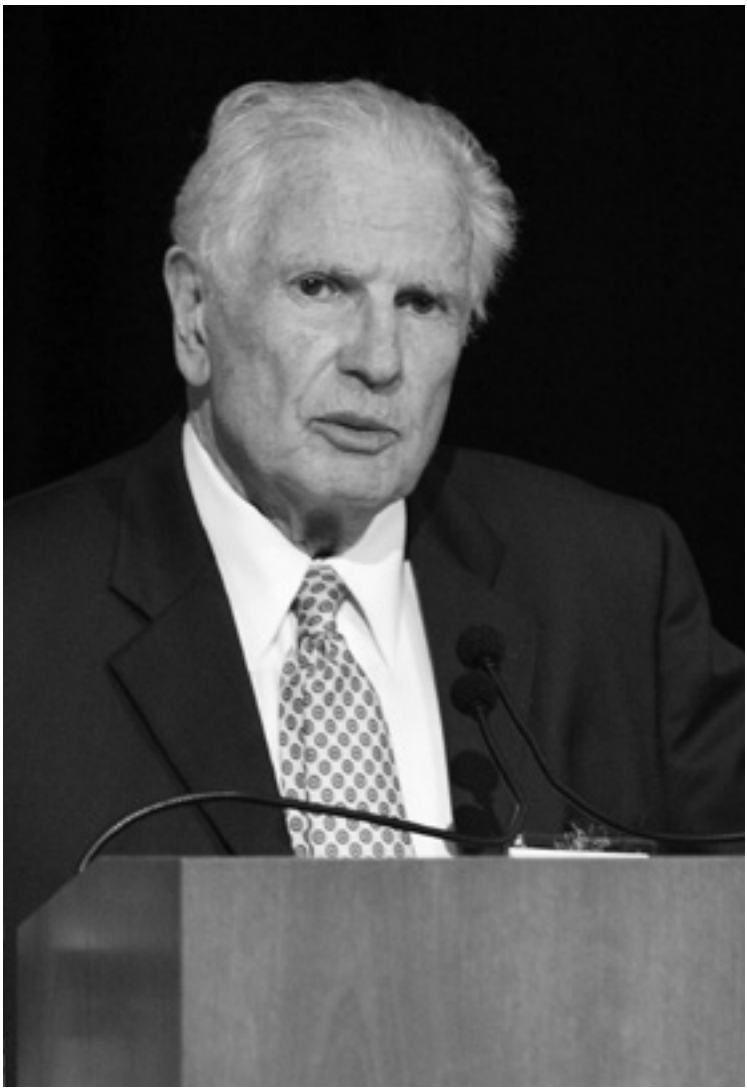
SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING BOOK CHAPTER



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LIBERTY AND EQUALITY UNDER THE CALIFORNIA CONSTITUTION

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INTRODUCTION

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

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

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

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

I. LIBERTY

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

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

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

3 Cal. Const. art. I, § 2.

4 Cal. Const. art. I, § 3.

5 Cal. Const. art. I, § 4.

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

7 Cal. Const. art. I, § 25.

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

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

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

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

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

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

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

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

11 Cal. Const. of 1849, art I, § 1.

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

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

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

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

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

A. REVIEW OF ECONOMIC REGULATION

1. The Early California Cases

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

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

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

defendant had made.[15] Chief Justice Murray and Justice Burnett found the law to violate the California Constitution, mainly on the basis of the language in article I, Section 1.[16] Chief Justice Murray's opinion declared:

> This principle is as old as the Magna Charta [sic]. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.[17]

Justice Burnett expressed an even more enthusiastic view:

> [F]or the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.[18]

There was a dissenting view by the colorful and controversial Justice David Terry,[19] who dismissed article I, section 1 as a "mere reiteration of a truism which is as old as constitutional government."[20] "We cannot declare a legislative act void because it conflicts with our opinion of policy, expediency, or justice," Terry insisted. "We are not guardians of the rights

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15 *Id.* at 3.

16 *Id.* at 6–10.

17 *Id.* at 6.

18 *Id.* at 17 (Burnett, J., concurring).

19 David S. Terry was in many respects a rogue justice who, among other things, stabbed a vigilante in San Francisco, shot and killed U.S. Senator Broderick in a duel, and ended up being shot and killed by a bodyguard for United States Supreme Court Justice Stephen Field, who acted in order to protect the justice against what he believed to be a threat on his life. For an interesting and entertaining narrative of that turbulent period *see* Milton S. Gould, A Cast of Hawks (1985).

20 *Billings*, 7 Cal. at 19.

of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance."[21]

The following year, however, Justice Terry had a libertarian change of heart. In *Ex parte Newman* he joined Justice Burnett to strike down a recently adopted Sunday closing law, both on the ground that it constituted religious discrimination in violation of article I, section 4, and on the ground that it interfered with the "right to acquire property" protected by section 1.[22] "[M]en have a natural right," he now declaimed, "to do anything which their inclinations may suggest, if it be not evil in itself, and in no way impairs the rights of others."[23] To hold otherwise would mean that the Legislature could "fix the days and hours for work, and enforce their observance by an unbending rule which shall be visited alike upon the weak and the strong."[24] In response to the accusation that this seemed a departure from his view in Billings, Terry responded that he was merely bowing to precedent.[25]

This time it was Stephen Field, soon to be appointed by President Lincoln to the U.S. Supreme Court, who dissented, invoking the same argument of judicial modesty that Justice Terry had abandoned. "The Legislature," he proclaimed, "possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action."[26]

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[21] *Id*. at 21.

[22] *Ex parte* Newman, 9 Cal. 502 (1858).

[23] *Id*. at 507.

[24] *Id*. at 508.

[25] *Id*. at 510.

[26] *Id*. at 520 (Field, J., dissenting). It was no answer to say, as Terry did, that people do not need protection against overwork, for "[l]abor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise." *Id*. Field's views while serving on the California Supreme Court seem difficult to reconcile with his later views on the U.S. Supreme Court. *Compare* his dissenting opinion in the *Slaughterhouse Cases*, 83 U.S. 36 (1873) (arguing that a state law centralizing all animal-slaughter operations in New Orleans to prevent cholera-causing contamination of the water supply intruded on butchers' right to pursue their occupation).

Several years later, in *Ex parte Andrews,*[27] judicial modesty prevailed. The Legislature had enacted a new Sunday closing law, virtually identical to the one struck down in *Newman*, but the composition of the court had changed. Chief Justice Burnett was no longer there, nor was Justice Terry, who was forced to leave the court after killing U.S. Senator Broderick in a famous duel.[28] Field had become chief justice, and two new justices, Baldwin and Cope, had joined the court. Justice Baldwin, with scarcely a nod to *Newman*, wrote an opinion for a unanimous court upholding the statute on the basis of the reasoning contained in Field's prior dissent.[29] The right to acquire property, he declaimed, does not deprive the Legislature of the "power of prescribing the mode of acquisition, or of regulating the conduct and relations of the society in respect to property rights."[30] The Legislature may "repress whatever is hurtful to the general good," and that body "must generally be the exclusive judge of what is or is not hurtful," including "moral as well as physical" harm:

> [I]t is impossible for us to see why that department may not protect and regulate labor and the relations of the different members of society so that one class may not injure a dependent class — the master the apprentice — the husband the wife — the parent the child — or why, if it be in the interest of the whole society that no labor not necessary should be done on a given day, it may not prohibit it on that day.[31]

Deference to legislative judgment was reflected also in *Ex parte Smith*, upholding the conviction of two women for violating a Sacramento ordinance which prohibited the playing of musical instruments or the presence of women in saloons after midnight.[32] In rejecting their constitutional attack based on article I, section 1,[33] Justice Sanderson's opinion for a unanimous court relied heavily upon social contract theory:

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27 *Ex parte* Andrews, 18 Cal. 678 (1861).

28 *Supra* note 19.

29 *Andrews*, 18 Cal. at 685.

30 *Id.* at 682.

31 *Id.* at 682–83.

32 *Ex parte* Smith, 38 Cal. 702 (1869).

33 The court also rejected challenges under article I, section 11, *infra* Part II, which required that "laws of a general nature shall have a uniform operation," and under the Fourteenth Amendment to the federal Constitution. *Id.* at 712.

> [W]hen men who come together for the purpose of adopting a form of government and establishing a system of laws, stipulate that the rights of life, liberty, property, and the pursuit of safety and happiness are inalienable . . . they are not to be understood as meaning that those rights shall not be at all interfered with by the law-making power. On the contrary, their language is to be interpreted in view of the object which has called it forth, or as meaning that those rights are not to be interfered with, except so far as the ends and objects of government may require."[34]

And, the power to determine which legislation is necessary and appropriate to accomplish the ends of government is lodged with the Legislature. If the Legislature abuses that power "the remedy lies . . . with the people, through the ballot-box; and, if that proves ineffectual, a further remedy lies in revolution, or the right which the people have to change their form of government . . . ."[35] If the legislative body considered that the presence of women in bars after midnight "is of a vicious and immoral tendency," that was sufficient, though Justice Sanderson also made clear that he considered their judgment "as sound, and their action as not only just and reasonable, but as eminently wise and salutary."[36]

*2. The Development of "Substantive Due Process": The "*Lochner *Era"*

In the aftermath of the Civil War, the tension between judicial "restraint" and judicial "activism" heightened nationwide. State legislatures throughout the country responded to the burgeoning industrial revolution with increased regulation of business, and state courts responded to the regulation with increased wariness. Even before the war some state courts, relying on due process or "law of the land" clauses in their state constitutions, began to develop doctrinal grounds for checking what seemed to them to be excessive or unwarranted governmental power, beyond the "proper" limits of the police power which all state legislatures were said to possess.[37]

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[34] *Id.* at 705.

[35] *Id.* at 707.

[36] *Id.* at 709.

[37] *See, e.g.,* Wynehamer v. State of New York, 13 N.Y. 378 (1856); *see* Edwin Corwin, *Due Process of Law before the Civil War, in* American Constitutional History: Essays by Edward S. Corwin (Alpheus T. Mason and Gerald Garvey, eds., 1964); Peter

Following adoption of the Fourteenth Amendment, some state courts relied upon the Due Process clause contained in that Amendment to strike down economic regulations which they considered to be outside the proper boundaries of legislative control,[38] and it was not long before the U.S. Supreme Court followed their lead.

In *Munn v. Illinois* the court rejected an attack on a state law regulating the rates of grain elevators, basing its decision on the common law precedents upholding regulation of private property "affected with a public interest" and deference to legislative judgment as to the type of regulation necessary.[39] The court nevertheless warned that the states' "police power" had its limits, and that its exercise was subject to judicial determination.[40] That warning was repeated in *Mugler v. Kansas,* stating (in dicta) that a purported exercise of the police power which had no "real or substantial relation" to public health, morals, or safety could run afoul of the Due Process Clause of the Fourteenth Amendment.[41] In 1897 these warnings came to fruition in *Allgeyer v. Louisiana*, in which the Supreme Court held a Louisiana statute prohibiting contracts of marine insurance except with a company licensed to do business within the state to be invalid as infringing upon the liberty of contract protected by the Due Process Clause. [42] Reliance on the Due Process Clause as a substantive limitation on state regulation reached its peak eight years later in *Lochner v. New York* which held invalid a New York statute that limited the hours of work for bakers.[43]

J. Galie, *State Courts and Economic Rights*, 496 Annals Am. Acad. Pol. & Soc. Sci. 76–87 (1988). Indeed, notwithstanding the U.S. Supreme Court's subsequent rejection of substantive due process in the economic arena, that doctrine continued to thrive under many state constitutions over the years and well into modern times. *Id.*

38 *See, e.g., In re* Application of Jacobs, 98 N.Y. 98 (1885) (invalidating a statute which prohibited the manufacturing or preparation of tobacco in tenements in cities of 500,000 or more residents). By the time the U.S. Supreme Court decided *Allgeyer v. Louisiana*, *infra* note 42, ten other states had followed the New York approach. *See* Bernard Siegan, Economic Liberties and the Constitution 58–59 (1980).

39 Munn v. Illinois, 94 U.S. 113, 126–134 (1877).

40 *Id.* at 134.

41 Mugler v. Kansas, 123 U.S. 623, 661 (1887).

42 Allgeyer v. Louisiana, 165 U.S. 578, 591–93 (1897).

43 Lochner v. New York, 198 U.S. 45 (1905).

The "*Lochner* era" prevailed for approximately the next thirty years, during which the U.S. Supreme Court invalidated a wide range of federal and state regulatory statutes in the name of the Due Process Clause. Use of that rationale did not always result in invalidation — there was still room for regulation which, in the eyes of the justices, bore an adequate relationship to the "proper" goals of the police power, such as regulating hours of work for women[44] — and the Due Process Clause was not the only doctrinal instrument of invalidation. The Equal Protection Clause played a role, as did the Impairment of Contracts clause and the "Dormant Commerce Clause," read as limiting state regulation that infringed upon federal authority to regulate interstate commerce. But it was the Due Process Clause that gave business its most formidable weapon against state regulation.

