tenants Association, formed by a group of tenants, had been accustomed to distributing newsletters to tenants by placing them at or under their apartment doors, and it continued to do that even after new management adopted the no-distribution rule. The Association maintained that it had both a contractual and a state constitutional right to continue what it had been doing. The trial court denied the injunction based on the Association's contract theory, but the Court of Appeal decided in favor of the Center on both grounds, concluding that the California free speech provisions, like the First Amendment, required state action for their application.[69] The Supreme

64 *E.g.*, Allred v. Harris, 14 Cal.App.4th 1386 (1993) and cases cited.

65 Bank of Stockton v. Church of Soldiers, 44 Cal.App.4th 1623, 1629–30 (1996).

66 Trader Joe's Co. v. Progressive Campaigns, 73 Cal.App.4th 425, 433 (1999).

67 *E.g.,* Savage v. Trammell Crow Co., 223 Cal.App.3d 1562 (1990) (prohibition against placing leaflets on parked cars to prevent litter and traffic problems is appropriate place restriction).

68 Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 26 Cal.4th 1013 (2001).

69 Golden Gateway Ctr. v. Golden Gateway Tenants Assn., 87 Cal.Rptr.2d 22 (1999).

Court affirmed,[70] but did so through a set of opinions which left the issue, and for that matter *Pruneyard* itself, very much in doubt.

While the *Golden Gateway* case was pending for decision, the Supreme Court decided *Gerawan Farming, Inc. v. Lyons*.[71] *Gerawan* involved a completely different issue — whether a statutory requirement for contributions to an industry publicity fund violated constitutional principles against "compelled speech" — but in the course of emphasizing differences between the state and federal protections for free expression, the Court, in an opinion by Justice Mosk, expressed through dicta an expansive view of article I, section 2(a): "[A]rticle I's right to freedom of speech, unlike the First Amendment's, is unbounded in range. It runs against the world, including private parties as well as governmental actors."[72]

Three dissenting justices in *Golden Gateway*,[73] including one sitting by assignment, picked up on this language and concluded, based on the wording of article I, section 2 together with its application in *Pruneyard*, that the dictum in *Gerawan* was a correct statement of the law.[74] This did not mean, in their view, that there were no limits on the application of article I, section 2(a) but, rather, that in a particular context the Court "must balance the private and societal interests in the speech against any competing constitutional concerns"; on that balance, the Tenants Association deserved to prevail.[75] Moreover, in their view, the Center's ban on distribution could not be maintained as a time, place, and manner restriction because, even assuming it was content neutral, it was overly broad and failed to leave open ample alternative channels of communication.[76]

Three other justices[77] were of the view that state action is a necessary predicate for the application of article I, section 2(a), and disavowed the language of *Gerawan* as ill-considered dicta.[78] While the language of section

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70 *Golden Gateway Ctr.*, 26 Cal.4th 1013.

71 Gerawan Farming, Inc. v. Lyons, 24 Cal.4th 468 (2000).

72 *Id.* at 492.

73 Justices Werdegar, Kennard, and Klein (the latter by assignment from the Court of Appeal).

74 *Golden Gateway*, 26 Cal.4th at 1045.

75 *Id.* at 1049, 1053.

76 *Id.* at 1050–51.

77 Justices Brown, Baxter, and Chin.

78 *Golden Gateway,* 26 Cal.4th at 1029.

2(a) contains no explicit state action requirement, the history underlying New York's analogous provision, from which the California provision derived, reflects an understanding that it was designed to protect against governmental interference with speech, and the history of the California provision reveals no different intent.[79] *Pruneyard* should be viewed as a determination that for purposes of the California Constitution state action exists where the property in question is "freely and openly accessible to the public," and thus serves as the functional equivalent of a traditional public forum.[80] Since Golden Gateway limits access to residential tenants and their invitees, *Pruneyard* did not apply.[81]

Chief Justice George supplied the deciding vote, but on grounds which explicitly left the state action question unresolved. It was unnecessary, in his view, to determine the applicability of article I, section 2(a) because even if it did apply the landlord may "prohibit[] the tenants association from leaving unsolicited pamphlets on or under the hallway doors of fellow tenants, or in a pile for the taking in the hallway."[82] His opinion went on to say that if and when the Court was called upon to decide the state action question, "it will be helpful to consider the diverse circumstances in which the free speech clause might be implicated," indicating that he had in mind "circumstances in which a private person or entity may attempt to utilize its power or authority in one sphere to censor or undermine what might be viewed as another individual's 'core' free speech rights."[83] Further delineation of the scope of article I, section 2 could be left for another day.

Seven years later, the state action issue still unresolved, the California Supreme Court accepted an invitation from the federal Circuit Court of Appeals for the District of Columbia to clarify the applicability of *Pruneyard* to a situation in which a labor union, pursuant to a dispute with one of the tenants in Fashion Valley Mall, sought through picketing and handbills

79 *Id.* at 1025–28.

80 *Id.* at 1033.

