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The CALIFORNIA State Constitution

SECOND EDITION

Joseph R. Grodin
Darien Shanske
Michael B. Salerno

OXFORD

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Second Edition

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Foreword by Chief Justice Tani Cantil-Sakauye

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G. Alan Tarr, Series Editor

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For my patient and loving wife, Janet

—J.R.G.

For Stephani and Maisie, whose love and inspiration make all things possible

—D.S.

For my children, Gian and Giuliana

—M.B.S.

SERIES FOREWORD

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution-makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively in changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the federal Bill of Rights for redress. As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were "rediscovered." The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as Chief Justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren's tenure from erosion by the Burger Court. In particular, they began

to look to state bills of rights to secure the rights of defendants and to support other civil-liberties claims that they advanced in state courts.

The "new judicial federalism," as it came to be called, quite quickly advanced beyond its initial concern to evade the mandates of the Burger Court. Indeed, less than two decades after it originated, it became a nationwide phenomenon. For when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees of the right to privacy and of gender equality, for example, that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken altogether, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

Yet the renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts with notable success: since 1960, ten states have adopted new constitutions and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars too have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

In this second edition, Joseph Grodin updates his original study of the California Constitution, along with new coauthors Michael Salerno and Darien Shanske, as part of *The Oxford Commentaries on the State Constitutions of the United States*, a series which reflects the renewed interest in state constitutions and will contribute to our knowledge about them. Because the constitutional tradition of each state is distinctive, the volume begins with the history and development of constitutionalism in California. It then provides the complete text of the state's current constitution, with each section accompanied with commentary that explains the provision and traces its origins and its interpretation by the courts and by other governmental bodies. Finally, the book concludes with a bibliography, a table of cases cited in the volume, and a topical index.

G. Alan Tarr

FOREWORD

This second edition of *The California State Constitution* is a much anticipated and very welcome addition to the arsenal of reference materials available not only to the courts and attorneys but also to the public interested in the governance of California. In the more than two decades since the first edition was published, there have been noteworthy and controversial changes in the provisions of the California Constitution itself as well as significant developments in the appellate case law interpreting and applying our state constitution in a great variety of settings and circumstances. The updated section-by-section review and analysis of the California Constitution set forth in this edition will afford invaluable guidance as new circumstances and controversies arise, presenting issues that may bring into play the provisions of our state constitution.

As former Chief Justice Malcolm Lucas noted in his foreword to the first edition of this treatise, one of the key overarching issues that courts frequently face when called upon to interpret and apply the provisions of the California Constitution is the appropriate relationship between the provisions of the state constitution and the provisions of the federal Constitution. As a historical matter, of course, state constitutions of the original states predated the adoption of the federal Constitution. Furthermore, when the California Constitution was first drafted and adopted in 1849, the provisions of the state constitutional Declaration of Rights were the only source of protection for the populace from overreaching actions of the state government. There was no other protection because at that time the federal Bill of Rights applied to and limited only the actions of the federal government, not the states. Accordingly, a number of early California Supreme Court decisions recognized that the California Constitution is a document of independent force and that its provisions, even when linguistically similar or identical to provisions of the federal Constitution, need not necessarily be interpreted to bear the same meaning that the U.S. Supreme Court had given to an analogous federal constitutional provision. Nevertheless, for many years California Supreme Court decisions, in interpreting the state constitution, generally deferred to the U.S. Supreme Court's interpretation of similar provisions of the federal Constitution, particularly in settings where the federal constitutional jurisprudence was more developed than the parallel state constitutional provision. Over the past several decades, however, the California Supreme Court has demonstrated a renewed appreciation of the truly independent nature of the California Constitution and an increased willingness to examine and analyze both the distinct origins of state constitutional provisions and the manner in which those provisions

have been interpreted and understood in past California decisions and in the California legal context more generally.

In my view, this is an entirely appropriate and important development. The California Constitution has its own distinct history, both as initially created at the 1849 constitutional convention and as revised at the 1879 constitutional convention, as well as through the numerous constitutional amendments and revisions of the state constitution that have been adopted by the voters of California over the past century. Many commentators have observed the relative ease by which the California Constitution can be amended through the initiative process and have accurately highlighted how this unusual attribute of our state constitutional structure has expanded our state constitution. But the fact that the people of California have such a contemporary, continuing, and direct voice in the substantive content of our state constitution also means that the California Constitution can accurately be viewed as a document truly belonging to the people of this state. Through the proposal and adoption of constitutional amendments relating to, for example, the operation of the criminal justice system, the protection of an individual's privacy, the openness of governmental actions, and the reform of the electoral and reapportionment ground rules, the voters of California have in recent years utilized the democratic process to fashion the state's fundamental charter in a manner that embodies their views and perceived needs. Accordingly, in interpreting the California Constitution, courts are properly mindful of the distinct and truly independent character of this extraordinary document.