The *Lochner* era ended in the 1930s, beginning with dicta in *Nebbia v. New York* deferential to legislative judgment,[45] and then with *West Coast Hotel v. Parrish*, in which the court, overruling prior precedent, upheld a state minimum wage law for women.[46] In doing so it resoundingly rejected *Lochner*'s jurisprudential underpinnings and adopted a highly deferential view toward legislative policymaking in the commercial arena which prevails to this day, both under the Due Process Clause and under the Equal Protection Clause. The court will uphold economic regulation so long as there is a "rational basis" for believing it to serve a legitimate legislative goal.

3. The Lochner *Era in California*

The California Supreme Court, in a series of cases beginning in 1890 and continuing for several decades, exhibited a skepticism toward economic regulation that paralleled developments in the U.S. Supreme Court and in other states. Between 1890 and 1920 the court struck down over a dozen statutes and ordinances aimed at regulating business activity in one way or another, including laws limiting hours of work on city projects;[47] a statute

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[44] Muller v. Oregon, 208 U.S. 412 (1908); *see also* Bunting v. Oregon, 243 U.S. 426 (1917) (upholding law establishing ten-hour day for factory workers).

[45] Nebbia v. New York, 291 U.S. 502, 537–38 (1934).

[46] West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[47] *Ex parte* Kuback, 85 Cal. 274 (1890) (invalidating Los Angeles ordinance prohibiting more than eight hours of work a day, as well as any work by Chinese, on city contracts). The court made no mention of its decision six years earlier, in *Ex parte Moynier*,

prohibiting barber shops from being open, or barbers from working, on Sundays and other holidays;[48] a county ordinance prescribing building requirements and other conditions for the operation of facilities for "insane persons, or persons affected with inebriety, or other nervous diseases";[49] a statute requiring that as to all liens the contract price shall be payable in money;[50] ordinances in both San Francisco and Los Angeles prohibiting or limiting the creation of new cemeteries;[51] a statute requiring that boxes used to ship fruit contain a statement designating the county and locality within which the fruit was grown;[52] a Los Angeles ordinance prohibiting gas works within a defined area;[53] a statute making it a misdemeanor to sell tickets to performances in excess of the price originally charged by management;[54] a San Francisco ordinance prohibiting the setting of fires on one's own property without a permit;[55] an ordinance requiring a permit for solicitation of donations to charities;[56] and a statute prohibiting an

65 Cal. 33 (1884), upholding a city ordinance requiring a license to operate a laundry during evening hours, stating that "we cannot say that [the restriction] is not necessary for the proper police and sanitary condition of the city." *Id.* at 36. Subsequently, in 1909, the court upheld a statute prohibiting the employment of miners underground for more than eight hours a day, on the basis of special health and safety hazards associated with the occupation, *In re* Martin, 157 Cal. 51 (1909); and in1912 the court upheld restrictions on hours of work by women in certain establishments, on the basis of special concerns for the health and safety of women, *In re* Miller, 162 Cal. 687 (1912).

48 *Ex parte* Jentzsch, 112 Cal. 468 (1896).

49 *Ex parte* Whitwell, 98 Cal. 73 (1893) (ordinance requiring that the building be constructed of either brick or iron, or iron and stone, that it not be located within 400 yards of any dwelling or school, that the named diseases be treated in different buildings, and that males and females not be treated in the same building).

50 Stimson Mill Co. v. F.W. Braun, 136 Cal. 122 (1902).

51 *Ex parte* Bohen, 115 Cal. 372 (1896) (ordinance prohibiting additional burials in cemeteries within city limits, but permitting new cemeteries); County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344 (1899); *cf.* Odd Fellows' Cemetery Ass'n v. City and County of San Francisco, 140 Cal. 226 (upholding San Francisco ordinance prohibiting cemeteries within city limits, distinguishing prior Los Angeles case on the basis that San Francisco was smaller geographically).

52 *Ex parte* Hayden, 147 Cal. 649 (1905).

53 *In re* Smith, 143 Cal. 368 (1904).

54 *Ex parte* Quarg, 149 Cal. 79 (1906).

55 *In re* McCapes, 157 Cal. 26 (1909).

56 *Ex parte* Dart, 172 Cal. 47 (1916).

employer from entering into a contract requiring an employee to surrender to him tips or gratuities received.[57]

The doctrinal basis for these decisions was often fuzzy, and apparently of little consequence. Decisions referred variously to article I, section 1 of the state Constitution,[58] to the due process clauses of the state and federal constitutions,[59] to the state constitutional prohibition against special laws,[60] and in some cases simply to treatises which described limitations upon the "police power" considered to be inherent in the nature of constitutional government:

> The constitutional guaranty securing to every person the right of "acquiring, possessing, and protecting property," . . . includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter . . . . These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by constitution, the individual, in becoming a member of organized society, unless the constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. . . .
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> The police power is broad in its scope, but . . . it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power.[61]

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[57] *Ex parte* Farb, 178 Cal. 592 (1918). The court made it rather clear in its opinion that it disapproved of tipping, referring to it as "organized blackmail." *Id.* at 594. *Farb* was later disapproved in *Cal. Drive-In Rest. Ass'n v. Clark*, 22 Cal. 2d 287, 295 (1943).

[58] *E.g., Stimson Mill Co. v. Braun*, 136 Cal. at 125 (1902).

[59] *Ex parte* Farb, 178 Cal. at 600.

[60] *Ex parte* Jentzsch, 112 Cal. at 471 (1896) (finding no justification for banning work on Sundays by barbers while allowing others to work).

[61] *Ex parte* Quarg, 149 Cal. at 81–82 (citing Cooley's treatise on Statutory Limitations and Barbour on Rights).

Rarely did the court articulate the reasoning behind its conclusions, other than to say it saw no basis for the particular regulation. In some cases it appeared the court was concerned that the regulation was motivated by special interests seeking protection against competition,[62] but that was seldom the explicit grounds for decision. In the case which led to the invalidation of the Los Angeles ordinance prohibiting gas works in a described area, for example, the area was Arroyo Seco, a rural community between Los Angeles and Pasadena, described as a "rocky waste between two and three hundred yards in width."[63] It contained only fifteen residences, and none within yards of petitioner Smith's gas works. It seemed apparent to Justice Shaw, who concurred in the majority opinion, that the ordinance was "manifestly intended to prohibit and suppress the particular business of the petitioner,"[64] but Justice Henshaw, writing for the majority, insisted that "the motives prompting its enactment are of no consequence" and that the only question was whether "the conditions . . . justify the enactment."[65] Without elaboration, he found they did not.

In some of these cases the court's conclusion seems quite strange through a modern lens — for example, the case invalidating the fire permit requirement just three years after the San Francisco earthquake and fire, on the basis of a property owner's right to control his own property.[66] While the opinions in such cases frequently paid lip service to the need for deference to the legislative process, the court insisted on its authority to determine the facts underlying the need for the legislation. On occasion there was a dissenting voice,[67] but most of the decisions were unanimous.

By the second decade of the twentieth century, however, perhaps responding to the Progressive revolution, there were signs that the state

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62 *E.g., Ex parte* Hayden, 147 Cal. at 653 (opining that a statute requiring fruit boxes to bear identification of the county and location where the fruit was grown seemed to benefit only certain producers with favorable localities).

63 *In re* Smith, 143 Cal. at 370–371.

64 *Id.* at 374 (Shaw, J., concurring).

65 *Id.* (majority opinion).

66 *In re* McCapes, 157 Cal. 26.

67 *E.g., Ex parte* Bohen, 115 Cal. at 379 (McFarland, J., dissenting from a decision invalidating ordinances that prohibited or limited new cemeteries, stating that "the ordinance in question operates uniformly upon all of the class who come within its provisions").

Supreme Court's attitude toward regulation was becoming more accepting of legislative judgment. In *In re Martin* the court rejected a state constitutional attack on a 1909 statute prohibiting employment of miners underground for more than eight hours a day and requiring that the hours be consecutive, reasoning that the legislation was within the "police power" because the work involved was particularly dangerous.[68] In doing so it followed the lead of the U.S. Supreme Court in *Holden v. Hardy*, which had upheld a nearly identical statute against attack under the Fourteenth Amendment.[69] The California court distinguished *Lochner*, which was decided after *Holden*, on the basis that the "primary consideration is whether or not the occupation possesses such characteristics of danger to the health of those engaged it in as to justify the legislature in concluding that the welfare of the community demands a restriction."[70] Rejecting petitioner's argument that the statute violated the protections of the California Constitution respecting "special legislation" because it did not include other equally dangerous occupations, the court said, "Whether these other occupations present the same dangers to health . . . and whether, if they do, these dangers can best be met by restricting the hours of labor, are primarily questions for the legislature."[71]

In *In re Miller* the court upheld a 1911 statute limiting the hours of work for females in certain establishments, including hotels, against attack under article I, section 1.[72] The court cited the U.S. Supreme Court's post-*Lochner* decision in *Muller v. Oregon*[73] along with cases from other states, but with an emphasis on legislative discretion:

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68 *In re* Martin, 157 Cal. 51, 56 (1909).

69 Holden v. Hardy, 169 U.S. 366 (1898).

70 *In re* Martin, 157 Cal. at 55.

71 *Id*. at 57.

72 *In re* Miller, 162 Cal. 687 (1912). Petitioner also challenged the statute as a discrimination against women under article XX, section 18 ("No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."). The court dismissed that challenge on the ground that "as in case of the other constitutional guaranties, the provision is subject to such reasonable regulation as may be imposed in the exercise of the police powers." *Id*. at 692, 695–97. This part of the court's holding has since been disapproved.

73 Muller v. Oregon, 208 U.S. 412 (1908) (upholding the constitutionality of a law restricting the hours worked by women in laundries).

> [A] large discretion is vested in the legislature to determine what measures are necessary [to promote general health and welfare]. Upon this question of fact, as also with regard to the facts upon which a lawful classification and discrimination depend, . . . the rule is well settled that the legislative determination that the facts exist which make the law necessary, must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice. . . . If reasonable men, upon a consideration of the facts might rationally reach the conclusion that the enforcement of the statute would tend to promote or preserve, in some appreciable degree, the public health or general welfare, the law must be accredited as a proper exercise of the police power, although other reasonable persons might take a different view.[74]

A similar deferential approach characterized the court's 1917 opinion in *Ex parte Barmore*, upholding a Los Angeles city ordinance making it unlawful to solicit custom or patronage within a railroad depot for any hotel or for the transportation of persons or baggage, since the city council "may well have thought that active solicitation of patronage within depots would interfere unduly with the peaceable and convenient use of depots by arriving and departing passengers."[75] The effect of the decision was to override a contract that petitioner Barmore had with the Southern Pacific Railroad to do precisely what the ordinance prohibited.[76]

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[74] *In re* Miller, 162 Cal. at 695–96. *See also In re* Wong Wing, 167 Cal. 109 (1914) (*per curiam* opinion rejecting an attack on a San Francisco ordinance limiting the hours in which laundries could engage in washing and ironing to the period from 7 a.m. to 6 p.m., assertedly in the interest of protection against fires).

[75] *In re* Barmore, 174 Cal. 286, 288 (1917).

[76] *Id.* at 289. *Cf.* Frost v. City of Los Angeles, 181 Cal. 22 (1919), invalidating, as beyond the state's police power, a statute providing for denial of permits to furnish water unless it was, "under all the circumstances and conditions . . . the purest and most healthful obtainable or securable." Justice Shaw's opinion for the court observed wryly: "Apparently this part of the law is based on the theory that it is better for the urban population of the state that they should die of thirst than that they should quench it with ordinary healthful water, which is not the very purest that can possibly be obtained." *Id.* at 28.