81 *Id.* at 1031.

82 *Id.* at 1041 (George, C.J., concurring).

83 *Id.* at 1042. As examples, he pointed to a landlord who, using the threat of eviction, limits or requires the expression of political views by tenants through campaign posters, or a union or employer who seeks to prohibit bumper stickers on vehicles in parking lots, or prohibiting or requiring other political activity. *Id.*

to urge customers to boycott the tenant.[84] The mall owner argued that *Pruneyard* should not apply to calls for a boycott because such expression is inimical to the purposes for which the public space was created.[85] Three justices of the California Supreme Court agreed; indeed, they would have gone further and overruled *Pruneyard* altogether.[86] The majority, however, including Chief Justice George, reconfirmed *Pruneyard*, reconfirmed the independent and broader protection for expression in the California Constitution, and applied the same standards it would apply if the space were publicly owned: the distinction the mall owner sought to make was content based, and therefore subject to strict scrutiny, which it could not survive.[87] The fact that the union's activity might result in economic harm to the mall and its tenants did not rise to the level of a compelling interest.[88]

The Court's decision in *Fashion Valley Mall* provides scant basis for determining the applicability of *Pruneyard* outside the shopping mall context. The Court of Appeal, in cases both before and after the *Fashion Valley Mall* decision, has fairly consistently declined to extend *Pruneyard* to stand-alone retail stores, even when they are part of a larger shopping center, on the ground that they do not include courtyards, plazas, or other places designed to encourage patrons to spend time together or be entertained,[89] and the Supreme Court has declined to review the decisions in these cases. The Supreme Court has granted review in the most recent case, *Ralph's Grocery Co. v. United Food & Commercial Workers Union Local 8*,[90] but that case involves additional issues, making it unclear whether the Court will feel called upon to confront the scope of *Pruneyard*.[91]

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84 Fashion Valley Mall v. National Labor Relations Board, 42 Cal.4th 850 (2007).

85 *Id.* at 868.

86 *Id.* at 870–82 (Chin, Baxter, and Corrigan, JJ., dissenting).

87 *Id.* at 868–69.

88 *Id.* at 869.

89 *E.g.*, Van v. Target Corp., 155 Cal.App.4th 1375 (2007); Albertson's, Inc. v. Young, 107 Cal.App.4th 106 (2003).

90 Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 186 Cal.App.4th 1078 (2010).

91 In *Pruneyard* the Court made clear that even where the principle in that case applied, expressive activity could be limited by reasonable content-neutral time, place, and manner rules. In *Savage v. Trammel Crow Co.*, 223 Cal.App.3d 1562 (1990), the Court of Appeal upheld a prohibition of leafletting in a shopping center's parking lot, based on evidence that it posed traffic and litter problems, but struck down a prohibition

V. EXPRESSIVE ACTIVITY ON PUBLIC PROPERTY: THE FORUM CONTROVERSY

For decades the U.S. Supreme Court has attempted to define the circumstances under which the government must yield its property to expressive activities. The results, in terms of coherence and clarity, leave a good deal to be desired. In 1983, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the U.S. Supreme Court articulated a tripartite categorical approach: there is the "quintessential public forum," public property which has by tradition been open to expressive activity, such as streets and parks; the "designated public forum," public property which the state has voluntarily opened for such use; and the "nonpublic forum," all other public property.[92] In the quintessential public forum, speech content regulations are subject to strict scrutiny, and any time, place, and manner regulations must be reasonable, must be "narrowly tailored to serve a significant government interest," and leave open "ample alternative channels" for speech.[93] According to the Court in *Perry,* the designated public forum is subject to the same restrictions, except that the government is free to withdraw the designation.[94] In the nonpublic forum, speech may be prohibited or restricted so long as the regulation is reasonable and viewpoint neutral.[95] But then there is *Good News Club v. Milford Central School*, allowing for a "limited public forum" that is reserved "for certain groups or for the discussion of certain topics," provided there is no viewpoint discrimination and the restriction as to speakers and content is "reasonable in light of the purpose served by the forum."[96]

Or so it is said. In applying public forum analysis, however, the U.S. Supreme Court has encountered considerable difficulty, and has displayed considerable internal disagreement, over the criteria for determining

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on distribution of religious tracts as content based. The Supreme Court has not had occasion to consider the reasonableness of rules in the case of private property.

92 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

93 *Id.* at 45.

94 *Id.* at 45–46.

95 *Id.* at 46.

96 Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) — perhaps suggesting, *contra Perry*, that the test for restrictions of speech in limited public forums is the same as in nonpublic forums.

whether government must make particular property available for expressive activity, what constitutes content neutrality, and what sorts of time, place, and manner restrictions are permissible. The Court's pattern of analysis has provoked a good deal of criticism from academics, and from some lower courts as well.[97] From time to time there have been signs of movement away from a categorical, and toward a more functional approach, deemphasizing "tradition" and "designation" in favor of an analysis that takes into account both governmental interests and the interests in free expression,[98] but the Court has adhered to its tripartite analysis.