Of course, recognition of the truly independent nature of the California Constitution is not to deny the supremacy of the provisions of the federal Constitution in settings in which the federal Constitution applies. Thus, for example, when the U.S. Supreme Court has interpreted a provision of the federal Constitution as prohibiting a state legislature from enacting a particular law or as precluding the use in a criminal trial of evidence obtained in a particular manner by a local police officer, that federal constitutional rule will be controlling over any state constitutional provision and will dictate the result in any case in which the federal constitutional provision is properly invoked. But the fact that the U.S. Supreme Court's current interpretation of a provision of the federal Constitution is controlling in this context does not mean that a similarly worded provision of the California Constitution must necessarily be interpreted to provide at least as much protection (or, stated somewhat differently, to be as restrictive of legislative or executive action) as the federal constitutional provision as interpreted by the federal high court. If the history, past interpretation, or intent of the state constitutional provision supports a different and less protective (or less restrictive) meaning of the state provision, the state provision can and should be read in that fashion, leaving the federal Constitution as the sole basis for the required contrary decision. Thereafter, should the U.S. Supreme Court reconsider its interpretation of a

federal constitutional provision, which is not uncommon, California courts would have no need to revise the interpretation of an analogous state constitutional provision but could properly maintain the interpretation dictated by the state constitutional history and intent. Accordingly, it is entirely proper for state courts, in determining the appropriate meaning of the California Constitution, to be faithful to a fair and accurate view of the intended meaning of each state constitutional provision, whether that meaning embodies a constitutional guarantee that is more expansive, equally expansive, or less expansive than that reflected in the interpretation of the analogous federal constitutional provision.

One important consequence of the independent nature of the provisions of the California Constitution is to place a significant responsibility upon counsel who rely upon a state constitutional provision in litigation. When a state constitutional provision is at issue, counsel should not rely solely upon the more familiar federal constitutional precedents interpreting the parallel provision of the federal Constitution. Instead, counsel should recognize the responsibility to research and analyze the independent sources that may shed light on the appropriate interpretation and application of the state constitutional provision in question. Past California decisions have identified many of the distinct sources that counsel should examine in this regard. They include the records of the state constitutional conventions, the distinct legal, political, and cultural settings in which the state constitutional provision was adopted, state court decisions and common legal practice revealing how the provision has been interpreted and understood over time, as well as the effect that developments in California statutory and common law properly have on the contemporary meaning of state constitutional provisions.

I can assure counsel that courts charged with the responsibility of determining the proper interpretation of state constitutional provisions will look for and appreciate the insight that counsel may contribute in this regard. And I have no doubt that the updated state constitutional reference guide that follows will often be a very helpful place to begin one's research and analysis.

Tani Cantil-Sakauye,
Chief Justice of California

PREFACE TO THE SECOND EDITION

Since the first edition of this book was published in 1993 the California Constitution, then already the second longest constitution in the United States, has nearly doubled in size and court decisions interpreting the constitution have mushroomed in proportion. A new edition is long overdue.

In addition to tracking the changes to the constitution and its interpretation, this second edition reflects changes in authorship and format as well. Joseph Grodin, the lead author of the first edition, remains an active participant, but his colleagues Calvin Massey and Richard Cunningham have opted in favor of other pursuits, to be replaced by Darien Shanske and Michael B. Salerno. And the original format, aimed primarily at students of government, has been expanded in a lawyer-friendly direction, with more thorough treatment of cases and legal analysis intended to provide a basis for research by lawyers, judges, and legal scholars.

While the book is a truly collaborative project, each of us has assumed primary responsibility for certain portions: Joseph Grodin for Part I (History) (with a section on fiscal history by Darien Shanske) and Articles I, II, VI, VII, XIV, XVIII, and XXXIV; Darien Shanske for Articles XI, XIII, XIIIA, XIIIB, XIIIC, XIIID, XVI, XIX, XIXA, XIXB, and XIXC; and Michael B. Salerno for Articles III, IV, V, X, XA, XB, XII, XV, XX, XXI, and XXXV. Article IX is the joint product of Joseph Grodin and Darien Shanske.

The authors wish to express their joint appreciation to former authors Calvin Massey and Richard Cunningham, whose work helped to provide the foundation for the current volume; to University of California, Hastings College of the Law for its institutional support, to faculty secretary Divina Morgan for her careful logistical assistance, and to UC Hastings graduate research assistant Nedda Black for her thoughtful creation of a workable index.

In addition, Joseph Grodin would like to acknowledge the invaluable assistance of his principal research assistant, Hastings student Samantha Elboim, as well as former Hastings students Natassia Kwan and Jessica Winter, and to extend special thanks to former Supreme Court Staff Attorney Beth Jay, as well as to Administrative Office of the Courts counsel Mary Roberts, and Hastings colleague Peter Keane, for their careful reading and thoughtful suggestions regarding portions of the text.

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Michael Salerno would like to express appreciation to Nedda Black, his former student and graduate research assistant, who provided basic research and valuable editorial assistance, and whose contribution to his parts of the book deserved special recognition. While he takes responsibility for the analysis and conclusions, potential omissions, and any errors in the articles assigned to him, he wishes to thank his former colleagues for their review and comments: Diane Boyer-Vine and Dan Weitzman for Article IV; Alf Brandt for Article X; and Bill Julian for Article XII. He would also like to recognize the generous support provided by University of California, Hastings College of the Law.

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