4. Economic Regulation and the "Rational Basis" Test in California

The effect of these decisions was to move the court to a position quite close to the modern "rational basis" test for assessing the constitutionality of economic regulation, an approach which it continued to follow during the 1920s and the 1930s. In 1925, for example, in *Miller v. Board of Public Works*, the court upheld a Los Angeles zoning ordinance establishing an area for single family residences, stating:

> [T]he police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.[77]

And, in 1936, in *Max Factor & Co. v. Kunsman*, the court upheld California's Fair Trade Act requiring retailers who sold trademarked goods to abide by minimum resale price terms specified in the manufacturer's sales contract.[78] "[T]his court has neither the power nor the duty to determine the wisdom of any economic policy," the court said, in language reminiscent of Justice Holmes's dissent in *Lochner*; "that function rests solely with the legislature."[79]

Still, echoes of the *Lochner* era continued well into the 1930s and beyond. In the same year that it decided *Kunsman* the California Supreme Court held an Oakland ordinance prohibiting laundry operations, including sales and delivery, after 6 p.m., to deprive a laundry owner of his liberty and property without due process of law, in violation of the state and federal constitutions, and to deprive him of the equal protection of the

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[77] Miller v. Bd. of Pub. Works, 195 Cal. 477, 485 (1925). *See also* Magruder v. Redwood City, 203 Cal. 665 (1928) (upholding ordinance excluding certain businesses from residential areas).

[78] Max Factor & Co. v. Kunsman, 5 Cal. 2d 446 (1936).

[79] *Id.* at 454. *See also* Agric. Prorate Comm'n v. Super. Ct., 5 Cal. 2d 550 (1936) (upholding the constitutionality of the state's Prorate Act, which provided lemon growers with an opportunity through petition to the Agricultural Prorate Commission to establish a prorated market if they faced "agricultural waste"); *In re* Fuller, 15 Cal. 2d 425 (1940) (upholding the constitutionality of the Small Loan Act, regulating the amount of interest small loan lenders are permitted to charge).

laws.[80] Still later, in *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, the Supreme Court invalidated legislation which mandated minimum prices for dry cleaning services, partly on the ground that the legislation benefited only the industry and not the public, and partly because the Legislature had delegated authority to establish minimum prices to an administrative body composed of industry representatives.[81]

The opinion in *Thrift-D-Lux* was 4–3, with a vigorous dissent by Justice Traynor that accused the majority of reverting to *Lochner*.[82] In 1959, in *Allied Properties v. Department of Alcoholic Beverage Control* a new court majority distinguished *Thrift-D-Lux* in a case upholding minimum price provisions for alcoholic beverages, and *Thrift-D-Lux* has not been heard of since.[83] When, in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, the court was invited to reconsider *Allied Properties* in light of numerous decisions by other state courts holding fair trade laws unconstitutional, the court declined the invitation.[84] Justice Tobriner's opinion for the court, referring to developments in the U.S. Supreme Court, distinguished between cases in which "appeal is made to liberties which derive merely from shifting economic arrangements" and "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society."[85] As to the former, the question is only whether the statute "reasonably relates to a legitimate governmental purpose," and in making that determination, "[w]e must not confuse reasonableness with wisdom. The doctrine that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded."[86]

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80 *In re* Mark, 6 Cal. 2d 516 (1936) (distinguishing the court's prior holding in *In re Wong Wing* as involving a limitation only on clothes processing in the laundry).

81 State Bd. of Drycleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 444, 448 (1953).

82 *Id.* at 455 (Traynor, J., dissenting).

83 Allied Props. v. Dep't Alcoholic Beverage Control, 53 Cal. 2d 141, 151 (1959).

84 Wilke & Holzheiser, Inc. v. Dep't Alcoholic Beverage Control, 65 Cal. 2d 349 (1966).

85 *Id.* at 359.

86 *Id.* (citing Ferguson v. Skrupa, 372 U.S. 726, 728–30 (1963)).

B. NON-ECONOMIC LIBERTIES

1. Non-Economic Liberties in the U.S. Supreme Court

Following the demise of *Lochner* the U.S. Supreme Court shied away from substantive due process doctrine, not only in the arena of economic regulation but also with respect to claims of constitutional protection for non-economic liberties. Instead, confronted by claims the court found meritorious, the court turned increasingly to the Equal Protection Clause of the Fourteenth Amendment. While the New Deal court was extremely deferential to application of the Equal Protection Clause in the context of economic regulation, it gradually developed a doctrinal justification for greater scrutiny of classifications in the case of liberty interests explicitly protected by the federal Bill of Rights and applicable to the states through the Fourteenth Amendment or otherwise deemed "fundamental," as well as of classifications that involved adverse treatment of "discrete and insular minorities." For example, in *Skinner v. Oklahoma*, in 1942, the court found unconstitutional a law requiring surgical sterilization of individuals convicted of three or more crimes involving "moral turpitude," not because the right to procreate was protected by substantive due process, but because the law discriminated in violation of the Equal Protection Clause with respect to the exercise of a fundamental liberty.[87]

Then, in 1965, the court confronted a case in which the protection of what the court was prepared to consider a fundamental liberty interest could not convincingly be decided on the basis of the Equal Protection Clause. The case was *Griswold v. Connecticut*, and the liberty interest was the right of access to contraceptives.[88] More precisely, the case involved the rights of Planned Parenthood and a physician to counsel the use of contraceptives, in violation of a statute which made that a crime; but the underlying liberty interest was that of the potential users.[89] A majority of the court were of the view that the statute was unconstitutional, but the right to use contraceptives did not seem to fall within any of the rights specifically enumerated in the Bill of Rights, and to rely on substantive due process to fill in the gap was anathema to most of the court. The result was an "opinion

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87 Skinner v. Oklahoma, 316 U.S. 535 (1942).

88 Griswold v. Connecticut, 381 U.S. 479 (1965).

89 *Id.* at 485.

of the Court" by Justice Douglas, rejecting reliance on substantive due process, and instead relying upon perceived "penumbras" emanating from the specific Bill of Rights guarantees.[90]

Penumbras aside, "privacy" was always a somewhat awkward label for the interests the court sought to protect in *Griswold* and its progeny. While the ban on contraception triggered visions of police spying upon people in their bedrooms, the right to obtain and use contraceptives in order to further one's own choices about sex and reproduction was really the heart of the issue. A much more convincing explanation, provided by Justice Harlan's concurring opinion in *Griswold*, was that the concept of substantive due process had not died, or if it had it could be resurrected in the service of protecting "liberty" of a different sort than the abstract right of contract protected in *Lochner*.[91] It could be used, with stricter scrutiny than the mere "rational basis" test supposedly applicable to all legislation, to protect, through the Due Process Clause, aspects of liberty deemed in some sense "fundamental."

Justice Harlan's vision in Griswold became the accepted rationale for the court's opinion in *Roe v. Wade*,[92] and it became the dominant doctrine in dealing with claims for constitutional protection for rights beyond those specifically enumerated in the Bill of Rights. The notion of "privacy" as the doctrinal tool for protecting such rights fell by the wayside. But not in California.

2. "Privacy" Under the California Constitution

Article I, section 13 of the California Constitution, in language virtually identical to that contained in the Fourth Amendment to the federal Constitution, prohibits unreasonable searches or seizures and requires probable cause for the issuance of a warrant.[93] Similarity of language notwithstanding,

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90 *Id.*

91 *Id.* at 499–502 (Harlan, J., concurring).

92 Roe v. Wade, 410 U.S. 113 (1973).

93 Cal. Const. art. I, § 13. In its present form, the section reads:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

the California Supreme Court in the 1970s declared that the California provision imposes a "more exacting standard" than its federal counterpart;[94] and in a number of cases read it to provide greater protection than the Fourth Amendment as interpreted by the U.S. Supreme Court.[95] In addition, the California Supreme Court has held this section to apply in some circumstances in which the Fourth Amendment would not apply for lack of state action.[96] Article I, section 13 is principally invoked by criminal defendants as a basis for the exclusion of evidence, and in that context article I, section 28 (f)(2) of the state Constitution, a product of the initiative process, now precludes California courts from excluding evidence that would be admissible under the federal standard.[97] Other remedies for violation of article I, section 13, however, are still available,[98] but in the non-criminal context it is the "privacy" language of article I, section 1 that has provided California courts with a textual basis for extending protection for privacy interests,[99] not only with respect to informational privacy, but with respect

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The provision derives from article I, section 19 of the 1849 Constitution, with minor nonsubstantive changes in 1974.

94 People v. Brisendine, 13 Cal. 3d 528, 545 (1975).

95 *E.g.*, People v. Krivda, 8 Cal. 3d 623 (1973) (dismissal of action based on evidence obtained through warrantless search of a garbage can); *Brisendine,* 13 Cal. 3d 528

96 *E.g.*, People v. Zelinski, 24 Cal. 3d 357 (1979) (search by privately employed store guards).

97 Cal. Const. art. I, § 28(f)(2) (adopted June 8, 1982; nonsubstantive amendments adopted 2008). This section reads:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

98 *See, e.g.*, People v. Cook, 41 Cal. 3d 373 (1985) (injunction limiting warrantless surveillance of backyard from police helicopter).

99 *Compare, e.g.*, Burrows v. Super. Ct., 13 Cal. 3d 238 (1975) (interpreting article I, section 13 to require exclusion of bank records obtained by prosecutor without warrant) *with* White v. Davis, 13 Cal. 3d 275 (1975) (interpreting article I, section 1 to preclude civil discovery order of bank records without notice and opportunity for account holder to object). The two opinions were filed the same month.

to autonomy as well, beyond the federal guarantees.[100] While informational privacy and autonomy are analytically distinct — informational privacy having to do with preventing others from knowing matters one would wish to keep private, autonomy having to do with the right to engage in particular activity whether others know about it or not — the two share an overlapping intellectual and jurisprudential history.

3. Informational Privacy in California

The ballot argument in support of the 1972 privacy amendment advised voters that there were "no effective restraints on the information activities of government and business" and proceeded to define the "right of privacy" in broad terms:

> The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us . . . This right should be abridged only when there is a compelling public need . . . .[101]

The first case to consider the application of the new right of privacy was *White v. Davis* in 1975.[102] Hayden White, a professor of history at UCLA, instituted a taxpayer's suit against Edward M. Davis, the Los Angeles chief of police, seeking to enjoin expenditures to support what he alleged to be

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[100] There have been occasional cases in which the court has relied upon the state Due Process Clause, rather than the privacy clause, as a basis for finding a particular interest to be fundamental so as to trigger strict scrutiny under the state's Equal Protection Clause. *See, e.g.*, Hawkins v. Super. Ct., 22 Cal. 3d 584 (1978) (right of defendant to preliminary hearing found to be fundamental so as to trigger scrutiny of a prosecutor's decision to seek indictment by a grand jury). And in the recent *In re Marriage Cases*, 43 Cal. 4th 757, 810 (2008), the court found the right to marry a person of one's choice to be fundamental both under the privacy clause and the Due Process Clause; *see infra* Part I-C.

[101] Ballot Pamp., Proposed Stats. & Amends. to Cal. Const. with arguments to voters, Gen. Election 26 (Nov. 7, 1972).

[102] White v. Davis, 13 Cal. 3d 757 (1975).

conduct of covert intelligence gathering activities at the university. These activities were alleged to include the placement of informers and undercover agents in classrooms, student organizations, and meetings for the purpose of submitting reports to the police chief and the development of files, unrelated to any illegal activity. The trial court having sustained a demurrer without leave to amend, the question before the California Supreme Court was whether these allegations stated a cause of action.

The court, in a unanimous opinion by Justice Tobriner, held that the conduct alleged implicated rights of free expression and association protected by both federal and state constitutions, and independently implicated the privacy amendment which had been adopted while the case was pending.[103] The ballot argument in support of the amendment, the court said, made three points clear:

> First, the statement identifies the principal "mischiefs" at which the amendment is directed: (1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose . . . or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian."[104]

In the same year it decided *White v. Davis* the court applied the privacy provision to hold that bank customers had a protectable privacy interest in financial information which they disclosed to a bank, so as to prevent a court from allowing discovery of that information in a suit against the bank by a third party without notice and opportunity to object and seek a protective

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[103] *Id.* at 768, 776.

[104] *Id.* at 775.

order.[105] That case, *Valley Bank of Nevada v. Superior Court*, has led to the application of article I, section 1 in a variety of civil litigation contexts.

Ten years after *White v. Davis* the Supreme Court again considered the application of article I, section 1 to informational privacy, this time arising out of an attempt by the City of Long Beach to administer polygraph tests to a group of employees working in a boat launch area where thefts had occurred from launch machines.[106] In a suit for injunctive relief brought by the labor union which represented the employees, the court held that the City's orders that the employees submit to polygraph examinations as a condition of their employment "intruded upon the employees' constitutionally protected zone of individual privacy and also violated their right to equal protection under the law."[107] The equal protection analysis was triggered by the fact that while separate state statutes prohibited compulsory polygraph examinations for private employees and for public safety officers, the statutory scheme left other public employees unprotected.[108] The privacy analysis focused on article I, section 1:

> If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality. . . . A polygraph examination is specifically designed to overcome this privacy by compelling communication of "thoughts, sentiments, and emotions" which the examinee may have chosen not to communicate.[109]

Since the polygraph examinations intruded upon the fundamental right of privacy, the burden was on the City to demonstrate that the classifications resulting from the statutory scheme were "justified by a compelling governmental interest and that the distinctions are necessary to further that purpose."[110] The court concluded the City had not met that burden.