There have been some hints of a less categorical, more functional approach by California courts, beginning with *In re Hoffman* in 1967.[99] There, the state Supreme Court, in an opinion by Chief Justice Traynor, held that Vietnam War protesters had the right to distribute leaflets in Union Station in Los Angeles, reasoning that

> a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. . . . Nor was there any other interest that would justify prohibiting petitioners' activities.[100]

The test, the Court said, is "not whether petitioners' use of the station was a railway use, but whether it interfered with that use."[101] The opinion gives no separate weight to the fact that the station was owned by three railroads and not by the government, but the reasoning would appear to apply

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97 *E.g.*, Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 Hastings L.J. 309 (1999).

98 In *Grayned v. City of Rockford*, the Court, while upholding an anti-noise ordinance as a reasonable time, place, and manner regulation, rejected the categorical approach, using broad language to describe the test as "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." 408 U.S. 104 (1972).

99 *In re* Hoffman, 67 Cal.2d 845 (1967).

100 *Id.* at 851.

101 *Id.*

a fortiori to a government-owned facility. The Court's opinion does not refer to the state Constitution, but the Supreme Court has since embraced *Hoffman* as part of California law.[102]

In the same year as *Hoffman* the Court decided *Wirta v. Alameda-Contra Costa Transit District*, involving the placement of advertising inside buses operated by a public transit district.[103] Commercial advertising was permitted, but the District refused to accept antiwar ads sponsored by an organization called Women for Peace, insisting that it would accept political advertising only at election time, and then only for or against a candidate or measure on the ballot. The Court held this policy unconstitutional, saying that while the Transit District did not have to allow ads inside buses, if it made that space available as a forum for commercial advertising it could not discriminate on the basis of content, and especially against political advertising, which was entitled to greater constitutional protection.[104] Again, the Court's opinion focused on the First Amendment, without mentioning the California Constitution. Seven years later, in *Lehman v. City of Shaker Heights,* the U.S. Supreme Court reached a contrary conclusion under the First Amendment.[105] In *Committee to Defend Reproductive Rights v. Myers*, involving discrimination in the availability of public funding for medical procedures, the state Court relied on *Wirta* as a statement of California law, stating that in *Lehman* the U.S. Supreme Court "declined to engage in the demanding scrutiny called for by the California precedents."[106]

Two Court of Appeal opinions gave further impetus to the *Hoffman* analysis, in the context of publicly owned property. In *Prisoners Union v. Department of Corrections* the court held that an organization seeking to distribute literature concerning prison conditions to persons visiting the prison was entitled to do so in the prison parking lot.[107] Relying in part on *Grayned,* the court held that the question was not whether the property could be considered a "public forum," but rather whether there was a "basic

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102 *See* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899 (1979).

103 Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal.2d 51 (1967).

104 *Id.* at 63.

105 Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

106 Comm. to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 264 (1981).

107 Prisoners Union v. Dep't of Corr., 135 Cal.App.3d 930 (1982). I confess to being the author of that opinion, a confession especially poignant because the opinion makes no reference to the California Constitution.

incompatibility" between the proposed communicative activity and the intended use of the government property.[108] *Prisoners Union* was followed two years later by the Court of Appeal in *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, holding that members of a group protesting nuclear weapons research at the University's laboratory had a right of access, under the California Constitution, to the laboratory's visitors center for the purposes of distributing and displaying its literature to the public.[109] Rejecting the federal categorical approach, the court suggested that the public forum question should be viewed as "a continuum, with public streets and parks at one end and government institutions like hospitals and prisons at the other," using a test of "basic incompatibility."[110]

In *San Leandro Teachers Ass'n v. San Leandro School District* the question reached the California Supreme Court.[111] A teachers' union which had been designated by teachers in the District as their bargaining representative sought to utilize internal school mailboxes to distribute communications to teachers, including endorsement of candidates in school board elections. The Court first analyzed the case under the federal Constitution, concluding that the mailboxes were a "nonpublic forum," so that viewpoint-neutral limitations on content, such as the district's no-politics rule, were permissible under the First Amendment.[112]

The Court then proceeded to consider the state Constitution, and the teachers' arguments that (1) as a matter of state constitutional law the proper test should be, not whether the mailboxes constituted a public forum, but rather a determination of the proper "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees";[113] or (2) if the

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108 *Id.* at 935–36.

109 U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab., 154 Cal.App.3d 1157 (1984).

110 *Id.* at 1164. Using the same test, it denied the group's request to be able to show films or slides in the auditorium of the visitors center.

111 San Leandro Teachers Ass'n v. Governing Bd. of the San Leandro Unified Sch. Dist., 46 Cal.4th 822 (2009).

112 *Id.* at 842.