In 1994 the California Supreme Court for the first time confronted directly the question whether state action was required for the application of article I, section 1, or whether it protected privacy interests against

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105 Valley Bank of Nevada v. Super. Ct., 15 Cal. 3d 652 (1975).

106 Long Beach City Emps. Ass'n v. City of Long Beach, 41 Cal. 3d 937 (1986).

107 *Id.* at 956.

108 *Id.*

109 *Id.* at 944.

110 *Id.* at 948.

nongovernmental entities as well. In *White v. Davis*, the court had listed, as one of the "mischiefs" against which the privacy amendment was aimed, the "overbroad collection and retention of unnecessary personal information *by government and business interests,*"[111] and subsequent decisions by the Court of Appeal, relying upon the frequent use of the phrase "government and business" in the ballot argument in favor of the amendment, had consistently concluded that the constitutional right of privacy could be enforced against private parties.[112] In *Hill v. National Collegiate Athletic Association* (NCAA) the court confirmed that reading, holding that the athletic association's drug testing program for athletes was subject to article I, section 1 privacy right analysis.[113] Observing that the language of the section was not determinative of the issue, the court turned to the ballot arguments as the best evidence of voter intent.[114] It found the repeated references to "information-amassing practices of both 'government' and 'business,'" as well as references to credit card purveyors, insurance companies, and private employers,[115] to be persuasive evidence of how the voters were likely to have understood the measure.[116] The court noted that "[i]n its day-to-day operations, the NCAA is in a position to generate, retain, and use personal information about student athletes and others. In this respect, it is no different from a credit card purveyor, an insurance company, or a private employer . . . ."[117]

The NCAA had pointed out that the court had assumed a state action requirement for application of certain other provisions in article I,

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111 *White*, 13 Cal. 3d at 775 (emphasis added).

112 *See* Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829–830 (1976) (improper disclosure of academic transcript by private university); Wilkinson v. Times-Mirror Corp., 215 Cal. App. 3d 1034, 1041–42 (1989) (publishing company's preemployment drug testing program).

113 Hill v. NCAA, 7 Cal. 4th 1, 20 (1994).

114 *Id.* at 16.

115 "Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a driver's license, a dossier is opened and an informational profile is sketched." *Id.* at 59 (quoting Ballot Pamp., Proposed Stats. & Amends. to Cal. Const. with arguments to voters, Gen. Election 26 (Nov. 7, 1972)).

116 *Id.* at 16–19. *Cf.* J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 Pepp. L. Rev. 327 (1992) (arguing that the history in the Legislature, which made no reference to private application, ought to govern).

117 *Hill*, 7 Cal. 4th at 19.

including the prohibition against unreasonable search and seizure[118] and the guarantee of due process,[119] and argued that the same requirement should apply to the privacy provision in section 1, but the court rejected that argument, noting that "those decisions were not premised on the *mere location* of the respective provisions in the constitutional text, but on their distinct language and histories."[120]

So far the opinion was unanimous, but matters became more contested when the court moved to consider how the privacy provision was to apply. The Court of Appeal, following language in *White v. Davis* and subsequent cases, which in turn followed the language of the ballot argument, had applied a "compelling interest" test, and held on that basis that the NCAA's program was unconstitutional.[121] But Chief Justice Lucas, joined by four other justices, rejected that test as being overly rigid, and not compelled either by the ballot argument or by prior case law except "[w]here the case involves an obvious invasion of an interest fundamental to personal autonomy, *e.g.*, freedom from involuntary sterilization or the freedom to pursue consensual familial relationships." In other cases, a general balancing test was to be used.[122]

In addition to calling for a balance of interests, the majority created an analytical schema by which the balance was to be determined. The plaintiff, in order to establish a constitutional violation, would have to show three things: (1) the identification of a "specific, legally protected privacy interest"; (2) a "reasonable expectation of privacy," taking into account the surrounding circumstances; and (3) a "serious" invasion of the plaintiff's privacy interests.[123] Upon such a showing, the defendant could present evidence of "competing interests," and the plaintiff would then have opportunity to

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118 People v. Zelinski, 24 Cal. 3d 357, 365 (1979).

119 Garfinkle v. Super. Ct., 21 Cal. 3d 268, 281–282; Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 366 (1974).

120 *Hill*, 7 Cal. 4th at 19. Justices Panelli, Arabian, and Baxter joined the chief justice's opinion. Justice Kennard wrote separately, agreeing with the majority's analysis but disagreeing with the disposition; she would have remanded to the lower court to give the plaintiffs opportunity to litigate on the basis of the court's newly established standards. *Id.* at 58 (Kennard, J., concurring and dissenting).

121 Hill v. NCAA, 18 Cal. App. 4th 1290, 1304 (1990) (citing *White*, 13 Cal. 3d at 776).

122 *Hill*, 7 Cal. 4th at 34, 37.

123 *Id.* at 35–37.

rebut by demonstrating the existence of less intrusive alternatives.[124] Moreover, the striking of the balance might be different in the case of a private entity, the majority said, because government action poses greater danger to freedoms, and because an individual generally has greater choice and alternatives in dealing with private actors than when dealing with governments.[125] In the end, after a long and somewhat meandering opinion, the court upheld the NCAA's drug testing program as constitutional.[126]

Hill appeared to redraw the balance suggested by prior case law. In lieu of a "compelling interest" standard which placed the burden of justifying an intrusion on privacy upon the defendant, *Hill* created a series of obstacles which a plaintiff would have to overcome in order to require the defendant to come forward with justification. Justice George, while concurring in the result, objected strongly both to the court's rejection of the "compelling interest" standard and to the court's "entirely new legal framework that, from all appearances, has no precedent in any past constitutional decision of this state or any other jurisdiction."[127] He found the first "element" — the identification of a legally protected privacy interest — to be unobjectionable, but he insisted that requiring the plaintiff to establish that his expectation of privacy was "reasonable" and "serious" before the defendant was under an obligation to provide justification introduced an "undesirable and unfortunate inflexibility into the constitutional analysis that, if faithfully applied, is likely to bar privacy claims that properly should be permitted to go forward."[128] Justice Mosk also dissented. Applying a "compelling interest" standard, he would have found the NCAA testing program unconstitutional.[129]

The role of the tripartite test created in *Hill* was clarified several years later in another drug-testing case, *Loder v. City of Glendale*.[130] The City, as part of its "war on drugs," was insisting that all job applicants and all candidates for promotion be subjected to urinalysis testing for marijuana

124 *Id*. at 37–38.
125 *Id*. at 38–39.
126 *Id*. at 57.
127 *Id*. at 66 (George, C.J., dissenting in part).
128 *Id*.
129 *Id*. at 110 (Mosk, J., dissenting).
130 Loder v. City of Glendale, 14 Cal. 4th 846 (1997).

and alcohol. Plaintiff Lorraine Loder, in a taxpayer suit, sought to enjoin expenditure of funds for the program on the basis that it violated both federal and state constitutions. The lead opinion, by Chief Justice George, found it unnecessary to consider the state privacy provision as to the suspicionless testing of current city employees applying for promotion, since that part of the program was held to violate Fourth Amendment standards declared by the U.S. Supreme Court.[131] Concluding, however, that the program as applied to job applicants would not violate the Fourth Amendment as construed by the high court, Chief Justice George proceeded to analyze the issue under the California privacy provision. In the process of doing so he restated and impliedly accepted the *Hill* limitations on the requirement for a showing of "compelling interest" to justify invasions of privacy; but at the same time he made clear that the three "elements" set forth in *Hill* (legally protected privacy interest, reasonable expectation of privacy, and serious invasion) "should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet [before] consideration of the legitimacy or importance of a defendant's reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice."[132] Rather, they should be viewed "simply as 'threshold elements' that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest," but not to "eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy

[131] *Id.* at 887. The opinion's explanation for considering the federal Constitution first was that there were pertinent federal precedents, whereas the state court had not previously addressed the issue of employment-related testing under the state Constitution. *Id.* at 866. For both principled and practical reasons I beg to differ. There is in principle no justification for reaching out to decide a federal constitutional issue if the issue can be resolved on the basis of state law, any more than there is for reaching out to decide a constitutional issue if the matter can be resolved through statutory interpretation. And as a practical matter, decision based on the federal Constitution where the case could be resolved on the basis of state law leaves open the possibility that the U.S. Supreme Court will disagree and remand for consideration under the state Constitution, resulting in needless appellate litigation; and in any event the failure to confront interpretation of the state Constitution inhibits the development of state constitutional law.

[132] *Id.* at 890–91.

interest."[133] And in a footnote, the opinion stated that the same analytical framework would apply to private entities, though "involvement of a governmental entity might affect the degree of the intrusion imposed by particular conduct and the importance of the interests served by the conduct."[134]

By that standard, the City of Glendale's drug testing program as applied to applicants was deemed to have met the *Hill* threshold, but the chief justice's lead opinion went to hold that it did not violate the privacy provision of article I, section 1, because an employer has a "substantial interest in conducting suspicionless drug testing of a job applicant," and drug testing of applicants as part of an otherwise lawful preemployment medical examination represents "much less of an intrusion on reasonable expectations of privacy than does drug testing in other contexts."[135] The chief justice's opinion was joined only by Justice Werdegar. Justice Kennard, concurring and dissenting, would have held the suspicionless testing of applicants to violate the Fourth Amendment, without passing on the California Constitution,[136] and Justice Mosk, applying a "compelling interest" standard, would have held the testing of applicants to violate both constitutions.[137] Justices Chin, Baxter, and Brown dissented, finding both parts of the City's drug testing program valid.[138]

Chief Justice George's "clarification" of the three *Hill* "elements" was subsequently confirmed in *Sheehan v. San Francisco 49ers,*[139] but disagreement continued over application of the clarified analysis. Plaintiffs, who were longtime 49ers season ticket holders, brought suit complaining that the National Football League's recently instituted policy of requiring patrons at their football games to submit to a patdown search before entering the stadium violated their privacy rights under the California Constitution. The trial court sustained the defendant's demurrer without leave to amend, and the Court of Appeal affirmed on the ground that the plaintiffs

133 *Id.* at 893.
134 *Id.*
135 *Id.* at 897–98.
136 *Id.* at 918–22 (Kennard, J., concurring and dissenting).
137 *Id.* at 900 (Mosk, J., concurring and dissenting).
138 *Id.* at 922 (Chin, Baxter, and Brown, JJ., dissenting).
139 Sheehan v. S.F. 49ers, 45 Cal. 4th 992 (2009).

consented to the pat-down by not simply walking away. The Supreme Court unanimously reversed, but in separate opinions which reflected continuing tension over how to deal with privacy claims. The lead opinion by Justice Chin, joined by Justices Kennard, Baxter, and Corrigan, found that the record, which consisted in its entirety of the complaint and the demurrer, did not contain enough information to establish as a matter of law that the complaint fails to state a cause of action,"[140] but went on to suggest a variety of ways in which the 49ers might nevertheless prevail. While accepting the lower court's premise that a person who attends an entertainment event may be deemed to consent only to security measures that are "reasonable under the circumstances," and not to "any security measures the promoters may choose to impose no matter how intrusive or unnecessary," the record was not sufficient to establish what the circumstances were.[141] Observing that in the absence of an answer the nature and weight of "competing social interests" could not be determined, the opinion noted that "the pursuit of safety, like the pursuit of privacy, is a state constitutional right."[142] And while it is relevant to consider the existence of less restrictive alternatives, a private entity is not required to show that it has adopted the least restrictive alternative: "The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties."[143] Therefore, the court concluded, further factual inquiry was necessary.

Justice Werdegar, joined by Justice Moreno and Chief Justice George, took the majority opinion to task for appearing to prejudge the outcome of the case.[144] Resolution of the case on demurrer, she pointed out, meant not only that the defendants had not yet submitted their justifications for the search; it meant also that plaintiffs did not have the opportunity to rebut asserted justifications or to propose less intrusive alternatives.[145] She criticized the majority for "delving into matters that are beyond our province"

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140 *Id.* at 996.

141 *Id.* at 1001.

142 *Id.* at 1000.

143 *Id.* at 1002.

144 *Id.* at 1005 (Werdegar, J., concurring).

145 *Id.* at 1004.

in ruling on a demurrer, including its allusion to the state Constitution's "safety" provision, and its dicta on the respective roles of the courts and private entities in evaluating measures alleged to infringe on privacy: "I am unwilling to substitute for the constitutional right the people [who voted for the privacy amendment] endorsed a reflective faith in the governmental and private actors they deemed wanting."[146] And, while the majority simply "assumed" the Sheehans had sufficiently alleged a serious invasion of privacy interests," she and her concurring colleagues were prepared to say it was clear they had done so.[147]

The balancing approach outlined in *Hill* as clarified in *Loder* and *Sheehan* has been invoked by the court in subsequent cases in a variety of contexts. For example, in *Pioneer Electronics v. Superior Court*, in the context of a consumers' right class action involving allegedly defective DVD players, the court held that plaintiffs were entitled, precertification, to the names and contact information of other customers who had complained to the seller provided the other customers were given notice and opportunity to seek protective orders, and that (contrary to the decision of the Court of Appeal) article I, section 1 did not require their affirmative consent.[148] The Supreme Court, emphasizing the "broad discretion" of the trial court in evaluating the application of *Hill* criteria, upheld the trial court's determination that the customers had no reasonable expectation that the information would be kept private in such a context unless they affirmatively consented; that there was no "serious" invasion of privacy; and that in any event the plaintiffs' interest in obtaining contact information as well as the public interest in supporting consumer rights litigation outweighed arguments for requiring affirmative assent.[149] Similarly, in *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court*, the court held that the public's interest in knowing the salaries paid to public employees outweighed the privacy interests of the employees, with the result that a newspaper publisher was entitled, under the California Public Records Act, to obtain the names, job titles and gross salaries of

146 *Id.* at 1005–06.

147 *Id.* at 1006–07.

148 Pioneer Elec. v. Super. Ct., 40 Cal. 4th 360, 374–75 (2007).

149 *Id.* at 371, 373–75.

city employees who earned at least $100,000 in a specified fiscal year.[150] A pending case, involving the right of a union representing public employees to obtain the names and addresses of employees in the bargaining unit who are not union members, is likely to shed further light on the balancing approach.[151]

C. INDIVIDUAL AUTONOMY UNDER THE CALIFORNIA CONSTITUTION

The line between "privacy" in the sense of protecting information about one's self and one's thoughts from the scrutiny of others and "privacy" in the sense of protecting against intrusion upon one's bodily integrity and personal autonomy, or personhood, can be a blurry one. It was blurry for the U.S. Supreme Court in and after *Griswold*, and it has been a bit blurry for the California Supreme Court as well. The ballot argument in favor of the privacy initiative refers broadly to the right of privacy as "the right to be left alone . . . . It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose."[152] The legislative history of what became the ballot proposition contains references to the federal constitutional right of privacy, including *Griswold* and its progeny, but the ballot arguments do not.[153]

Nonetheless, the California Supreme Court, in *City of Santa Barbara v. Adamson*, with little analysis, concluded that "privacy" under article I, section 1 included a right "to live with whomever one wishes or, at least, to live in an alternative family with persons not related by blood, marriage or adoption," so as to require a compelling governmental interest in order to justify a zoning ordinance which prohibited more than five persons from living together in a dwelling zoned for "single family" unless they were so

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150 Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Super. Ct., 42 Cal. 4th 319 (2007). *See also* Hernandez v. Hillsides, Inc., 47 Cal. 4th 272 (2009).

151 County of Los Angeles v. L.A. Cnty. Emp. Relations, 192 Cal. App. 4th 1409 (2011), *petition for review granted*, 262 P.3d 853 (U.S. June 15, 2011).

152 Ballot Pamp., Proposed Stats. & Amends. to Cal. Const. with arguments to voters, Gen. Election 26 (Nov. 7, 1972).

153 *See* Kelso, *supra* note 116, at 468, 473, 475, 477; *Hill v. NCAA*, 7 Cal. 4th at 28.

related.[154] In doing so, the court virtually ignored federal Supreme Court precedent which had reached a different conclusion under the federal Constitution.[155] And in *Committee to Defend Reproductive Rights v. Myers* the court held that "privacy" included a woman's right to choose to have an abortion.[156]

In fact, three years before the California privacy amendment and four years before *Roe v. Wade*, the California Supreme Court in *People v. Belous* had recognized *Griswold* as standing for a principle that embraced reproductive rights.[157] Thus, when the court came to consider the validity under the state Constitution of a restriction on funding of abortions under Medicaid, in *Myers*, the attorney general did not challenge the proposition that under article I, section 1 "all women in this state — rich and poor alike — possess a fundamental right to choose whether or not to bear a child."[158] He argued, rather, that the state court should follow the lead of the U.S. Supreme Court in *Harris v. McRae,* holding that government violates no federal constitutional precept when it simply declines to extend a public benefit to women who wish to exercise their constitutional right by having an abortion.[159]

In rejecting the attorney general's argument, Justice Tobriner's opinion for the majority reconfirmed the proposition that the court has a "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," and that in fulfilling that duty "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."[160]

Among the governing principles of California law was the doctrine of unconstitutional conditions, to the effect that when government excludes

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154 City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130–31 (1980).

155 Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). *See also Adamson*, 27 Cal. 3d at 139–40 (Manuel, J., dissenting).

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

157 People v. Belous, 71 Cal. 2d 954, 963 (1969).

158 *Myers*, 29 Cal. 3d at 262 (discussing Harris v. McRae, 448 U.S. 297 (1980)).

159 *Id.* at 257.

160 *Id.* at 261–62.

from benefit programs potential recipients solely on the basis of their exercise of constitutional rights in a manner the state does not approve, or does not wish to subsidize, it bears the burden of demonstrating (1) that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege; (2) that the utility of imposing the condition manifestly outweighs any resulting impairment of constitutional rights; and (3) that no less offensive alternatives are available. This doctrine had been invoked previously in *Danskin v. San Diego Unified School District*[161] to strike down exclusion of subversive groups from the use of school buildings for public meetings, and was developed in *Bagley v. Washington Township Hospital District,*[162] holding unconstitutional a condition of employment which prohibited employees of a local agency from taking part in campaigns relating to the recall of an elected official of the agency, and in numerous other cases as well.[163]

In *Myers*, Tobriner noted that the federal rule was different. "[F]or at least the past decade," he observed, "the federal decisions in this area have not been a reliable barometer of the governing California constitutional principles."[164] The U.S. Supreme Court's reasoning in *McRae*, to the effect that the exclusion of abortion benefits was permissible because it left an indigent woman no worse off than if there were no federally provided health care, "cannot be reconciled" with this line of cases. Justice Tobriner concluded that the statutory restrictions under consideration failed to meet any of the *Danskin–Bagley* requirements. First, the restriction, which had the effect of preventing poor women from obtaining an abortion to end a pregnancy which could threaten their health or even life, had no relationship to the declared primary purpose of the Medi-Cal program "to alleviate the hardship and suffering incurred by those who cannot afford needed medical care."[165] Second, the utility of imposing the restriction did not outweigh the "severe impairment" of the right of procreative choice protected by article I, section 1, which is fundamental because of its relationship to the "woman's health and personal bodily autonomy, and

161 Danskin v. San Diego Unified Sch. Dist., 28 Cal. 2d 536 (1946).

162 Bagley v. Wash. Twp. Hosp. Dist., 65 Cal. 2d 499 (1966).

163 *See Myers*, 29 Cal. 3d at 264–65 nn.7–14.

164 *Id.* at 267.

165 *Id.* at 271–72.

her right to decide for herself whether to parent a child."[166] Indeed, it was "doubtful whether the restrictions in this case serve any constitutionally legitimate, let alone compelling, state interest."[167] And third, even if the restriction were viewed, as urged by the attorney general, as an effort to aid poor women who have already decided to bear a child but cannot afford the expenses of childbirth, that goal could be readily achieved without burdening their right of procreative choice.[168] While the state is not obligated to fund the exercise of constitutional rights, "once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion."[169]

In 1997, in *American Academy of Pediatrics v. Lungren*, the court was again challenged to depart from federal precedent in the application of the privacy amendment, this time to a state statute requiring pregnant minors to secure parental consent or judicial authorization before obtaining an abortion.[170] The U.S. Supreme Court had upheld similar statutes against federal constitutional attack, on the ground that they did not "unduly burden" the right to an abortion, and the California statute was modeled on the Pennsylvania statute which had been upheld by the federal court.[171] The California Supreme Court initially upheld the state statute as well, by a vote of 4–3,[172] but before that decision became final the composition of the court changed: Justices Lucas, Mosk and Arabian, all of whom had been part of the majority, left the court to be replaced by Justices Chin, Werdegar, and Brown; and while Justice Brown remained with what had been the majority view, Justice Werdegar joined Chief Justice George and Justices Chin and Kennard to produce a contrary holding. Justice Kennard,

166 *Id.* at 273–82.

167 *Id.* at 276.

168 *Id.* at 283.

169 *Id.* at 284–85. *See also In re* Valerie N., 40 Cal. 3d 143 (1985) (holding that the right to procreative choice protected by article I, section 1 includes the right to be sterilized, through the proxy choice of a conservator, as a necessary means of preventing conception).

170 Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307 (1997).

171 *Id.* at 324 n.11 (listing decisions in which the U.S. Supreme Court has considered parental notice and consent provisions).

172 Am. Acad. of Pediatrics v. Lungren, 12 Cal. 4th 1007 (1996).

concurring in the result, wrote separately, leaving George, joined by Chin and Werdegar, to write the plurality controlling opinion.

Chief Justice George's plurality opinion emphatically rejected the need to follow federal precedent, emphasizing that the California Constitution "is, and always has been, a document of independent force," subject to different interpretation, "even when the terms of the California Constitution are textually identical to those of the federal Constitution."[173] As related to the case at hand there was a "clear and substantial difference" in the applicable text, since the state Constitution, unlike the federal, contains explicit protection for "privacy."[174] And, in a series of cases that included *Myers,* it had been established that "in many contexts the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."[175]

Turning to California law, the court found that the plaintiffs' privacy claim clearly met the "threshold elements" set forth in *Hill. Myers* had made clear that the "autonomy privacy" protected by article I, section 1 includes a pregnant woman's right to choose whether to have an abortion, and while the status of plaintiffs as minors was relevant in assessing the state's justification for the statute, it did not defeat their threshold showing of a "specific, legally protected privacy interest."[176] As a general matter minors had been held entitled to constitutional protection in other contexts; article I, section 1 specifically refers to "all people" as having the rights specified by that provision; and the ballot argument in support of the privacy amendment referred to the privacy rights of "every man, woman, and child in this state."[177] Nor did the general statutory rule requiring a

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[173] *Am. Acad. of Pediatrics*, 16 Cal. 4th at 325 (citing *People v. Brisendine*, 13 Cal. 3d 528 (1975), and *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990)).

[174] *Id.* at 326.

[175] *Id.* In addition to *Myers*, the court referred to *Hill v. NCAA*, 7 Cal. 4th 1, 20 (holding that the state Constitution, unlike the federal, applies to private as well as state action), to *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 134 (1980) (holding that the state right of privacy protects the right to reside with unrelated persons), and to numerous cases after *Myers* in which the court emphasized the broader protection afforded by the state Constitution. *See supra* notes 113–29, 154–55, and accompanying text.

[176] *Am. Acad. of Pediatrics*, 16 Cal. 4th at 332, 337.

[177] *Id.* at 334.

minor to obtain parental consent for medical care or the existence of numerous abortion/parental consent statutes in other states demonstrate that the plaintiffs' expectation of privacy was not "reasonable," since it "plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right."[178] Finally, the plaintiffs' showing was sufficient to meet *Hill*'s third threshold requirement of a "serious invasion of a privacy interest," since the impact of the statute upon a pregnant minor was clearly more than "de minimis or insignificant."[179]

Because the statute impinged upon an "interest fundamental to personal autonomy," it could be justified under California law only by the demonstration of a "compelling" state interest which could not be served by less intrusive means.[180] The U.S. Supreme Court had declined to apply strict scrutiny to a similar statute on the ground that the state has a heightened interest in regulating the activities of minors;[181] but Justice George's opinion rejected that analysis, reasoning that "[b]ecause the statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, in our view it is not appropriate *additionally* to lower the applicable constitutional standard under which the statute is to be evaluated simply because the privacy interests at stake are those of minors."[182]

In assessing the existence of a "compelling" state interest, the court needed to resolve a conflict with respect to the facts asserted in justification of the statute. The statute itself contained legislative findings, borrowed practically verbatim from the findings reflected in other state statutes which had been upheld by the U.S. Supreme Court, to the effect that the psychological consequences of an abortion on a minor can be severe, that minors often lack the ability to make fully informed choices, that parents

178 *Id.* at 338–39 (emphasis in original).

179 *Id.* at 339.

180 *Id.* at 340.

181 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976).