113 *Id.* at 843 (citing L.A. Teachers Union v. L.A. City Bd. of Educ., 71 Cal.2d 551, 558 (1969) (off-duty teachers could not be prohibited from circulating in the faculty

Court uses forum analysis, it should use the functional analysis suggested in some prior opinions rather than the more rigid categorical analysis of the federal courts, and consider whether the use of the mailboxes as proposed would be "basically incompatible" with their principal purpose.[114]

As to the first argument the Court questioned whether the decision in *L.A. Teachers Union* relied upon the California Constitution as distinguished from the First Amendment, but in any event distinguished that holding on the ground that while the faculty lounge and lunchroom in that case were places in which unrestricted conversations between teachers took place generally, in the present case the school mailboxes were "dedicated to school business and, by statute, to union communications with employees."[115] The District, said the Court, "has a legitimate interest in restricting mailbox communications so as not to permit such mailboxes to become venues for the one-sided endorsement of political candidates by those with special access."[116]

The Court rejected also the second argument, observing that the "basic incompatibility" test reflected in *U.C. Nuclear Weapons Labs* had not been relied upon since that opinion.[117] It also distinguished that case on the ground that the "primary purpose of the visitors center was the dissemination of information about the laboratory and its work," and that the Court of Appeal in that case determined that "the government had no legitimate interest in monopolizing the dissemination of information about the laboratory on that site."[118] In the present case, the Court reasoned, the District is "not attempting to monopolize speech regarding political endorsements in mailboxes," but rather "to disallow use of mailboxes for one-sided political endorsements," as a "means of promoting an important

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lunchroom and lounge a petition for the improvement of education)) and Cal. Teachers Ass'n v. San Diego Unified. Sch. Dist., 45 Cal.App.4th 1383 (1996) (teachers could be prohibited from wearing buttons opposing a statewide school voucher initiative while the teachers were in the classroom, but not in non-instructional settings)).

114 *Id.* at 842.

115 *Id.* at 843–44.

116 *Id.* at 844.

117 *Id.* at 845. The Court also asserted, as had the Court of Appeal, that in *Grayned* the concept of "basic incompatibility" was used only after it had been decided that the government property in question constituted a public forum, in order to determine whether a given regulation constitutes a reasonable time, place, and manner restriction. *Id.*

118 *Id.*

government interest, i.e., maintaining the integrity of the electoral process by neutralizing any advantage that those with special access to government resources might possess."[119]

The Court's distinctions of prior Court of Appeal opinions, in place of their outright rejection, led to uncertainty as to the status of public forum analysis under the California Constitution. That uncertainty has remained. In *International Society of Krishna Consciousness v. City of Los Angeles* (*ISKCON*), an organization wishing to solicit immediate donation of funds in the Los Angeles Airport brought suit in federal court to challenge the constitutional validity of a city ordinance prohibiting such solicitation.[120] Against the background of a U.S. Supreme Court decision that airports are not public fora under the First Amendment,[121] the Ninth Circuit Court of Appeal asked the California Supreme Court to answer the question under the state Constitution. Accepting the certification, the California Court split three ways. One justice (Kennard) expressed the view that airports are public fora under the state Constitution, while three justices (Justice Chin, joined by Justices Corrigan and Baxter) expressed the contrary view.[122] The remaining three justices (Justice Moreno, joined by Justice Werdegar and Chief Justice George) found it unnecessary to reach that question, deciding instead that even if airports are public fora under the state Constitution, the ordinance was not content based,[123] and that it constituted a reasonable time, place, and manner regulation.[124] All seven justices agreed with this conclusion.

It seems clear that the California Supreme Court is not tethered to federal law when it comes to expression on public property. In *Bailey v. Loggins,* for example, it found, beyond federal precedent, that a prison newspaper

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119 *Id.*

120 Int'l Soc'y of Krishna Consciousness v. City of L.A. (*ISKCON*), 48 Cal.4th 446 (2010).

121 Int'l Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

122 *ISKCON*, 48 Cal.4th at 460–66 (Kennard, Chin, Corrigan, and Baxter, JJ., concurring).

123 *Id.* at 457 (majority opinion). The California Court had previously decided that a law banning solicitation of funds is content neutral. L.A. Alliance for Survival v. City of L.A., 22 Cal.4th 352 (2000). It is possible that this view is or may turn out to be contrary to First Amendment law. If so, it would represent one of the few instances in which California courts have interpreted the state Constitution to be less protective of expression than the federal.

124 *Id.* at 404.

constituted a limited public forum subject to constitutional protection, so that prison authorities in deciding what could be printed must exercise their authority "even-handedly and with sensitivity to the values protected by the First Amendment and corresponding California constitutional and statutory provisions."[125] Yet, partly through studious avoidance on the part of the Supreme Court, it remains unclear to what extent California has a different constitutional approach to expression on public property, and the uncertainty has been amplified by changes in the composition of the Court.[126] The arguments in the opposing opinions of Justices Kennard and Chin in *ISKCON* turn in part upon differing interpretations of prior opinions, but more basically reflect differing views as to the proper balance between allowing the broadest feasible opportunity for free expression versus competing governmental interests — and to some extent between the desirability of a flexible approach as contrasted with the advantages of clear rules. Stay tuned.

VI. COMMERCIAL SPEECH

Judging from *Gerawan*,[127] California may have broader protection for commercial speech than the First Amendment provides, at least when it comes to compelled speech. In a 4–3 opinion by Justice Mosk that comments extensively upon the separateness of California's free speech doctrine, the Court held that a marketing order issued by the state secretary of food and agriculture at the behest of a group of plum producers and handlers, requiring plum producers to contribute to the advertising of plums, "implicated" free speech rights under the state Constitution, despite a decision by the U.S. Supreme Court in *Glickman v. Wileman Brothers*.[128] *Glickman* upheld a similar

[125] Bailey v. Loggins, 32 Cal.3d 907, 922 (1982); *see also* Lopez v. Tulare Joint Union High Sch. Dist., 34 Cal.App.4th 1302, 1318–19 (1995) (recognizing that "the California Supreme Court has taken a different approach than the U.S. Supreme Court when analyzing the government's ability to regulate the content of its own sponsored publications," and on the basis of *Bailey* finding a school newspaper to constitute a limited public forum subject to constitutional protection).

[126] Since *ISKCON*, Chief Justice George and Justice Moreno have both left the Court, replaced by Chief Justice Cantil-Sakauye and Justice Liu.

[127] Gerawan Farming, Inc. v. Lyons, 24 Cal.4th 468, 509–17; *see also supra* notes 74–75 and accompanying text.

[128] *Gerawan*, 24 Cal.4th at 517 (citing People v. Teresinski, 30 Cal.3d 822, 836 (1982) and discussing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)).

order by the U.S. secretary of agriculture against First Amendment attack. Referring to the *Teresinski* factors in support of the divergence, Justice Mosk pointed to the fact that *Glickman* was a 5–4 opinion, that it had been subject to extensive scholarly criticism, and that both textual and historical differences supported a different result.[129] As to historical differences, Justice Mosk observed that in the California of 1849 "the prevailing political, legal and social culture was that of Jacksonian democracy," animated by a spirit of individualism which "presupposed and produced . . . unrestrained speech about economic matters generally, including . . . commercial affairs."[130] And, he explained, the right to free speech is "put at risk both by prohibiting a speaker from funding speech that he otherwise would fund and also by compelling him to fund speech that he otherwise would not fund."[131] The dissenters, led by Chief Justice George, insisted there was no justification for interpreting article I, section 2(a) so as to afford a greater right "to obtain 'free rider' status with respect to such generic advertising."[132]

The majority opinion in *Gerawan* stops short of declaring the marketing order unconstitutional, however, instead remanding to the Court of Appeal to determine, inter alia, "what protection, precisely, article I afford[s] commercial speech, at what level, of what kind and . . . subject to what test";[133] and the subsequent history of the case, as well as the subsequent history of the *Glickman* opinion, leaves the relationship between state and federal law in this area decidedly muddy.

VII. ARTICLE I, SECTION 2: NEWSPERSON IMMUNITY

In *Branzburg v. Hayes* the U.S. Supreme Court declined to recognize a First Amendment right on the part of media reporters to resist subpoenas that require disclosure of confidential sources.[134] Justice Powell, who joined the plurality opinion to that effect, wrote a separate concurring opinion

129 *Id.* at 501–12.
130 *Id.* at 495.
131 *Id.* at 491.
132 *Id.* at 518 (George, C.J., dissenting).
133 *Id.* at 517 (majority opinion).
134 Branzburg v. Hayes, 408 U.S. 665 (1972).

suggesting that a balancing test be used in particular cases.[135] Whether or not the net result is that there exists a limited First Amendment privilege for reporters is a question over which lower courts have divided.[136]

In 1980, in the wake of *Branzburg*, California voters approved a state constitutional amendment proposed by the Assembly which renumbered the existing article I, section 2 to section 2(a) and added a subsection (b), which has the effect of protecting a newsperson from being adjudged in contempt for refusing to disclose either (1) unpublished information or (2) the source of information, whether published or unpublished.[137]

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135 *Id*. at 709–10 (Powell, J., concurring).

136 The California Supreme Court, in *Mitchell v. Superior Court*, concurred in the observation by some other courts that Justice Powell's position was the "minimum common denominator" of *Branzburg*, so that the decision does not preclude a qualified privilege, but stops short of deciding whether *Branzburg* requires such a privilege. 37 Cal.3d 268, 277–79 (1984).

137 Subsection 2(b) reads:

> (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.
>
> As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Cal. Const. art. I § 2(b).