182 *Am. Acad. of Pediatrics*, 16 Cal. 4th at 342.

ordinarily possess information that would be helpful to a physician in making a judgment about abortion, and that parents may better ensure that a daughter who has had an abortion receives adequate medical treatment.[183] But the trial court had held extensive hearings and made findings, based on the evidence introduced, to the effect that the statute would not serve, but rather would impede the state's interests in protecting the health of minors and enhancing the parent-child relationship. "As a general rule," the Supreme Court said, "it is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment," but "[w]hen an enactment intrudes upon a constitutional right . . . greater judicial scrutiny is required."[184] Taking note of "numerous, analogous statutory provisions authorizing a minor, without parental consent, to make medical and other significant decisions with regard to her own and her child's health and future, as well as the overwhelming evidence introduced at trial," the court concluded that the state had failed to establish that the statute was necessary to further the otherwise compelling interests asserted in its support.[185]

Without doubt the most controversial decision recognizing a fundamental right has been *In re Marriage Cases*, involving the constitutionality of a statute prohibiting marriage between persons of the same sex.[186] While its principal focus was on the state Constitution's Equal Protection Clause, Chief Justice Ron George's opinion for the majority began by addressing the right to marry, which had been declared in previous cases to be fundamental,[187] and concluded that under both article I, section 1 (the right to privacy) and under article I, section 7 (due process of law) there exists a fundamental right to marry a person of one's choice, and that this right includes a right to state recognition of the marital relationship — a right on the part of same-sex couples as well as heterosexual couples to establish "an *officially recognized and*

183 *Id.* at 324–25.

184 *Id.* at 348–49.

185 *Id.* at 356–57.

186 *In re* Marriage Cases, 43 Cal. 4th 757 (2010).

187 *E.g., In re* Valerie N., 40 Cal. 3d at 161 ("The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests. These rights are aspects of the right to privacy which . . . is express in section 1 of article I of the California Constitution" (citations omitted)); *Williams v. Garcetti*, 5 Cal. 4th 561, 577 (1993) (referring to "rights not explicitly listed in the Constitution [as] the right 'to marry, establish a home and bring up children'").

protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage."[188] Later in its opinion the court relied upon the fundamentality of the right of homosexual couples to marry as well as the "suspect" nature of the classification involved to hold that "strict scrutiny" was appropriate, and that the limitations of the statute could not be justified by a compelling governmental interest.[189]

II. EQUALITY UNDER THE CALIFORNIA CONSTITUTION

The idea of equality under the law, we have come to learn, is complicated. Treating people and groups of people differently is essential to most legislation, and not all differential treatment gives rise to justifiable claims of constitutional discrimination. Implicit in judicial application of a general equality principle are two fundamental issues: what sort of justification is required in order to support treating particular individuals, or groups of individuals, in a different manner from other individuals or groups; and to what extent is the existence of that justification a matter for determination by the courts, rather than by the Legislature? Within these broad questions lurk other, particular, questions. When the justification for a classification depends upon factual assumptions, to what extent and in what manner should courts undertake to determine, independently of the Legislature, the existence of such "constitutional facts"? Under what circumstances will supportable generalizations about a group justify treating that group differently, in the face of individual differences? Should courts inquire into the actual motivations behind a statute, and if so, how? These, and other related questions, have become accepted components of modern equal protection analysis, and in the U.S. Supreme Court have given rise to "levels of scrutiny," dependent upon concepts like "fundamental rights" and "suspect class."

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188 *Marriage Cases*, 43 Cal. 4th at 781 (emphasis in original).

189 *Id.* at 843, 847, 854 (concluding that sexual orientation is a suspect class; that fundamental interests are involved, further requiring strict scrutiny; and that the state's interest is not a compelling one for equal protection purposes).

But much of this modern analysis is fairly recent. The federal Constitution contained no mention of equality prior to the adoption of the Fourteenth Amendment, and while the U.S. Supreme Court began to develop jurisprudence under the Due Process Clause in *Lochner,* it took nearly a century before the U.S. Supreme Court came to address the meaning of the Equal Protection Clause in any significant way.[190] Meanwhile state courts, including the California Supreme Court, were left to their own devices, operating with whatever language their state constitutions provided. It should not be a surprise that their decisions, from a more modern perspective, appear to be a bit primitive and unrefined.

Article I, section 7 of the California Constitution, in language patterned after the Due Process Clause of the Fourteenth Amendment to the federal Constitution, provides in part: "A person may not be . . . denied equal protection of the laws . . . ."[191] But that is a relatively recent addition to the state Constitution, dating from a general constitutional revision in 1974. Prior to that time, the equality principle was represented by other, even more inscrutable, provisions.

Article I, section 11 of the 1849 Constitution provided that "[a]ll laws of a general nature shall have a uniform operation"; and this provision, slightly modified, is retained in the present Constitution as article IV, section 16(a).[192] The 1879 Constitution added a provision prohibiting "local or special laws" in thirty-two enumerated areas and "[i]n all other cases

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190 *Cf.* Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897) (invalidating statute requiring railroads, but not other defendants, to pay attorneys' fees to successful plaintiffs in certain cases). In 1911, just four years after the Supreme Court gave an expansive reading to the Due Process Clause in *Lochner*, the court said of the Equal Protection Clause that a classification is presumed valid "if any state of facts reasonably can be conceived to sustain it." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911). As late as 1927, Justice Holmes referred to equal protection as "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200 (1927).

191 Cal. Const. art. I, § 7.

192 Cal. Const. of 1849, art. I, § 11; Cal. Const. art. IV, § 16(a). That section now reads: "All laws of a general nature have uniform operation." The word "shall" was deleted as part of a 1966 revision, but the change appears to have made no difference in interpretation. *See, e.g.,* People v. Soto, 171 Cal. App. 3d 1158 (1985) (asserting that article IV, section 16(a) "will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries").

where a general law can be made applicable."[193] That provision, streamlined, now appears as article IV, section 16(b).[194] The 1879 Constitution also added a "privileges and immunities" clause, presently contained in article I, section 7(b).[195] In addition to these general provisions, the 1879 Constitution contained a specific prohibition of discrimination on account of sex.[196] These, before 1974, constituted the textual basis for protection of equality.[197]

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193 CAL. CONST. of 1879, art. IV, § 25.

194 CAL. CONST. art. IV, § 16(b) ("A local or special statute is invalid in any case if a general statute can be made applicable.").

195 CAL. CONST. of 1879, art. I, § 21; CAL. CONST. art. I, § 7(b). That section now reads: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.") A similar provision was contained in the Iowa Constitution upon which article I, section 11 of the California Constitution of 1849 was based, but for reasons unclear the framers of that Constitution omitted it in 1849. *See* the opinion of Justice Sanderson in *Brooks v. Hyde*, 37 Cal. 366, 377–78 (1869), suggesting that the first clause (uniform operation) considered by itself was "unintelligible," and its meaning only clarified by the second clause (privileges and immunities); so that he found it a "little surprising" that the 1849 delegates, if unwilling to accept both clauses, should choose the former.

196 "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." CAL. CONST. of 1879, art. XX, § 18. In 1974 the language was amended to its current form: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." CAL. CONST. art. I, § 8.

197 While these provisions recognized the principle of equality in some contexts, in other contexts California's constitutional history was not so benign. The 1879 Constitution reflected the prevailing anti-Chinese bias of the Workingmen's Party, calling upon the Legislature to take steps to protect the state "from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or . . . otherwise dangerous . . . to the . . . State, and to impose conditions upon which persons may reside in the state, and to provide the means and mode of their removal from the state . . . ." CAL. CONST. of 1879, art. XIX, § 1 (repealed 1952). Section 4 of that article declared that "Asiatic coolieism is a form of slavery [and] all contracts for coolie labor shall be void." *Id.* § 4. In addition, and more directly, section 2 prohibited corporations from employing "any Chinese or Mongolian," and section 3 prohibited Chinese from employment on public works. *Id.* §§ 2, 3. These and similar provisions were quickly invalidated by the federal courts. *See, e.g., In re* Parrott, 1 F. 481 (C.C.D. Cal. 1880) (voiding section 2); Baker v. City of Portland, 2 F. Cas. 472 (C.C.D. Or. 1879) (No. 777) (voiding a similar Oregon statute).

But what is a "general law," so as to require that it have "uniform operation"? When, in 1861, the Legislature saw fit to enact a statute directing a trial court to order a change in venue for a particular criminal defendant from San Francisco to Auburn, the Supreme Court in *People ex rel. Smith v. Judge of the Twelfth District* held the law did not violate this provision because it was a special law, not a law of a "general nature," and that the Legislature "has the plenary power to pass special laws where special reasons exist."[198] The requirement for uniformity, the court said, is only that the law apply equally "under the same facts," not where the facts are different.[199] And in rejecting a challenge to the lack of "uniformity" in a Sacramento ordinance which banned women from saloons after midnight, the court observed: "It was not intended that all differences founded upon class or sex should be ignored. This must be so from the very nature of things, and from the universal custom and practice of law-makers."[200]

After the 1879 changes, banning "local or special laws . . . where a general law can be made applicable"[201] and prohibiting denial of "privileges and immunities,"[202] the court began to grapple with the questions posed by these changes: What makes a law "local or special"? What determines whether a general law "can be made applicable"? And how are the "privileges and immunities" that are entitled to protection defined? Decisions tended to deal with these questions on an *ad hoc* and somewhat formalistic basis. A statute making it a misdemeanor for a person to engage in the business of baking between 6 p.m. on Saturday and 6 p.m. on Sunday was invalid as a "special law . . . for the punishment of crimes and misdemeanors" where a general law (*i.e.,* one banning all Sunday work) could (arguably) be made applicable.[203] But a statute which banned business on Sundays while exempting "hotels, boarding houses, barber shops, baths,

198 People *ex rel.* Smith v. Judge of the Twelfth Dist., 17 Cal. 547, 554 (1861).

199 *Id.* at 555. The court also held, rather remarkably, that the law did not violate separation of powers. *Id.* at 556–62.

200 *Ex parte* Smith, 38 Cal. 702, 711 (1869); *see also supra* notes 32–34 and accompanying text.

201 Cal. Const. of 1879, art. IV, § 25.

202 Cal. Const. of 1879, art. I, § 21.

203 *Ex parte* Westerfield, 55 Cal. 550–51 (1880) (citing Cal. Const. of 1879, art. IV, § 25 and further stating that "[i]f there be authority to restrain the labor on some one day it must be, if at all, under a general law restraining labor on that day") .

markets, restaurants, taverns, livery stables or retail drug stores" was a "general law, uniform in its operation," and granted no "privileges or immunities" in violation of the state Constitution.[204] The earlier case was distinguished as involving a "special law."[205] And a Sunday closing law applying only to barber shops and bath-houses was invalid as a special law and a denial of privileges and immunities.[206]

Meanwhile, a law that required certain categories of cities to negotiate with property owners before exercising the power of eminent domain while allowing other cities to exercise that power was an invalid "special law,"[207] but a law banning the sale of alcoholic beverages to Indians was "general and uniform in its operation" because "it affects in the same manner all persons belonging to the class to which it refers."[208] That, however, hardly addressed the underlying objection to the law, which was that it singled out Indians as a class from all other people. The court responded to that objection by saying that the Legislature had power to restrict the sale of alcoholic beverages to "certain classes of persons who are peculiarly liable to be injured or demoralized" by such indulgence, concluding:

> Whatever may be true in respect to particular individuals of that race, it is certainly true that Indians, as a class, are not refined and civilized in the same degree as persons of the white race; and for that reason are less subject to moral restraint, and, therefore, not only less able to resist the desire for such liquors, but also more liable to be dangerous to themselves or others when under the influence of intoxicating liquors. It was, doubtless, in view of considerations like these that, in the judgment of the legislature, it was thought wise to give to persons of the Indian race, as well as the community in which they move, the protecting influence of this statute.[209]

Although the state "privileges or immunities" clause has sometimes been cited as a basis for invalidating legislation, along with the prohibition

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204 *Ex parte* Koser, 60 Cal. 177, 188, 189–90 (1882). *Accord In re* Sumida, 177 Cal. 388, 392–93 (1918) (upholding an ordinance similar to that in *Ex parte Koser*).

205 *Ex parte* Koser, 60 Cal. at 191–92.

206 *Ex parte* Jentzsch, 112 Cal. 468 (1896).

207 City of Pasadena v. Stimson, 91 Cal. 238, 251–52 (1891).

208 People v. Bray, 105 Cal. 344, 348 (1894).

209 *Id.* at 349.

on special laws,[210] it has seldom received independent focus or analysis in the opinions of the court.