In various cases the California Supreme Court has held (1) that the broad definition of "unpublished information" does not require a showing by the newsperson that the information was obtained in confidence;[138] (2) that a newsperson's protection under the shield law "must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right";[139] (3) that there is no similar requirement for accommodation in a civil action;[140] (4) that the prosecution in a criminal proceeding cannot insist upon such balancing based upon the people's right to due process under article I, section 19 of the California Constitution, since the "absoluteness of the immunity embodied in the shield law only yields to a conflicting federal constitutional . . . right";[141] and (5) that since the shield law by its terms provides only an immunity from contempt, and not a privilege, extraordinary writ relief is available only after a judgment for contempt has been entered, and a trial court may impose sanctions other than contempt, including monetary sanctions provided by section 1992 of the California Civil Procedure Code.[142]

VIII. ARTICLE I, SECTION 3: THE RIGHT TO ASSEMBLE AND PETITION

Article I, section 10 of the 1849 Constitution provided that "[t]he people shall have the right to freely assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances." In 1974, pursuant to recommendations by the Constitution Revision Commission, the section was renumbered as article I,

138 Delaney v. Super. Ct., 50 Cal.3d 785, 798 (1990).

139 *Id.* at 793.

140 New York Times Co. v. Super. Ct., 51 Cal.3d 453, 462 (1990).

141 Miller v. Super. Ct., 21 Cal.4th 883, 901 (1999).

142 *New York Times*, 51 Cal.3d at 458–61. Observing that the monetary sanctions under section 1992 are limited (up to $500 forfeiture plus actual damages) and are obtainable only in an independent action, and are "not effective as a practical matter" so that "contempt is generally the only effective remedy against a nonparty witness," the Court rejected the newsperson's argument that the operation of section 1992 would frustrate the purposes of the shield law. *Id.* at 461, 464; Cal. Civ. Proc. Code § 1992 (2011).

section 3 and amended to its present form: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." The Commission report explained that the section was being broadened to clarify that the right of petition extends beyond the Legislature to include other branches of the government.[143]

The earliest application of this provision came at the turn of the century, in connection with an 1899 primary election law that prohibited the election of delegates to a convention of any political party not representing three percent of the votes cast at the previous election.[144] Characterizing the law as a discrimination against minority parties, the Supreme Court relied upon the original provision, along with other provisions of the state Constitution, to hold the law unconstitutional.[145] For the next three quarters of a century California courts treated the provision as if it merely replicated the First Amendment's analogous protection for assembly and petition,[146] sometimes citing the state language but relying primarily on U.S. Supreme Court decisions for the analysis.

The California Supreme Court's opinion in *Pruneyard*, however, relied in part upon the state constitutional rights of assembly and petition to support its holding that the state Constitution protects rights of expression on nongovernmental property beyond any protection provided by the federal Constitution. And in *City of Long Beach v. Bozek* the Court, in an opinion by Justice Mosk, cited this provision in holding that the right to petition includes an absolute privilege to file a lawsuit against a government entity without fear of a malicious prosecution lawsuit.[147] The opinion makes reference to both federal and state constitutional provisions, giving rise to grant of *certiorari* by the U.S. Supreme Court. That Court vacated the opinion and sent the case back for clarification as to whether it was decided on federal or state grounds. On remand, the California Supreme Court

143 Joseph R. Grodin, Calvin Massey & Richard Cunningham, The California State Constitution 42 (Oxford Univ. Press 2011) (1993).

144 Britton v. Bd. of Election Comm'rs, 129 Cal. 337 (1900).

145 *Id.*

146 "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

147 City of Long Beach v. Bozek, 31 Cal.3d 527 (1982).

confirmed that the opinion was supported independently by the state Constitution, and reiterated its prior opinion.[148]

The California Supreme Court has not addressed this provision since *Bozek*, and the cases in the Court of Appeal that have cited to *Bozek* have involved actions for malicious prosecution. The potential exists for application of this provision in other contexts, but neither courts nor litigants appear to be giving it much attention.

IX. ARTICLE I, SECTION 3(B): PUBLIC RIGHT OF ACCESS TO INFORMATION

The argument has often been made that the rights protected by the First Amendment should include a public right of access to government places and papers, as a means of enhancing the values of self-governance, which it is one of the functions of the First Amendment to preserve. The U.S. Supreme Court recognized a limited right of access under the First Amendment to court proceedings,[149] but has otherwise proved unwilling to expand that right, for example to prisons.[150]

Many states, however, including California, have imposed upon government an obligation to allow broad public access to meetings and papers through statutes. In 2004 California voters went further, approving a legislatively proposed constitutional amendment, Proposition 59 on that year's ballot, which establishes a state constitutional right of access "to information concerning the conduct of the people's business," including "the meetings of public bodies and the writings of public officials and agencies."[151]

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148 City of Long Beach v. Bozek, 33 Cal.3d 727 (1983).

149 Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (right to attend criminal trials held to be implicit in the First Amendment); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596 (1982) (closure requires compelling government interest and narrow tailoring); *cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press has no right of access to documents subject to protective order in civil proceeding).

150 The Court has held that the press has no First Amendment right to visit inmates (Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974)) or to inspect jail conditions (Houchins v. KQED, 438 U.S. 1 (1978)).

151 Cal. Const. art. I, § 3(b) provides:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

It is unclear to what extent Proposition 59 changed previous law. The ballot argument in support of the proposition asserts that existing disclosure laws "have been eroded by special interest legislation, by courts putting the burden on the public to justify disclosure, and by government officials who want to avoid scrutiny and keep secrets."[152] The Legislative Analyst's summary which accompanied the measure states that "[a]s a result, a government entity would have to demonstrate to a somewhat greater extent than under current law why information requested by the public

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

(6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions; nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

[152] November 2004 Official Voter Information Guide, Proposition 59 Arguments and Rebuttals, *available at* http://vote2004.sos.ca.gov/propositions/prop59-arguments.htm.

should be kept private. Over time, this change could result in additional government documents being available to the public."[153] Thus far, the few appellate court opinions that have considered Proposition 59 have not provided much enlightenment.[154]

X. SOME THOUGHTS ON METHODOLOGY

While there is a growing recognition on the part of judges and lawyers, and for that matter the public generally, that state constitutions have an important role in the protection of what we call "constitutional rights," questions remain as to the methodology for interpreting the relevant constitutional provisions — in particular the role to be played, if any, by U.S. Supreme Court decisions under the federal Constitution.[155] Despite the fact that state and federal constitutional protection for civil rights and liberties have different historical roots — often, but not always, reflected in differences in language — it has often proved tempting for a state court to rely heavily on federal precedent, especially when there is a dearth of state authority.

In recent years California courts, in the context of free speech, have been relatively resistant to that temptation. From time to time an opinion will cite the comment in a 1938 opinion, *Gabrielli v. Knickerbocker*, to the effect that "cogent reasons" must exist for departing from the U.S. Supreme Court's interpretation of a "similar provision" in the federal Constitution;[156] but *Gabrielli* provided no explanation for such a rule,

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153 November 2004 Official Voter Information Guide, Proposition 59 Analysis by the Legislative Analyst, *available at* http://vote2004.sos.ca.gov/propositions/prop59-analysis.htm.

154 *See* Mercury Interactive Corp. v. Klein, 158 Cal.App.4th 60 (2007) (declining to construe article I, section 3 as establishing a right of access to sealed court documents beyond existing law).

155 Disagreement over the proper role of U.S. Supreme Court opinions in state constitutional interpretation has provoked a plethora of scholarly and judicial opinion, and I do not undertake to provide a general evaluation here. For an excellent source, see Robert F. Williams, The Law of American State Constitutions (2009).

156 *E.g.,* Edelstein v. City and Cnty. of S.F., 29 Cal.4th 164, 168 (2002) (citing People v. Monge, 16 Cal.4th 826, 844 (1997), which in turn cites Gabrielli v. Knickerbocker, 12 Cal.2d 85, 89 (1938)). *See also* Raven v. Deukmejian, 52 Cal.3d 336, 353 (1990) (listing cases).

other than to cite to several decisions from other states which in turn contained no explanation. Moreover, *Gabrielli* illustrates one of the dangers in such a rule. The case involved an attack under both federal and state constitutions against a flag salute requirement in public schools. The Court, pointing to several cases in which the U.S. Supreme Court had summarily affirmed state court decisions upholding such requirements, declared that the issue under the federal Constitution "is no longer open."[157] Five years later the high court announced its 8–1 decision in *West Virginia Board of Education v. Barnette* holding a compulsory flag salute to violate several provisions of the federal Constitution, thus leaving the state Constitution with lesser protection for liberty.[158]

In 1982, in *People v. Teresinski*, the California Supreme Court, reiterating the dogma that decisions of the U.S. Supreme Court are entitled to "respectful consideration . . . and ought to be followed unless persuasive reasons are presented for taking a different course,"[159] set out a list of factors, considered in prior cases, relevant to that determination. These include whether there are differences in "language or history"; whether the most recent opinion of the high court represents a limitation on rights established by earlier precedent "in a manner inconsistent with the spirit of the earlier opinion"; the "vigor" of any dissenting opinion or "incisive academic criticism"; and whether adherence to the federal precedent would overturn established California doctrine affording greater rights.[160] *Teresinski* was an illegal search case, and in free speech cases what have become known as the "Teresinksi factors" are seldom mentioned.[161]

Certainly the *Teresinski* factors are broad and vague enough to allow for considerable flexibility in deciding state constitutional issues, but the question remains, and is seldom asked, why federal precedents should be entitled to any deference at all, beyond respectful consideration of the reasoning which they contain. Perhaps an argument can be constructed on the basis of uniformity: people, especially those who are not lawyers, may

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157 *Gabrielli*, 12 Cal.2d at 89.

158 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

159 People v. Teresinski, 30 Cal.3d 822, 836 (1982).

160 *Id.* at 836–37.