A. "REASONABLE" VS. "ARBITRARY" CLASSIFICATIONS

In 1894, in *Darcy v. Mayor of San Jose,* the Supreme Court offered a bit of coherence to the analysis of legislative classifications.[211] At issue was a statute requiring the mayor and common council of "all cities" with a population between 10,000 and 25,000 to fix the salaries for police officers and captains at no less than $100 per month, not to exceed $125 per month. Darcy, a police officer in San Jose, brought suit to enforce the statute. As against the City's argument that the statute in question was a prohibited "special law," Darcy maintained that it was in fact a "general law" because it applied to all cities within the class.[212] The court, rejecting Darcy's argument, observed that "by this logic no limitation is imposed upon the power of the legislature by the numerous constitutional provisions against special and local laws. . . . [I]f they can be thus easily evaded, how ineffectual and farcical they are."[213] Instead, the court quoted from and adopted as a "correct statement of the rule" a decision of the New Jersey Supreme Court, applying a similar provision in that state's constitution:

> There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.[214]

There being "no rational ground" for the classification at issue, it was "arbitrary and unauthorized."[215]

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210 *E.g., Ex parte* Jentzsch, 112 Cal. 468.

211 Darcy v. Mayor of San Jose, 104 Cal. 642 (1894).

212 *Id.* at 644–45.

213 *Id.* at 645.

214 *Id.* at 646 (quoting State *ex rel.* Richards v. Hammer, 42 N.J.L. 435, 439 (1880)).

215 *Id.* at 648–49. The court has since declared that classifications on the basis of population are permissible unless "no state of facts can reasonably be conceived to justify the classification made." Bd. of Educ. v. Watson, 63 Cal. 2d 829, 837 (1966).

Classifications that implicated political rights were treated differently, foreshadowing the subsequent development of strict scrutiny for classifications involving fundamental rights. In *Britton v. Board of Election Commissioners* the court struck down California's primary election law prohibiting selection of delegates or participation in primary elections of any political party which did not receive at least 3 percent of the total vote in the previous election.[216] Referring to the Privileges and Immunities Clause and the requirement for all laws of a general nature to have a uniform operation, as well as to the state constitutional guarantee of the rights of assembly and petition, the court asked, rhetorically, "How can it be said that a law which protects by legislation a certain number of citizens forming one political party, and deprives a fewer number of citizens forming another political party of the same protection, is not violative of these provisions?"[217]

With respect to economic legislation, however, and in the absence of factors triggering "strict scrutiny," decisions after *Darcy* display substantial deference to legislative judgment, much like the decisions of the U.S. Supreme Court. In 1915, the California Supreme Court upheld a San Francisco ordinance requiring that operators of "jitneys" — defined as motor vehicles carrying passengers between fixed points in the city for a charge of ten cents or less — were required to have a license and post a bond against liability for accidents.[218] Rejecting the argument of jitney owners that this was a "special law," discriminating against jitneys compared to other vehicles, the court said:

> The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements[. T]he presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see the same was without warrant in the facts.[219]

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

217 *Id.* at 342–43 (invoking Cal. Const. of 1879, art. I, §§ 10, 11, 21).

218 *In re* Cardinal, 170 Cal. 519 (1915).

219 *Id.* at 521. In a previous case, *Ex parte King*, 157 Cal. 161, 164 (1910), the court had expressed similar deference in upholding a ban on "itinerant saloons" established

By 1940, the California Supreme Court had accepted the formulation of extreme deference to legislative judgment reflected in some U.S. Supreme Court opinions:

> When the classification made by the legislature is called into question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge and other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.[220]

And in 1948, the court, reviewing prior case law, declared broadly: "[I]t is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution."[221]

From time to time, as in the U.S. Supreme Court, it appears that some form of heightened scrutiny has been at work even when it is not explicitly recognized or articulated in the court's opinion. For example, in *Department of Mental Hygiene v. Kirchner,*[222] the state Supreme Court held that a statute imposing liability upon the spouse, parent or child for the care in a state institution of a mentally ill person or inebriate involved an "arbitrary" classification in violation of the equal protection principle.[223] On

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temporarily outside a city or town but in the vicinity of labor camps where workers were employed on public works. *But cf.* Town of St. Helena v. Butterworth, 198 Cal. 230 (1926) (invalidating an ordinance which imposed a license tax of $15 per quarter on the business of traveling wholesalers but exempted wholesalers with a fixed business. The court relied on the state Privileges and Immunities Clause of article I, section 21, saying, "We are unable to perceive any rational reason for such discrimination in favor of the one class as against the other." *Id.* at 232–33 (citing Cal. Const. of 1879, art. I, § 21). The court distinguished its prior opinion in *Ex parte Haskell*, 112 Cal. 412 (1896), which had upheld a Chico ordinance imposing a license tax on persons selling various named products "outside of those conducting regular places of business."

220 *In re* Fuller, 15 Cal. 2d 425, 437 (1940) (quoting Borden's Farm Products, Inc. v. Baldwin, 293 U.S. 194, 209 (1934). The "if any state of facts can be conceived" test dates back earlier, at least to *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911).

221 County of Los Angeles v. S. Cal. Tel. Co., 32 Cal. 2d 378, 390 (1948).

222 60 Cal. 2d 716 (1964).

223 Dep't of Mental Hygiene v. Kirchner, 60 Cal. 2d 716 (1964).

certiorari to the U.S. Supreme Court, that court issued an order stating that it could not be determined from the state court's opinion whether its holding was based on the federal Equal Protection Clause or the equivalent provision of the California Constitution or both.[224] Accordingly, it vacated the California Supreme Court's judgment and remanded the cause to that court "for such further proceedings as may be appropriate under state law."[225] On remand, the California Supreme Court affirmed that it would reach the same conclusion exclusively on the basis of the state Constitution, article I, section 11 (uniform operation of general laws) and article I, section 21 (privileges or immunities), and reiterated its former decision as filed.[226] Neither of the California court's opinions contained in-depth focus on the standard that was being applied, but it is difficult to reconcile the result with the highly deferential rational basis test.

In the late 1970s the court flirted briefly with an explicitly more expansive role for the courts in determining the "rationality" of classifications.[227] In *Brown v. Merlo,* the court held invalid, under both federal and state constitutions, California's "automobile guest statute," which "deprive[d] an injured automobile guest of any recovery for the careless driving of his host unless the injury resulted from the driver's willful misconduct or intoxication."[228] Justice Tobriner's opinion for a unanimous court, finding this to be an "arbitrary and unreasonable classification," stated in a lengthy and substantive footnote:

> Although by straining our imagination we could possibly derive a theoretically "conceivable". . . state purpose that might support

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224 Dep't of Mental Hygiene v. Kirchner, 380 U.S. 194, 196 (1965).

225 *Id.* at 201.

226 Dep't of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588 (1965); CAL. CONST. of 1879, art. I, §§ 11, 21.

227 In *Hawkins v. Super. Ct.*, 22 Cal. 3d 584 (1978), Justice Mosk, joined by Justice Newman, wrote a concurring opinion to his own majority opinion, arguing for adoption of an "intermediate" test to be applied when rights are "important" though not "fundamental," or when a classification is "sensitive" but not "suspect." Such an intermediate standard would call for justification of the classification on the basis that it "significantly" furthers "important" state interests. *Id.* at 601–02 (Mosk, J., concurring). Justice Mosk's proposal, which is similar to the position of Justice Tobriner in the cases discussed in this paragraph, has never been adopted.

228 Brown v. Merlo, 8 Cal. 3d 855, 859 (1973).

> this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to a statutory purpose. We recognize that in past years several federal equal protection cases have embraced such excessively artificial analysis in applying the traditional "rational basis" equal protection test. More recently, however, the United States Supreme Court has drawn back from such an absolutely deferential position and has again demanded that statutory classifications bear some substantial relationship to an actual, not "constructive," legislative purpose . . . . Professor Gunther has pointed out this development . . . in a recent law review article, and has suggested that such movement may well herald a "newer equal protection" providing a "new bite" for the traditional "rational basis" test. *Whatever the accuracy of Professor Gunther's prediction with respect to the interpretation of the federal equal protection clause, we believe that it would be inappropriate to rely on a totally unrealistic "conceivable" purpose to sustain the present statute in the face of our state constitutional guarantees.*[229]

The Legislature responded to *Brown v. Merlo* by amending the guest statute to apply only to vehicle owners riding as passengers. When the amended statute came before the California Supreme Court, Justice Tobriner wrote an opinion which again struck the statute down, holding that it was "not reasonably related to the dual legislative goals of protecting hospitality and eliminating collusive fraud."[230] But Justice Tobriner's opinion was joined by only three other justices, McComb, Mosk, and Burke, the last sitting on assignment to fill a then-existing vacancy on the court. Justice Sullivan, who had joined in *Brown v. Merlo*, dissented, insisting that the owner provision could be justified by goals and purposes "wholly different from those which were considered in overturning the guest statute"; and, going further, he expressed second thoughts about the "new" equal protection analysis reflected in the *Brown* footnote.[231]

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229 *Id.* at 866 n.7 (emphasis added; citations omitted).

230 Schwalbe v. Jones, 534 P.2d 73 (1975).

231 *Id.* at 81 n.2. Justice Sullivan, rather curiously, made reference to his then-recent opinion in *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1 (1974), applying

Justice Sullivan's dissent was joined by Chief Justice Wright and Justice Clark. Before Justice Tobriner's opinion could become final, the vacancy which existed at the time it was filed was filled by appointment of Justice Richardson, and these four voted to grant rehearing. The ensuing opinion, written by Justice Sullivan , upheld the statute on the basis of what it characterized as "the basic and conventional standard for reviewing economic and social welfare legislation," and disapproved the language in *Brown v. Merlo* insofar as it suggested a different test.[232] "We are persuaded," Justice Sullivan said, "that to elevate the aforesaid language into doctrinal concept, and thus to dilute the traditional standard which we have here expressed, would result in the substitution of judicial policy determination for established constitutional principle."[233] Only Justice Tobriner, joined by Justice Mosk, dissented.[234]

But then the composition of the court changed again, and in *Cooper v. Bray* the court, in an opinion by Justice Tobriner joined by Chief Justice Bird and Justices Mosk, Manuel, and Newman, overruled *Schwalbe*, finding the owner/guest exclusion to be without rational basis, based on a "serious and genuine judicial inquiry."[235] Justices Richardson and Clark dissented.[236]

Cooper v. Bray has not been overruled, but the court's view of the appropriate criteria for evaluating rational basis may have been. A footnote in *Warden v. State Bar* declares:

> At the time *Cooper v. Bray* and similar cases were decided by this court, there was some suggestion in the academic literature that the United States Supreme Court might be moving toward the adoption of a so-called "newer equal protection," which would provide a "new bite" . . . and some of the analysis in those opinions may reflect that milieu. Since that time, the United States Supreme Court has . . . reaffirmed the deferential nature of the restrained

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a rational relationship test to overturn a statute denying licensure as medical practitioners to osteopaths.

232 Schwalbe v. Jones, 16 Cal. 3d 514, 517, 518 n.2 (1976).

233 *Id.* at 518 n.2.

234 *Id.* at 525 (Tobriner, J., dissenting).

235 Cooper v. Bray, 21 Cal. 3d 841, 848, 855 (1978).

236 *Id.* at 856 (Richardson, J., dissenting).

> "rational relationship" equal protection standard [and] under both the federal and state equal protection clauses, the rational relationship test remains a restrained, deferential standard, albeit one that continues to provide protection against classifications that do not bear a rational relationship to a reasonably conceivable, legitimate purpose.[237]

Why the standard for "rational basis" under the California Constitution should conform to varying views in the United States Supreme Court was not discussed, nor is the answer clear. Possibly the addition of explicit "equal protection" language in 1974 acted as a gravitational pull on the court's application of identical federal language. There are arguments for and against rational basis with a "bite," and perhaps someday the California court will confront those arguments more directly. Meanwhile, the requirement that the basis for the classification be "reasonably conceivable" provides a degree of flexibility. Stay tuned.

B. THE CALIFORNIA CONSTITUTION AND "SUSPECT CLASSES"

1. Sex Discrimination under the California Constitution

As noted above, the California Constitution since 1879 has prohibited persons from being "disqualified from entering or pursuing a business, profession, vocation, or employment because of sex."[238] In the first case to consider the application of that provision, the California Supreme Court read it strictly, invalidating a San Francisco ordinance which prohibited the employment of women as waitresses between the hours of 6 p.m. and 6 a.m. in places where alcoholic beverages were sold, and rejecting arguments based on morality or the protection of females.[239] "All these are considerations of policy," said the controlling opinion, "the determination of which belonged to the convention framing and the people adopting the

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237 Warden v. State Bar, 21 Cal. 4th 628, 648 n.12 (1999).

238 Cal. Const. art. I, § 8 (appearing in its original form as Cal. Const. of 1879, art. XX, § 18).

239 *In re* Maguire, 57 Cal. 604 (1881).