161 An exception is *Gerawan Farming, Inc. v. Lyons*. *See supra* notes 130–37 and accompanying text.

find it difficult to understand why "constitutional rights" should vary from one state to another. Our commitment to the idea that as a nation we are joined by common concepts of rights that are in some meaningful sense "fundamental" is arguably weakened by such diversity. In some contexts there may be some value in uniformity per se, as a means, for example, of avoiding confusion on the part of those whose activities take them across state lines,[162] though that problem arises equally in situations where there are differences in state statutory or common law. Finally, it may be simpler and less controversial, when there are clear federal precedents pointing to unconstitutionality, for a state court to rely on those precedents rather than break new state constitutional ground. But whether these arguable advantages outweigh the disadvantages of deference — including the constrictions on the development of state constitutional jurisprudence and the risk of changes in federal law, not to mention the awkwardness which results when the high court disagrees — is highly questionable.

It has been pointed out that the history of California's free speech provision offers little guidance as to how it should be interpreted, but this is true of the First Amendment as well. When the U.S. Supreme Court embarked upon the development of First Amendment jurisprudence in the middle of the twentieth century it had little to rely upon other than its own reasoning and assessment concerning the place of free expression in a free society, the weight to be given other societal values, and the relative roles of the courts and legislatures. With respect to issues such as those raised in *Pruneyard* there is the added dimension of private property rights. The judicial task is a demanding one, but it is no more demanding for state courts than for federal.

The California Supreme Court has frequently observed, for example in *Los Angeles Alliance for Survival,* that the fact that the state provision is worded more expansively and has been interpreted as being more protective than the First Amendment does not mean it is broader in all its

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162 *See, e.g.,* Int'l Soc'y of Krishna Consciousness v. City of L.A., 48 Cal.4th 446, 464 (2010) (Chin, J., concurring) ("The public, litigators, and government attorneys advising their clients need a clear, consistent 'public forum' doctrine in cases arising on public property, not seemingly random fluctuations between state and federal constitutional law.").

applications.[163] But whether or not it should be so interpreted ought to depend upon independent analysis rather than upon some presumption in favor of the federal rule, as Chief Justice George's opinion in that case demonstrates. The issue was whether a regulation of solicitation should be viewed as content based or content neutral under the free speech provisions of the state Constitution. After setting out the history of California's free speech provisions and acknowledging their support for a higher level of protection in many contexts, the opinion carefully examines both the history of solicitation regulations in California and the theoretical foundations of the content-based doctrine concluding, contrary to a Court of Appeal opinion which is criticized and disapproved, that such regulations should not be viewed as content based.[164] The fact that the U.S. Supreme Court happened to reach the same conclusion was secondary, and not a principal focus of the Chief Justice's opinion. As the Court put it in a different context:

> [S]uch independent construction does not represent an unprincipled exercise of power, but a means of fulfilling our solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law. . . . [J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate responsibility for resolving questions of state law, including the proper interpretation of provisions of the state

163 L.A. Alliance for Survival v. City of L.A., 22 Cal.4th 352, 367 (2000). There are numerous instances in which the Court has upheld limitations on speech under both constitutions. *E.g.*, Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121 (1999) (upholding an injunction against repetition of harassing statements found to violate the California Fair Employment and Housing Act, distinguishing the early prior restraint case of Dailey v. Super. Ct., 112 Cal. 94, 96 (1896) on the ground that it did not involve speech already determined to be unlawful); *cf.* Brown v. Kelly Broad. Co., 48 Cal.3d 711 (1989) (relying on distinctive wording of article I, section 2 as a reason for *not* extending the federal rule requiring malice in defamation actions on the part of public figures to private persons: "The federal Constitution, by contrast, contains no express provision imposing responsibility for abuse of the right of free speech. This difference refutes defendants' policy argument that our state Constitution weighs in favor of a standard of fault higher than that required under the federal Constitution.").

164 *L.A. Alliance for Survival*, 22 Cal.4th 352.

> 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.[165]

* * *

[165] Comm. to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 261–62 (1981) (quoting People v. Chavez, 26 Cal.3d 334, 352 (1980)). The Court has not been entirely consistent in following these principles of independent construction. For example, in *Edelstein v. City and County of San Francisco*, the Court partially overruled a prior decision that held a ban on write-in voting in municipal elections to violate article I, section 2 as well as the First Amendment. 29 Cal.4th 164 (2002). The *Edelstein* court based its decision on a subsequent U.S. Supreme Court decision upholding, against a federal constitutional challenge, an even broader ban. *Id.* at 168 (citing Burdick v. Takushi, 504 U.S. 428 (1992)). The Court acknowledged that the explanation for the divergence between the prior California case and the subsequent federal case was that the prior state decision "placed a higher value than the *Burdick* court on . . . the 'expressive function' of voting," but instead of saying that this represented a legitimate difference which justified a different state rule, or that the majority simply disagreed with the value assessment in the prior decision and on that basis declined to follow it, the majority explained its decision by saying there were no "cogent reasons" for departing from the federal rule. *Id. Compare* Robins v. Pruneyard Shopping Ctr., 23 Cal.3d 899, 908 (1979) ("The fact that those [state] opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent.").