Constitution . . . . The policy of the ordinance is inconsistent with the policy intended and fixed by the Constitution. They cannot both stand."[240]

Soon after *Maguire,* however, the court began to backtrack. In *Ex parte Felchlin*, the court with little discussion upheld a city licensing scheme that imposed a license fee of $150 per month on bars that employed women in any capacity while imposing a fee of only $30 per quarter on bars that did not;[241] and the following year, in *Ex parte Hayes*, the court upheld an ordinance flatly prohibiting the issuance of liquor licenses in places where women served as waitresses.[242] When, in 1915, the court upheld a law limiting hours of work for women in certain occupations, it declared broadly that the constitutional provision is "subject to such reasonable regulations as may be imposed in the exercise of police powers."[243]

In the 1971 case of *Sail'er Inn, Inc. v. Kirby*, the court unanimously returned to what *Maguire* held to be the original understanding of the prohibition against disqualification for sex.[244] Overruling *Hayes*, and declaring that the general hazards of an occupation "cannot be a valid ground for excluding [women] from those occupations," it held that long-standing prohibition against the employment of women as bartenders was invalid.[245]

The court in *Sail'er Inn* also found the challenged law to be invalid under Title VII of the Civil Rights Act of 1964[246] and under the equal protection clauses of both the federal and state constitutions.[247] While the U.S. Supreme Court, at the time *Sail'er Inn* was decided, had not yet settled on a characterization of sex for purposes of determining the level of scrutiny, Justice Peters's decision for the California court found sex to be a "suspect class," triggering strict scrutiny.[248] It did so on the basis that sex was an "immutable trait"; that it bore no relation to a person's ability to perform or contribute to society; and that it was historically associated

240 *Id.* at 608–09.
241 *Ex parte* Felchlin, 96 Cal. 360 (1892).
242 *Ex parte* Hayes, 98 Cal. 555 (1893).
243 *In re* Miller, 162 Cal. 687 (1912); *see supra* notes 72–74.
244 Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 8 (1971).
245 *Id.* at 10 n.7.
246 *Id.* at 13.
247 *Id.* at 22.
248 *Id.* at 20.

with legal and social disabilities.[249] While the federal Supreme Court has since adopted a position of "intermediate scrutiny" for sex classifications, the California Supreme Court adheres to the characterization of sex as a suspect class, triggering strict scrutiny.[250] The court has also held that an employee claiming she was dismissed for refusing to submit to sexual harassment could rely on article I, section 8 as an expression of public policy, rendering her dismissal tortious.[251]

2. Sexual Orientation as Suspect Class

In *In re Marriage Cases*, the California Supreme Court struck down a ban on same-sex marriages, holding that as a matter of state constitutional law sexual orientation is a suspect class, triggering strict scrutiny under California's Equal Protection Clause.[252] The Court of Appeal had held that, while gays and lesbians had historically suffered legal and social disabilities as a class, and that while sexual orientation, like sex, bears no relation to a person's ability to perform or contribute to society, strict scrutiny was not appropriate because of that court's doubt whether this characteristic is "immutable."[253] The Supreme Court disagreed. Noting that a person's religion and alienage are both considered suspect classes for equal protection purposes, though neither is immutable, it held that "[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[254]

The court in that case also rejected the attorney general's argument that "suspect" classification should be reserved for minorities who are

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249 *Id*. at 9, 18, 19.

250 *See In re* Marriage Cases, 832 n.55 (2008) ("Past California decisions, by contrast [to U.S. Supreme Court decisions] have applied the strict scrutiny standard when evaluating discriminatory classifications based on sex and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification" (citations omitted)).

251 Rojo v. Kliger, 52 Cal. 3d 65 (1990). *Compare* Ross v. RagingWire Telecomm., 42 Cal. 4th 920 (2008) (Privacy provision in article I, section 1 did not render employer's termination of employee for marijuana use contrary to public policy).

252 *In re* Marriage Cases, 43 Cal. 4th 757, 840–41 (2010).

253 *In re* Marriage Cases, 143 Cal. App. 4th 873, 922 (2006).

254 *In re* Marriage Cases, 43 Cal. 4th at 841–42.

unable to use the political process to address their needs, and that this was not true of the gay and lesbian community in California.[255] Conceding that some California decisions had referred to a group's "political powerlessness" as a factor, the court said "our cases have not identified a group's *current* political powerlessness as a necessary prerequisite for treatment as a suspect class," for if that were the case, "it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications." Rather,

> [T]he most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society. Thus, "courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices." This rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.[256]

3. De Facto Discrimination and the School Busing Amendment

The U.S. Supreme Court held, in *Washington v. Davis*, that the federal Equal Protection Clause prohibits only purposeful discrimination; discriminatory results are not enough to support a find of violation.[257] In the South, where segregated schools long existed by virtue of law — "de jure" — a finding of discriminatory purpose was seldom difficult, and the only problem was one of the appropriate remedy. Where there was a background of de jure discrimination, the court upheld the use of affirmative injunctions, including busing of children, as an appropriate remedy. But in the North, where there was no history of *de jure* discrimination but often a pattern of segregation *de facto*, linked to segregated housing, proving discriminatory purpose was often difficult.

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255 *Id.* at 842–43.

256 *Id.* at 843 (quoting *Sail'er Inn*, 5 Cal. 3d at 18 (1971)).

257 Washington v. Davis, 426 U.S. 229 (1976).

In 1963, in *Jackson v. Pasadena School District*, the California Supreme Court stated that school boards have an obligation to take reasonable steps to alleviate school segregation "regardless of its cause."[258] But in that case purposeful segregation was found, so the statement could be considered dicta. Thirteen years later, however, in *Crawford v. Board of Education*, the court confirmed that statement in a case in which purposeful segregation had not been shown, as a matter of California legal principles, and upheld a trial court decision ordering busing of children as an appropriate remedy.[259] Many parents reacted strongly to the busing order, and as a result article I, section 7 of the Constitution was amended by an initiative measure in 1979 providing that public entities in the state had no "obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation";[260]

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258 Jackson v. Pasadena City Sch. Dist., 59 Cal. 2d 876, 881 (1963).

259 Crawford v. Bd. of Educ., 17 Cal. 3d 280, 301–02, 310 (1976).

260 Cal. Const. art. I, § 7(a). Before the amendment, section 7(a) read simply, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Following the 1979 amendment, section 7(a) now reads:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution.
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> Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such

and the amendment was upheld by the U.S. Supreme Court against federal constitutional attack.[261] The 1978 amendment has no application beyond the school context, but the California court's view of the unconstitutionality of de facto segregation has not been resurrected in other contexts.

3. Affirmative Action and Proposition 209

In 1996, negative reaction to affirmative action led to the proposal and adoption of an initiative measure — Proposition 209, the "California Civil Rights Initiative" — adding a new section to the state Constitution, article I, section 31. The gist of that section appears in the broad declaration of subsection (a):

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.[262]

In its first opinion applying section 31, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the Supreme Court adopted a broad interpretation of

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provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

261 Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

262 Cal. Const. art. I, § 31.

"preferential treatment," striking down a San Jose ordinance that sought to increase the participation of minority and women contractors on public works by establishing "participation goals" based on the availability of qualified minority and women contractors, and by requiring "reasonable efforts" to meet those goals, including notice to minority and women contractors, follow-up contact, and, if the contractor were rejected, a statement of written reasons for the rejection.[263] The majority opinion by Justice Brown, joined by Justices Mosk, Baxter, and Chin, discussed at length the historical and judicial background of affirmative action, and in effect applauded the decision of voters to do away with it.[264] Justice Kennard and Chief Justice George, joined by Justice Werdegar, joined in the result but declined to join Justice Brown's opinion, which Chief Justice George criticized as being unnecessarily broad.[265] George's opinion, relying upon what voters were told in the voter pamphlet, agreed that San Jose's ordinance constituted preferential treatment, but at the same time suggested that section 31 did not prohibit all modes of outreach to minority and women contractors, and offered suggestions of alternatives that would be permissible.[266]

Ten years later, in *Coral Construction, Inc. v. City and County of San Francisco*, the Supreme Court revisited section 31 in a case involving a quite similar ordinance, and rejected the City's arguments that section 31 was invalid under the federal Equal Protection Clause because of the U.S. Supreme Court's so-called "political structure doctrine."[267] The court

263 Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000)

264 *Id.* at 563–64.

265 *Id.* at 576–77 (George, C.J., concurring and dissenting).

266 *Id.* at 592, 596–98.

267 Coral Constr., Inc. v. City and County of San Francisco, 50 Cal. 4th 315, 332 (2010). Essentially, the "political structure doctrine" holds that the federal Constitution is violated when a facially neutral law singles out a racial issue for special treatment and at the same time alters the political process in such a way as to entrench unique structural burdens on minorities' future ability to obtain beneficial legislation. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982). The court's rejection of the applicability of that doctrine was by a vote of 8–1, with Justice Moreno dissenting. *Coral Construction*, 50 Cal. 4th at 342 (Moreno, J., dissenting). The structural burden doctrine was the basis for Judge Henderson's initial injunction against Proposition 31, but the Ninth Circuit rejected that argument in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707–09 (9th Cir. 1997), and again, more recently, in *Comm. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

also rejected an argument by the City that its ordinance was valid under subsection (e) of section 31 as "action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."[268] The court did, however, overturn summary judgment in favor of plaintiffs on a third argument by the City: that its action was required by the federal Equal Protection Clause in order to remedy prior, intentional acts of discrimination.[269] The City would be allowed to try and establish, on remand, that it had purposefully or intentionally discriminated against minority or women contractors, that the purpose of the ordinance was to provide a remedy for such discrimination, that the ordinance was narrowly tailored to achieve that purpose, and that a race- and gender-conscious remedy was necessary as the only, or at least the most likely, means of rectifying resulting injury.[270] It is apparent that section 31 stands as a formidable barrier to the use of race- or gender-conscious criteria in the public sector, possibly more of a barrier than under the Equal Protection Clause.

SOME CONCLUDING THOUGHTS

The California Supreme Court was an early leader in recognizing the separate nature of state constitutions and accepting responsibility for independent construction of provisions relating to individual rights. Carrying out that responsibility is not an easy task, especially when the provisions under construction are worded the same or very similar to analogous provisions of the federal Constitution. In such cases it may be tempting for a state court simply to follow the lead of the U.S. Supreme Court, and by doing so

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The argument is still alive, however. The Sixth Circuit, in a narrowly divided *en banc* opinion, has held that a Michigan measure similar to Proposition 209 is unconstitutional on the basis of the political structure doctrine (*Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 2012 WL 5519918 (2012), and the issue may be headed to the U.S. Supreme Court.

268 *Coral Construction*, 50 Cal. 4th at 335. The City relied upon "affirmative action" language contained in applicable federal regulations, but the majority (8–1 with Justice Moreno dissenting) interpreted that language as not requiring racial preferences. *Id.* at 334–35.

269 *Id.* at 335.

270 *Id.* at 337–38.

avoid both the challenge of developing an independent jurisprudence and exposure to the charge of "judicial activism."

My previous piece published in these pages, on Freedom of Expression, dealt with constitutional provisions very similar to the First Amendment, and demonstrated how in that context the California Supreme Court has for the most part met that challenge in an open and creative way. The state constitutional provisions which are the focus of this piece might be said to provide the court with an easier route to an independent jurisprudence. This is especially true of article I, section 1, which has no federal counterpart. But developing an independent jurisprudence even when it is not tied to analogous federal constitutional language is a challenging enterprise. If it is to be conducted with integrity it requires the court to engage in an enterprise not unlike the interpretive enterprise that the U.S. Supreme Court has confronted under the federal Constitution. That enterprise entails difficult questions that are often not readily answered by examination of the text or by historical facts. It may require the court to identify what values are being protected by the constitutional framework, and to decide to what extent courts, as distinguished from legislatures, have responsibility for protecting those values. We have become accustomed to translating these questions into doctrinal language like "fundamental rights" and "suspect classes," "strict scrutiny" and "rational basis," but these categories, useful as they may be, are in turn judicial constructs which do not inhere in constitutional language or history. Their definition, and their application, ultimately require judges to consider arguments, and to make choices, among competing visions for a democratic society that recognizes both majority rule and minority rights.

In giving definition to concepts of "liberty" and "equality" over the years, the California Supreme Court has of necessity been engaged in that task. To a modern critical eye it may not have always performed with consistency or clarity, but that is understandable, given the complexities of the problems, changing social views, and the inevitable differences in outlook among justices. For what it is worth, both as a former justice and as a student of the law, I would give the court's historical record in developing an independent state jurisprudence high marks.

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